COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 of the Judicial Education and Conference Center, 2011 Commerce Park Drive, Annapolis, Maryland on November 21, 2014.

Members present:

Hon. Alan M. Wilner, Chair
Hon. Robert A. Zarnoch, Vice Chair

A. Gillis Allen, II, Esq.
H. Kenneth Armstrong, Esq.
Robert R. Bowie, Jr., Esq.
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.
Hon. Joseph H. H. Kaplan
Derrick William Lowe, Esq., Clerk
Bruce L. Marcus, Esq.
Donna Ellen McBride, Esq.
Hon. Danielle M. Mosley
Hon. W. Michel Pierson
Hon. Paula A. Price
Hon. Julia B. Weatherly
Robert Zarbin, Esq.
Thurman W. Zollicoffer, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Brian L. Zavin, Esq., Office of the Public Defender
Erin Gable, Esq., M.S.B.A., Lawyer Specialization Committee
Thomas J. Dolina, Esq., M.S.B.A., Lawyer Specialization Committee
Ginny Miles, Esq., Assistant State's Attorney for Anne Arundel Co.
Kathleen Rogers, Esq., Deputy State's Attorney for Anne Arundel Co.
Rose Day, District Court Headquarters
Mark Bittner, Judicial Information Systems
Joyce Smithey, Esq., Rifkin, Weiner, Livingston, Levitan & Silver
Anne Brinkmann, Esq., Pro Bono Resource Center
Hon. Kathryn G. Graeff, Court of Special Appeals
Glenn Grossman, Esq., Bar Counsel, Attorney Grievance Commission
Debra Gardner, Esq., Legal Director, Public Justice Center
P. Tyson Bennett, Esq., M.S.B.A, Rules of Practice Committee
Susan M. Erlichman, Esq., Executive Director, Maryland Legal Services Corporation
Pamela Ortiz, Esq., Executive Director, Access to Justice Department
Julia Doyle Bernhardt, Esq., Assistant Attorney General

The Chair convened the meeting. He announced that the Court of Appeals on its own initiative had adopted as an emergency measure an amendment to Rule 20-405, Other Submissions, which pertains to electronic submissions other than briefs, record extracts, or appendices filed in an appellate court and new Rule 20-406, which pertains to the time for filing electronic submissions in an appellate court.

Additional Agenda Item

The Chair presented Rule 1-325, Waiver of Costs Due to Indigence, and an explanatory memorandum that had been sent to the Committee members the previous day, for the Committee's consideration.

MEMORANDUM

TO	:	Members of the Rules Committee
FROM	:	Alan M. Wilner
DATE	:	November 20, 2014
RE	:	Rule 1-325

> In September, the Committee sent to the Court of Appeals, as part of its 186th Report, substantial revisions to Rule 1-325, dealing with the waiver of court costs due to a party's indigence. The thrust of the revisions was (1) to clarify when prepayment of prepaid costs could be waived by the clerk without the need of a court order, (2) to set a clear standard for the waiver of prepayment by the court, and (3) to clarify the procedure for the waiver of prepayment of prepaid costs in the appellate courts (the circuit courts when the appeal is from the District Court and the Court of Appeals and

Court of Special Appeals when the appeal is to those courts from a circuit court).

The period allowed for comments on the 186th Report expired last week. Several comments were received with respect to Rule 1-325, mostly in support of the proposed changes but suggesting some additional modifications. In analyzing those suggestions, Sandy and I have discovered some additional issues that had not been considered by the Committee. Some of them are not really substantive in nature and can easily be dealt with by revising some language. There are one or two that are substantive, however, and that should be considered by the Committee so that an appropriate recommendation can be made to the Court.

Unfortunately, the resolution of some of these issues, particularly those making some necessary distinctions between appeals from the District Court to a circuit court and appeals to the Court of Appeals and Court of Special Appeals produce a much lengthened and harder-to-read Rule. One possible solution to that is to split the Rule into two – one dealing with costs that are purely internal to a court and the other dealing with appeals, where costs in both courts are in play. That is a separate issue – one really of style – but it should be considered in the context of other possible revisions. It is important that any questions regarding the structure of the Rule, apart from what it says, be considered by the Committee rather than be thrust upon the Court without a Committee recommendation.

The purpose of this Memorandum is to set forth the issues that have emerged and propose some solutions for the Committee to consider.

(1) One issue, triggered by a concern expressed by the Public Defender, pertains to the nature of the certification by an attorney that the filing (submission in MDEC parlance) has merit. That requirement appears in a number of places in different

language. Current Rule 1-325 (a) provides that, if the party is represented by an attorney, the request for waiver must be accompanied by the attorney's signed certification that the claim, "is meritorious." The court may waive payment if satisfied that the party is indigent and that the claim "is not frivolous." There are no exceptions to the certification requirement.[1] The requirement that the attorney certify that the filing has merit is also statutory, at least with respect to circuit court costs. CJP §7-201 provides for the waiver of prepayment if the court finds that the party is indigent and the party's attorney, if any, certifies that the claim "is meritorious."

Rule 3.1 of the Maryland Lawyers' Rules of Professional Conduct prohibits an attorney from bringing or defending a proceeding or asserting or controverting an issue therein "unless there is a basis for doing so that is not frivolous." The Rule adds that such a basis may include "a good faith argument for an extension, modification or reversal of existing law," which gives some latitude to argue for a particular result even when current law would not permit that result.

At the subcommittee level, a request was made to excuse legal service organizations and the Public Defender from the certification requirement, which the subcommittee rejected. The subcommittee's view, essentially, was that representing the poor is not a license to pursue frivolous claims or to violate Rule 3.1. Instead, it proposed that the attorney's certification be that, to the best of the attorney's knowledge, information, and belief, there is good ground to support the claim, appeal, application, or request and that it is not interposed for any improper purpose or delay. The full Committee approved that language, and that is what is recommended in the pending 186th Report. The Public Defender

[1] Rule 1-325 (b) requires the State to pay the costs relating to an appeal where (1) the Public Defender is authorized to represent the party and declines to do so, and (2) the party is indigent.

has iterated his concern that, because he is statutorily obligated to represent certain individuals in appeals in juvenile cases (and in criminal cases) and may not be familiar with all that occurred in the trial court, he may not be able to make such a certification upfront.

Sandy and I have discussed the Public Defender's concern (which, if honored, is likely to be pressed by the legal service organizations as well) and propose for the Committee's consideration a certification by the attorney that the attorney "has read Rule 3.1 [of the MLRPC] and that, to the best of the attorney's knowledge, information, and belief, the attorney's advocacy of claims, assertions, and issues on behalf of the party is not inconsistent with that Rule." **That is the first issue for the Committee.**

(2) A second issue arises from certain differences in appeals from the District Court to a circuit court and from a circuit court to the Court of Appeals or Court of Special Appeals. In the latter situation, two fees are involved – a fee charged by the circuit court clerk for assembling the record and a separate filing fee charged by the clerk of the appellate court. The Committee's proposal deals with the waiver of prepayment of both fees, and no change is suggested. In a District Court appeal, the clerk of the District Court does not charge a fee for assembling the record. The only cost relating to the District Court proceeding is for preparation of a transcript when one is necessary to the appeal (See Rules 7-103 and 7-113). There is also a circuit court filing fee. The current practice is for a District Court judge to deal with any request to waive prepayment of both fees, subject to review by the circuit court of any decision regarding that court's filing fee. Language changes are proposed to delineate more clearly the distinctions between the waiver process.

(3) The Pro Bono Resource Center complained that subsection (d)(1) of the Rule imposed duties on the Maryland Legal Services

Corporation that were burdensome and unnecessary. Sandy and I agree that the current proposed language is unwieldy and should be changed in several respects, to have certain confirmations made by the legal services organization that actually designated the attorney rather than by the MLSC and to have a uniform request for waiver form for use by those organizations. That language will be presented as a handout. The Pro Bono Resource Center also requested that a representative list of the kinds of costs subject to waiver be included in the Rules, which may be accomplished through a Committee Note. They will supply their requested list for Committee consideration.

(4) The Public Justice Center has requested a Rule permitting the waiver of transcript costs in appeals from the circuit courts. That request was considered by the Committee and rejected, largely on the basis of cost – the fact that, unlike in the District Court, where transcripts, when required, usually, are prepared by court employees, most circuit court transcripts are prepared by independent contractors who are paid for their work. The question is whether the Committee would want to reconsider that decision.

If possible, we would like to get the Committee's view on these issues tomorrow. Any further changes to Rule 1-325 will need to be presented to the Court of Appeals as a supplement to the 186th Report, which is ripe to be taken up by the Court in December or January.

AMW:cdc

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

AMEND Rule 1-325 to revise provisions pertaining to the waiver of certain costs, as follows:

Rule 1-325. ~~FILING FEES AND COSTS - INDIGENCY~~ WAIVER OF COSTS DUE TO INDIGENCE

~~(a) Generally~~

~~A person unable by reason of poverty to pay any filing fee or other court costs ordinarily required to be prepaid may file a request for an order waiving the prepayment of those costs. The person shall file with the request an affidavit verifying the facts set forth in that person's pleading, notice of appeal, application for leave to appeal or request for process, and stating the grounds for entitlement to the waiver. If the person is represented by an attorney, the request and affidavit shall be accompanied by the attorney's signed certification that the claim, appeal, application, or request for process is meritorious. The court shall review the papers presented and may require the person to supplement or explain any of the matters set forth in the papers. If the court is satisfied that the person is unable by reason of poverty to pay the filing fee or other court costs ordinarily required to be prepaid and the claim, appeal, application, or request for process is not frivolous, it shall waive by order the prepayment of such costs.~~

~~Committee note: The term "other court costs" in section (a) of this Rule includes the compensation, fees, and costs of a master or examiner. See Rules 2-541 (i), 2-542 (i), 2-603 (e), and 9-208 (j).~~

(a) Scope

Sections (b) through (f) of this Rule apply only to civil actions in a circuit court or the District Court.

(b) Definition

In this Rule, except as provided in

section (g), "prepaid costs" means costs that, unless prepayment is waived pursuant to this Rule, must be paid prior to the clerk's docketing or accepting for docketing a pleading or paper or taking other requested action.

(c) No Fee for Filing Request

No filing fee shall be charged for the filing of the request for waiver of prepaid costs pursuant to section (d) or (e) of this Rule.

(d) Waiver of Prepaid Costs by Clerk

On written request, the clerk shall waive the prepayment of prepaid costs, without the need for a court order, if:

(1) the party is an individual who is represented (A) by an attorney retained through a **pro bono or legal services program on a list of programs serving low income individuals that is submitted by the Maryland Legal Services Corporation to the State Court Administrator and posted on the Judiciary website, provided that an authorized agent of the program provides the clerk with a statement that (i) names the program, attorney, and party; (ii) states that the attorney is associated with the program and the party meets the financial eligibility criteria of the Corporation; and (iii) attests that the payment of filing fees is not subject to Code, Courts Article, §5-1002 (the Prisoner Litigation Act) grantee of the Maryland Legal Services Corporation that (i) is on a list of grantees certified to the State Court Administrator by the Corporation and posted by the State Court Administrator on the Judiciary website, and (ii) certifies in the request, filed on a form approved by the Corporation, that the attorney was retained by the party through the grantee's pro bono or legal services program serving low income individuals and that the payment of filing fees is not subject to Code, Courts Article, § 5-1002 (the Prisoner Litigation Act)**, or (B) by an attorney provided by the

Maryland Legal Aid Bureau, Inc. or the Office of the Public Defender, and

(2) the attorney certifies **that the attorney has read Rule 3.1 of the Maryland Lawyers' Rules of Professional Conduct and** that, to the best of the attorney's knowledge, information, and belief, ~~**there is a good ground to support the claim, application, or request for process and it is not interposed for any improper purpose or delay**~~ **the attorney's advocacy of claims, assertions, and issues on behalf of the client is in compliance with that Rule.**

Committee note: The Public Defender represents indigent individuals in a number of civil actions. See Code, Criminal Procedure Article, §16-204 (b).

Cross reference: See Code, Human Services Article §§ 11-101(f) and 11-501 through 11-603.

(e) Waiver of Prepaid Costs by Court

(1) Request for Waiver

An individual unable by reason of poverty to pay a prepaid cost and not subject to a waiver under section (d) of this Rule may file a request for an order waiving the prepayment of the prepaid cost. The request shall be accompanied by (A) an affidavit substantially in the form approved by the State Court Administrator, posted on the Judiciary website, and available in the Clerks' offices, and (B) if the individual is represented by an attorney, by the attorney's certification that **the attorney has read Rule 3.1 of the Maryland Lawyers' Rules of Professional Conduct and**, to the best of the attorney's knowledge, information, and belief, ~~**there is good ground to support the claim, appeal, application, or request for process and it is not interposed for any improper purpose or delay**~~ **the attorney's advocacy of claims, assertions, and issues on behalf of the client is in compliance with**

that Rule.

(2) Review by Court; Factors to be Considered

The court shall review the papers presented and may require the individual to supplement or explain any of the matters set forth in the papers. In determining whether to grant a prepayment waiver, the court shall consider:

(A) whether the individual has a family household income that qualifies under the client income guidelines for the Maryland Legal Services Corporation for the current year, which shall be posted on the Judiciary website; and

(B) any other factor that may be relevant to the individual's ability to pay the prepaid cost.

(3) Order

If the court finds that the party is unable by reason of poverty to pay the prepaid cost and that the pleading or paper sought to be filed does not appear, on its face, to be frivolous, it shall enter an order waiving prepayment of the prepaid cost. In its order, the court shall state the basis for granting or denying the request for waiver.

(f) Award of Costs at Conclusion of Action

(1) Generally

At the conclusion of an action, the court and the clerk shall allocate and award costs as required or permitted by law.

Cross reference: See Rules 2-603, 3-603, 7-116, and *Mattison v. Gelber*, 202 Md. App. 44 (2011).

(2) Waiver

(A) Request

At the conclusion of an action, a party may seek a final waiver of open costs, including any appearance fee, by filing a request for the waiver, together with (i) an affidavit substantially in the form prescribed by subsection (e)(1)(A) of this Rule, or (ii) if the party was granted a waiver of prepayment of prepaid costs by court order pursuant to section (e) of this Rule and remains unable to pay the costs, an affidavit that recites the existence of the prior waiver and the party's continued inability to pay by reason of poverty.

(B) Determination by Court

In an action under Title 9, Chapter 200 of these Rules or Title 10 of these Rules, the court shall grant a final waiver of open costs if the requirements of Rules 2-603 (e) or 10-107 (b), as applicable, are met. In all other civil matters, the court may grant a final waiver of open costs if the party against whom the costs are assessed is unable to pay them by reason of poverty.

(g) Waiver of Prepaid Appellate Costs

(1) ~~**Scope of Section**~~ **Definitions**

~~**This section applies to appeals from an order or judgment of the District Court to a circuit court and to appeals, applications for leave to appeal, and petitions for certiorari or other extraordinary relief seeking review in the Court of Special Appeals or the Court of Appeals from an order or judgment of a circuit court in a civil action.**~~

In this section:

(A) "appeal" means an appeal, an application for leave to appeal to the Court of Special Appeals, and a petition for certiorari or other extraordinary relief filed in the Court of Appeals in a civil action; and

(B) "prepaid costs" means ~~(A) the fee charged by the clerk of the trial court for assembling the record, including the cost of the transcript in the District Court, and (B) the filing fee charged by the clerk of the appellate court~~ (i) in an appeal from the District Court to a circuit court, the cost of a transcript in the District Court and the filing fee charged by the clerk of the circuit court, and (ii) in an appeal to the Court of Special Appeals or the Court of Appeals, any fee charged by the clerk of the circuit court for assembling the record and the filing fee charged by the clerk of the appellate court.

~~(2) Definition~~

~~In this section, "prepaid costs" means (A) the fee charged by the clerk of the trial court for assembling the record, including the cost of the transcript in the District Court, and (B) the filing fee charged by the clerk of the appellate court.~~

~~Cross reference: See the schedule of appellate court fees following Code, Courts Article, §7-102 and the schedule of circuit court fees following Code, Courts Article, §7-202.~~

~~(3)~~ (2) Waiver

(A) Generally

Waiver of prepaid costs under this section shall be governed generally by section (d) or (e) of this Rule, as applicable, except that:

(i) **in an appeal from the District Court to a circuit court or from a circuit court to the Court of Appeals or Court of Special Appeals**, the request for waiver of both the trial and appellate court costs shall be filed in the trial court with the notice of appeal;

(ii) in an appeal from the District Court, the request for waiver of both the cost of a transcript and the circuit court filing fee shall be determined in the District Court, but the decision regarding the circuit court filing fee may be reviewed in the circuit court.

Committee note: The current practice is for a District Court judge to rule on a request for waiver of both costs, subject to review of the decision regarding the circuit court filing fee by a circuit court judge. If the party is entitled to a waiver under section (d) of this Rule, that decision could be made by the clerk.

~~**(ii)**~~ **(iii) in an appeal from a circuit court,** waiver of the fee charged for assembling the record shall be determined in the ~~**trial**~~ **circuit** court~~;~~ ~~**(iii)**~~ **and** waiver of the appellate court filing fee shall be determined by the appellate court, but the appellate court may rely on a waiver of the fee for assembling the record ordered by the ~~**trial**~~ **circuit** court;

(iv) both fees shall be waived if **(a)** the appellant **will be represented in the appeal by an eligible attorney under section (d) of this Rule, (b) the attorney certifies that the attorney has read Rule 3.1 of the Maryland Lawyers' Rules of Professional Conduct and, to the best of the attorney's knowledge, information, and belief, the attorney's advocacy of claims, assertions, and issues on behalf of the client is in compliance with that Rule and (c) the appellant** received a waiver of prepaid costs under section (d) of this Rule **in the trial court or was not subject to any prepaid cost in that court~~, will be represented in the appeal by an eligible attorney under that section, and the attorney certifies that the appeal is meritorious and that the appellant remains eligible for representation in accordance with section (d) of this Rule~~; ~~and~~**

(v) if the appellant received a waiver of prepaid costs under section (e) of this Rule, the trial court and appellate courts may rely upon a supplemental affidavit of the appellant attesting that the information supplied in the affidavit provided under section (e) of this Rule remains accurate and that there has been no material change in the appellant's financial condition or circumstances.; **and**

(vi) in any case, civil or criminal, in which the appellant is not entitled to seek a waiver under subsection (g)(2)(A)(iv) or (v) of this Rule, the appellant shall follow the procedure set forth in section (e) of this Rule. The request shall be filed in the trial court, which shall proceed with accordance with the procedure set forth in subsection (g)(3)(B) of this Rule.

(B) Procedure

(i) If an appellant requests the waiver of the prepaid costs in both the trial and appellate courts, the trial court, within five days after the filing of the request, shall act on the request for waiver of its prepaid cost and transmit to the appellate court the request for waiver of the appellate court prepaid cost and a copy of the request and order regarding the waiver of the trial court prepaid cost.

(ii) The appellate court shall act on the request for the waiver of its prepaid cost within five business days after receipt of the request from the trial court.

(iii) If either court denies, in whole or in part, a request for the waiver of its prepaid cost, it shall permit the appellant, within 10 days, to pay the unwaived prepaid cost. If, within that time, the appellant pays the full amount of the unwaived prepaid cost, the appeal or application shall be deemed to have been filed on the day the request for waiver was filed in the trial court.

~~(b)~~ (h) Appeals Where Public Defender Representation Denied - Payment by State

The court shall order the State to pay the court costs related to an appeal or an application for leave to appeal and the costs of preparing any transcript of testimony, brief, appendices, and record extract necessary in connection with the appeal, in any case in which (1) the Public Defender's Office is authorized by these rules or other law to represent a party, (2) the Public Defender has declined representation of the party, and (3) the party is unable by reason of poverty to pay those costs.

Source: This Rule is derived as follows:
Section (a) ~~is derived from former M.D.R. 102 and Courts Article §7-201~~ is new.
Section (b) is new.
Section (c) is new.
Section (d) is new.
Section (e) is new.
Section (f) is new.
Section (g) is new.
Section ~~(b)~~ (h) is derived from former Rules 883 and 1083 b.

The Chair said that he had sent out a memorandum to the Committee the previous day regarding some issues with Rule 1-325. These had surfaced from comments received from the Public Justice Center, the Pro Bono Resource Center, and the Office of the Public Defender ("OPD"). The comments were mostly favorable, but these organizations had several concerns that they had asked to be addressed, some of which the Committee had already considered and rejected. The Chair noted that he and the Reporter had looked into this and had found several other problems. The Chair had explained these issues in the memorandum.

The Chair remarked that one of the issues that both the

General Provisions Subcommittee and the Rules Committee had discussed was a requirement for a waiver of prepaid costs. If an attorney is involved in the case, the attorney has to certify that the filing of the complaint has merit. This is in the statute, Code, Courts Article, §7-201, Payment of Fees and Waiver of Fees for Indigent Petitioners, and it is also in current Rule 1-325. When the Subcommittee had discussed this, a number of the groups at that meeting had asked that this certification requirement be eliminated. The Subcommittee's decision was that it should remain. The full Committee agreed, although the standard has been changed to "the best of the attorney's knowledge, information, and belief." The OPD had raised this issue again. The Chair asked Mr. Zavin, who is with the OPD, if he wished to speak on this.

Mr. Zavin explained that Rule 1-325 applies to the civil appeals handled by the OPD, not the criminal appeals. Although most of their cases are criminal appeals, they do handle a substantial number of civil appeals. The majority of them are from juvenile delinquency or Child in Need of Assistance ("CINA") cases, or from Termination of Parental Rights cases where the OPD represents the parents. The legislature has determined in those cases that there is a right to counsel and that right is to be provided by the OPD. As a result, if an indigent client wants an appeal in those cases, the OPD has to represent him or her. On occasion, the OPD represented those clients in the circuit court.

Mr. Zavin noted that a client may have been *pro se* or may have been represented by private counsel in the circuit court but has run out of funds and needs the help of the OPD for the appeal. If an individual requests an appeal allowed by statute, the OPD is required to assist that person by noting the appeal and by assigning an attorney. The OPD must order a transcript to be able to represent the person. At the time of noting the appeal, especially in the cases where the OPD did not represent the person in the circuit court, they will not be aware of the merits of the appeal. Nevertheless they are required by statute to represent the individuals. As a result, they would not be able to comply with the requirement that they certify the appeal as meritorious.

Mr. Zavin remarked that this is not to say that the OPD would pursue a frivolous appeal. They have a statutory obligation to represent the client. They order the transcript and review it, and if it is determined that there are frivolous issues, they would advise the client to dismiss the appeal or to raise only the issues that the OPD has determined are not frivolous. They make their best efforts at that point. At the time of noting the appeal, appellate counsel will not have reviewed the transcript and would not be able to make any certifications.

The Chair commented that there were two considerations other than what Mr. Zavin had said. One was that while there may be a requirement of OPD representation, it does not mean that the

court has to waive its costs for a frivolous appeal. There is also Rule 3.1, Meritorious Claims and Contentions, one of the Rules of Professional Conduct, which prohibits attorneys from raising issues for which there is no basis. The Rule has some flexibility. It does not regard as frivolous the argument that current law, which may preclude the relief being sought, should be changed. That argument can be made under Rule 3.1. The Chair tried to redraft the standard in Rule 1-325 around Rule 3.1. Instead of requiring the attorney to certify that the appeal has merit, although that is the statutory language, the attorney would certify that he or she has read Rule 3.1 and that the appeal is not inconsistent with that Rule. The requirement of some certification of merit is in the current Rule, and it is also in the statute. This is a policy question.

Mr. Frederick asked whether the Title 1 Rules apply in appellate courts. The Chair responded affirmatively. Mr. Frederick referred to section (b) of Rule 1-311, Signing of Pleadings and Other Papers, which reads: "The signature of an attorney on a pleading or paper constitutes a certification that the attorney has read the pleading or paper; that to the best of the attorney's knowledge, information, and belief, there is good ground to support it; and that it is not interposed for improper purpose or delay." This should apply to the situation in Rule 1-325. The Chair said that this is fairly consistent with Rule 3.1.

Ms. Bernhardt expressed the view that juvenile delinquency

cases, which are quasi-criminal, should not be included. They should be treated like criminal cases with a right to counsel. The Chair responded that there is not necessarily a right to waiver. Ms. Bernhardt said that there are constitutional cases involving equal protection and the right to free appeals. The Chair noted that indigent people have that right, because the OPD pays the fee.

The Reporter commented that Rule 3.1 provides that a Public Defender or a person defending the criminal or juvenile action has every right to require the State prove every element of the offense. Ms. Bernhardt remarked that she did not see any real basis for the distinction between juvenile delinquency cases and criminal cases, because of the way that the U.S. Supreme Court has treated juvenile cases. Judge Pierson agreed, but he noted that this would be redrafting all of Rule 1-325 because of a small subset of cases, appeals in juvenile delinquency and CINA cases, which are technically civil cases. The Rule provides currently that it only applies in civil cases. Rather than redrafting the entire standard, which currently complies with the statute, an exception could be carved out. The Chair responded that at the appellate level, it will have to apply to both civil and criminal cases. However, in the trial courts, the proposed change applies only to civil cases.

The Chair pointed out that what was being considered were the proposed amendments to Rule 1-325 that are already pending in the Court of Appeals in the 186th Report. A comment to that

Report had been received. He asked if anyone had a motion to amend what had been sent up to the Court of Appeals, which would then be filed in a Supplement to the 186th Report. No motion was forthcoming.

The Chair said that a second issue, which was a style matter, was clarifying some of the differences between appeals from the District Court to the circuit court and appeals from the circuit court to the Court of Special Appeals. There are some slight differences. The differences could be noted as a matter of style. To clarify by adding language to the Rule explaining exactly what happens as to how one goes about getting a waiver of prepaid fees from the District Court to the circuit court and from the circuit court to the Court of Special Appeals would make it very long and unwieldy.

The Chair commented that he and the Reporter had spoken the previous day about splitting the Rule as a matter of style. Rule 1-325 would address only the waiver of costs that are internal to a court, and a new Rule 1-325.1 would address what happens when there is an appeal, and there are costs in both courts. The new Rule would deal with how these costs are waived. From a style point of view, section (g) of Rule 1-325 could be moved to a new Rule. Both Rules would be about four or five pages long rather than one Rule being nine pages long. Cross references would need to be changed.

The Chair asked if anyone had an objection to splitting the Rule into two Rules. Judge Weatherly remarked that it would make

Rule 1-325 easier to read. By consensus, the Committee approved splitting Rule 1-325 into two Rules.

The Chair told the Committee that the Public Justice Center was renewing its prior request regarding circuit court transcripts. The Chair said that he would raise this issue again in case anyone on the Committee would like to change Rule 1-325. The draft of the proposed changes to Rule 1-325 provided that in a District Court appeal to the circuit court if a transcript of the District Court proceeding is required and presumably would only for on-the-record appeals, the cost of that transcript can be waived, because the Chair had been advised that, in those instances, District Court employees prepare the transcript. They are not sent out routinely to a contractor. The Public Justice Center would like the same Rule to apply to appeals from the circuit court to the Court of Special Appeals. Both the General Provisions Subcommittee and the full Committee rejected this because of costs. The court reporters who prepare transcripts of circuit court proceedings have to be paid to prepare the transcripts. It was a fiscal issue, not a policy question. The Public Justice Center had raised this issue again, and the Chair asked if anyone on the Committee would like to reconsider it. No response was forthcoming.

The Chair commented that Sharon Goldsmith, Esq., Executive Director of the Pro Bono Resource Center had asked that the attorneys who will be provided by the Maryland Legal Service Corporation ("MLSC") grantees (other than those provided by the

Legal Aid Bureau) make the request to waive prepayment of prepaid costs on an MLSC form, so there would be one uniform form that the judge would see for all grantees. The forms would not be different from one organization to another. The Chair inquired if anyone had a problem with this. The Reporter pointed out that the bolded language in subsection (d)(1) of the version of Rule 1-325 that had been handed out at the meeting (Version 2.1) was new and was added to address this issue.

Ms. Ortiz said that some of the concern was the statement in Rule 1-325 (d)(1) as drafted. The attorneys who are representing clients through a legal services provider in Maryland can request a fee waiver simply by filing a statement in support of that request and noting in that statement that the attorney is representing his or her client through an approved legal services provider and that the client has already been established to be income-eligible for the services of that program. It appeared that the Pro Bono Resource Center had been concerned that the statement had to be signed off by or submitted by the program.

The Chair asked whether this had been addressed. Ms. Ortiz said that she had thought that this process was working properly. She believed that the attorney was authorized to act as an agent on behalf of the program. The statement and the form that are being used have been posted, and they are being used already in MDEC filings. It is the statement in support of the waiver. The affidavit is for indigent individuals who are self-represented. Ms. Ortiz added that she would distribute the statement and form

for those at the meeting to look at.

Ms. Brinkmann, who was with the Pro Bono Resource Center, explained that their concern was that the Rule should be clear that for volunteer attorneys seeking fee waivers, the process is simple. Ms. Ortiz responded that this problem had been solved, because of the fairly simple form that was being used. The way that it had been drafted created some additional problems. The MLSC is being allowed to submit a list of providers. The Chair remarked that he had thought that this was the idea that Ms. Goldsmith had been concerned about. It is the grantees of the MLSC who actually provide the attorneys. Ms. Ortiz noted that Rule 1-325, as it had been drafted originally was broader than that. It allowed the MLSC to submit their proposed list of providers, which has already been done.

The Chair asked if Ms. Ortiz wanted a change in the language of subsection (d)(1) of Rule 1-325. Ms. Ortiz responded that the Pro Bono Resource Center may want some clarification as to what an agent is and that the attorney can submit the statement on behalf of the organization. Ms. Brinkmann explained that their concern is making it clear to the volunteers that requesting the waiver is as simple as filling out the one-page form.

Ms. Erlichman, Executive Director of the MLSC, said that the confusion with regard to the comments that Ms. Goldsmith had submitted pertained to the phrase "authorized agent." She did not think that this was ever intended to be the MLSC. It is the entity that is to provide the list of providers to the court each

year. Those providers are not necessarily limited to MLSC grantees. There is a process in place with programs that are provided by nonprofit, legal services providers as well as the clinical programs from the law schools to submit an application to the MLSC to indicate that they indeed fall within the parameters to be included in the list. This should not be limited to only MLSC grantees. As to the issue of the "authorized agent," it was always intended by the Committee to be the attorneys acting on behalf of the legal services provider. The Chair asked if Ms. Erlichman wanted any changes in the Rule in the 186th Report on this topic, and she answered negatively.

Ms. Brinkmann commented that the Pro Bono Resource Center had also requested a possible inclusion of an illustrative list. The Reporter questioned whether there had been a problem. Ms. Brinkmann responded that her role at the Pro Bono Resource Center was to manage the litigation fund that reimburses volunteer attorneys for the costs they incur in volunteering. A number of them had difficulty requesting fee waivers. The Center receives requests for reimbursements for filing and other fees.

The Chair said that he had spoken with Ms. Goldsmith about this, and he suggested that nothing addressing this be put in Rule 1-325, because new fees can arise that are not on the list. A Committee note or something similar may be helpful. Ms. Brinkmann agreed that this would be helpful. The Chair remarked that Ms. Goldsmith had been concerned about appearance fees. Ms. Erlichman commented that the language referring to "appearance

fees" is actually in Rule 1-325 (f)(2)(A).

The Reporter said that she had just gotten an email that morning. The examples of the filing fee are quite obvious, but the problem must be the appearance fee. The Chair added that this seemed to be what Ms. Goldsmith had been concerned about. Ms. Brinkmann responded that she and her colleagues wanted to see the language referring to "appearance fees" moved to the front of the Rule. It should be when funds for reimbursement of the attorneys for the filing fees are being requested in section (d). The Chair asked if the problem needs to be addressed in the Rule. Ms. Brinkmann answered that they would be satisfied if it were in a Committee note or a comment. Mr. Carbine inquired why this could not be handled by the service provider. The provider is given a packet of information and the list of fees that can be waived. The Chair said that whether it is a request that goes to the court in section (e) or whether it is a statement under section (d) of Rule 1-325, which the clerk can do automatically, a list of what the attorney would like waived can be included.

Ms. Gardner explained that the problem is that the Rule references only the appearance fees in section (f) pertaining to the final waiver and not in the part of the Rule pertaining to prepayment of the waiver, which is section (d), so the clerks can still continue to refuse to waive prepayment of the plaintiff attorney's appearance fee. The clerks currently understand that they may be required to waive the filing fee but do not necessarily uniformly understand that they all are required to

waive prepayment of an appearance fee. The Reporter pointed out that this is more of an issue of the education of the clerks. The Chair asked if anyone had an objection to adding appearance fees to section (d). No one objected. By consensus, the Committee approved adding appearance fees to section (d).

By consensus, the Committee approved Rule 1-325 subject to the addition of appearance fees to section (d), the section pertaining to waiver of prepaid costs by the clerk.

Agenda Item 1. Consideration of proposed new Rule 20-204.2 (Issuance of Original Process - Criminal)

Mr. Carbine presented Rule 20-204.2, Issuance of Original Process - Criminal, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 20 - ELECTRONIC FILING AND CASE MANAGEMENT

CHAPTER 200 - FILING AND SERVICE

ADD new Rule 20-204.2, as follows:

Rule 20-204.2. ISSUANCE OF ORIGINAL PROCESS - CRIMINAL

(a) Definitions

The definitions in Rule 4-102 apply in this Rule, except that in this Rule "charging document" does not include (1) a charging document entered into the "Commissioners' Assistant" electronic system and transmitted into MDEC from that system or (2) a citation.

(b) Filing of Charging Document; Issuance of Paper Warrant or Summons

A charging document shall be filed in paper form and the clerk shall scan the document into the MDEC system. In accordance with the applicable Rules in Title 4, a warrant or summons pertaining to the charging document shall be issued in paper form.

(c) Subsequent Submissions

Unless exempted by the State Court Administrator, the filing of subsequent submissions in a criminal action shall be governed by the Rules in this Title.

Source: This Rule is new.

Rule 20-204.2 was accompanied by the following Reporter's note.

Although submissions in criminal actions currently are exempt from the requirement of e-filing in MDEC, it is anticipated that submissions in criminal actions in Anne Arundel County will be included in MDEC in the spring of 2015. Before this occurs, Rules that address the issuance of original process in criminal actions, as well as any other rules changes pertaining to the inclusion of criminal actions in MDEC, will need to be transmitted to the Court of Appeals. As a starting point, proposed Rule 20-204.2 has been recommended by the MDEC Implementation and Remote Access Subcommittee. The Subcommittee's view is to keep the procedure as simple as possible, subject to further modification when MDEC is implemented in additional jurisdictions.

Mr. Carbine told the Committee that MDEC went live in Anne Arundel County on October 14, 2014. He and the others who have worked on MDEC had found that the current Odyssey software will not accommodate the filing of charging documents in a criminal

case. Some other related problems in Odyssey with criminal filings had caused Ms. Harris, who is the State Court Administrator, to exempt the criminal filings from the Title 20 Rules until the spring. Rule 20-204.2 is designed to be in place when Title 20 will be allowed to apply to criminal cases.

Mr. Carbine said that he would explain Ms. Harris' demonstration of how the application of MDEC to criminal cases will work. In one hand, there is the current case management program. In the other hand, there is a charging document in PDF form which can be filed with MDEC as civil cases are. However, it does not do the data-capturing that the court administrators need to do their statistics, which are not done in MDEC, but in the current case management system. The Rule that is being proposed provides that the filer files the charging document in paper form just as it is done now. The clerk then takes the paper form and puts in all of the statistical information that is required. The clerk then scans the charging document into MDEC.

Mr. Dunn asked why the information could not be taken from the PDF form if it is not entered manually. Mr. Carbine responded that it is not the paper, it is capturing the individual charges. These cannot be tracked statistically through the computer. Mr. Carbine was not sure what the reason was, but the PDF form cannot be filed and then the information entered into the program. Judge Mosley commented that the form is scanned into what she calls "the box." A person manages "the box." What goes into "the box" becomes the case file. Mr.

Carbine said that he had been working with Tyler Technologies, the company setting up MDEC to be able to add this capsule to the Odyssey System, but it is not feasible yet. This is well beyond Mr. Carbine's area of responsibility. He remarked that he thought that there were some other issues associated with this.

The Chair told the Committee that two people at the meeting are from the State's Attorney's Office in Anne Arundel County. Ms. Miles said that she was an Assistant State's Attorney in Anne Arundel County. In that county, there had been a physical demonstration of the fact that the new computer systems, the incoming Odyssey which will then be turned into MDEC, are not compatible with each other when there is a criminal indictment or information. Rule 20-204.2 indicates that a charging document entered into the "Commissioners' Assistant" electronic system is more compatible with MDEC. However, when the hard copy of an indictment or information is received by the clerk's office, the software does not support taking the charges and then allowing the clerk to input information, such as the amount of a bond or the date of hearings. It manually has to be moved over to the other system, which now has case management ability.

Ms. Miles commented that it seemed to her that until Tyler gets the system up and running, there has to be a human being between the paper that is filed with the clerk's office and getting that case to become electronic. For this reason, the recommendation was that for the time being, the indictments and information in Anne Arundel County continue to be filed in paper

form. The clerk will actually manually take over that job and turn it into an electronic case. The State's Attorney's Office hoped that Rule 20-204.2 would be approved by the Rules Committee, because otherwise it will be impossible to indict anyone.

The Chair noted that at the MDEC Implementation and Remote Access Subcommittee meeting, the question had been asked as to what the other State's Attorneys do with respect to service copies of the charging document. Nine of 24 counties reported, and they are all handling this differently. Ms. Miles agreed, noting that the State's Attorney's Office is providing the service copy for the defendant. There had been a concern that the clerk would not be asked to do the extra work of generating the service copy. Among the larger jurisdictions, she had not heard from Howard or Prince George's Counties on this issue. The Reporter commented that the procedure for the circuit court seemed appropriate. However, the situation at the commissioner's level seems confusing. What will the judge have in the electronic file if the charging document has emanated from that level? Does the judge have enough information to determine what documents actually got served on the criminal defendant?

Ms. Rose Day told the Committee that she works at District Court headquarters. The idea of two systems had been discussed. The filing system for the public and for attorneys is the Odyssey system. This is where charging documents cannot be input into that system, because in order for the case to begin in the case

management system, it is necessary to assign charges. The public should not be able to access what the charges are. This is why the charges cannot be accepted at this time in the filing system. Some of the kinks in the system have to be worked out. As to the issue regarding the commissioners, they will be working on the same system that they are working on today for several years until Odyssey is rolled out throughout the entire State. When the system documents cases that are filed in the commissioner's office, or there is a statement of charges filed, they still need to be in the paper format. The commissioner's system will not change from what it is today until several years from now.

Ms. Rose Day remarked that she and her colleagues would recommend that in section (a) of Rule 20-204.2, excepting out the charging document that goes to the commissioner is not appropriate because no charging document goes to the commissioner. They are dealing with physical papers and are including data and information. They are not downloading to Odyssey. The physical paper that is the charging document would be scanned into Odyssey by either the clerk or the commissioner. The court would take on the function of scanning that in, so that it becomes a document of the case. The paperwork that is filed will be served on the defendant. The court record is the electronic record, and the physical piece of paper is scanned in. The judge in the courtroom would see the charging document, the service document. Any type of physical paper that exists today would be an electronic document in Odyssey. It would be there in

PDF format, but it has to start with the paper document.

The Chair said that one of the issues that had come up in the Subcommittee was charging more than one defendant in a single charging document. They had asked Ms. Miles about it, and she had reported that of the nine State's Attorneys who had spoken to her, only Montgomery County does that. The Chair asked whether the question of charging multiple defendants in a single charging document is going to be a problem for MDEC, either currently in Anne Arundel County or afterwards statewide. Ms. Day answered that this would happen more in the circuit court. Each defendant should have his or her own individual case. Charging multiple defendants in a single charging document is a problem. The Chair said that if and when Montgomery County becomes part of MDEC, this will be an issue.

Mr. Zarbin asked what the clerks' opinions were on all of this. Mr. Lowe responded that this does not change what the current practice is. Judge Price asked whether a defendant's charging document with the underlying facts is available to the public when the charges are scanned into Odyssey before the defendant is served. Ms. Day answered that there is a level of security that can be put on those cases. A timeline could be added so that the information is not available for a certain amount of time. Or the case could be obscured from public view. This is all set up behind the scenes. The actual documents are only viewable by the parties to the case once they have the ability to log on. It is not something that everyone can see.

Mr. Bittner told the Committee that he is from Judicial Information Systems (JIS). Remote access through the Internet remains on CaseSearch and will remain so at this point in time. No documents are seen in CaseSearch, only docket entries. If someone is a registered user, an e-filer, for the cases that the person is a party to, he or she will be able to go into a portal and see the documents. These are not available to the public over the Internet. Public access terminals at the courthouse will provide that information for any document that is not shielded or for any cases that are not sealed. Currently, anyone can ask for a paper file. The same information can be seen on a computer terminal at the courthouse. There are multiple vehicles into the system.

Mr. Bittner noted that the word "Odyssey" is used in a very general sense. It is the case management system that the clerks use and that the judges take the information from. Electronic filing is a separate product called "File and Serve." It is a Tyler product that connects with Odyssey. It is a web-based electronic filing vehicle to get documents into Odyssey, which is where the clerk and the judge see them and review them. It is the repository of all of the case documents and information.

Mr. Bittner said that "File and Serve" does not now support the entry of charges, because a *pro se* defendant or anyone could determine what the charges are going to be. If the State's Attorney or someone else would like to be able to do something to initiate a case, years ago, it had been decided for the project

that in criminal cases, case initiation would have to be done in paper form. If the State's Attorney's Office has their own system through which they can interface with Odyssey later, that has yet to be seen. Tyler is not working to make the "File and Serve" capable of entering charges. This is not a change to their front-end system that has been requested.

The Chair referred to section (d) of Rule 4-212, Issuance, Service, and Execution of Summons or Warrant. It provides that files and records of the court pertaining to a warrant and the charging document upon which the warrant was issued shall not be open to inspection until the warrant is served, and a return of service has been made, or 90 days has elapsed. They are shielded, but this only applies to a charging document where there has been a warrant. What about charging documents where there is no warrant? Ms. Day responded that nothing prohibits someone from viewing those charging documents. Some kind of security would be added to the file. This is similar to the current procedure where the clerk or the commissioner puts a piece of paper into the file that indicates that it cannot be viewed by the public for 90 days.

The Chair asked whether the file would be shielded if the defendant has not been arrested, and the State's Attorney gets an indictment or files a criminal information. Ms. Day answered that only the arrest warrant would be shielded, but not the charging document. If someone currently came to the clerk's office and wanted to see that file, they could view it, because

it is a public document. The Chair added that it could not be viewed if it was sealed. The Reporter inquired whether Ms. Day and Mr. Bittner had reviewed Rule 20-204.2. It seemed from the discussion that subsection (1) of section (a) should be deleted, because that only pertains to the electronic input of the charges into the "Commissioners' Assistant" system. Ms. Day responded that it should be deleted, or the term "charging document" should be changed to the word "information." The Reporter commented that this was not the concern. Ms. Day agreed that subsection (1) of section (a) could be deleted.

The Reporter commented that at the commissioner's office, many papers are produced. Under MDEC in Anne Arundel County, does that paper physically go to the clerk's office? Ms. Rose Day responded affirmatively. The Reporter asked if the clerk scans all of the paperwork. Ms. Day referred to the language in section (b) that read: "and the clerk shall scan the document...". Ms. Day inquired whether that language should be changed to "and the court shall scan the document...". The Reporter pointed out that judges will not be scanning the papers.

Ms. Day noted that it may not be an actual clerk who scans the documents. It could be a temporary employee or the commissioner who does the scanning. The Reporter said that it would be the clerk or someone supervised by the clerk. The clerk is a deputized person who is responsible for maintaining the integrity of those documents. It is, however, the clerk who must find the way to get the paperwork into the electronic system.

Mr. Carbine asked why subsection (1) of section (a) of Rule 20-204.2 was proposed to be deleted. The Reporter responded that JIS had advised that what goes into the "Commissioner's Assistant" system is just the fact that charges have been filed, but the physical paper that starts at the commissioner's office still goes to the clerk's office, and then the clerk scans it in. Judge Ellinghaus-Jones remarked that JIS had said that the "Commissioner's Assistant" system is never going to be compatible with MDEC. The reference to the commissioner's documents had been taken out, because those documents are always in paper form.

Ms. Day said that the "Commissioner's Assistant" would be compatible with MDEC when all of the jurisdictions in the State are on MDEC. Mr. Bittner explained that the "Commissioner's Assistant" system will be replaced. When all jurisdictions are on MDEC, there will be no need for the system. Until that time, because the system is cross-jurisdictional, it has to remain in place. Once all jurisdictions are on MDEC, then the commissioners will use the Odyssey system as their software.

Judge Ellinghaus-Jones said that there will never be a charging document transmitted from the "Commissioner's Assistant" system to MDEC. The Reporter commented that the charging document needs to be disseminated. The Chair asked whether the reference to "a citation" in subsection (2) of section (a) of Rule 20-204.2 should be left in the Rule.

The Reporter inquired whether the judge who tries a case on

a citation has a copy of the citation. Ms. Day replied affirmatively. She pointed out that there are different citations. One is a traffic citation, and the others are criminal and civil citations. There are electronic citations for traffic citations that come through to the court. The Chair asked if this is true statewide for all police departments. Ms. Day answered that some jurisdictions are still using paper traffic citations. There will never be 100% of jurisdictions using electronic citations. The bulk of the traffic citations, about 85%, are electronic. The criminal citations still need to be in paper form.

The Reporter asked whether everything else is getting scanned in as a PDF, except for traffic citations that are sent electronically by police officers. Mr. Bittner replied that nothing is happening now, because they are not in MDEC now. In Anne Arundel County, there are no citations in MDEC. The Reporter inquired if there will be in the spring of 2015. Mr. Bittner responded that in the spring, the paper citations will still have to be entered and probably scanned, because they are a charging document.

The Chair referred to section (b) of Rule 20-204.2. It stated: "A charging document shall be filed in paper form and the clerk shall scan the document...". It had been stated that 85% of the citations are electronic. Mr. Bittner noted that those will come through electronically, but as Ms. Day had said, there will be never a time when the system completely does not use

paper. Ms. Day added that they would like to exclude e-citations. Mr. Bittner commented that another example is Department of Natural Resources ("DNR") citations. JIS had already contacted DNR, but they are not in a position nor do they have the staff or funding to give JIS an electronic feed. Eventually JIS would like all citations to be electronic, but they cannot set up a time frame on that, because it is dependent on all those agencies issuing the citations.

The Chair questioned whether section (a) of Rule 20-204.2 is necessary. The Reporter asked if the actual citation is viewed on the computer screen. Judge Ellinghaus-Jones replied that in the court file, there is a copy of the citation. The Reporter asked how it gets in there. Judge Ellinghaus-Jones answered that the e-citation uploads after the officer enters it. Mr. Bittner added that it uploads to the current existing traffic system. Traffic cases have not yet gone to MDEC. When the criminal cases go to MDEC, the traffic cases will go. Ms. Day said that in the current system, the judge can see the actual citation, a computer printout of the citation, which is the data entry into the system, and the docket sheet for minor traffic cases, which has all of the data from the citation.

The Chair inquired whether, with respect to electronic citations that are written by the police, it is the case now that the citations are filed electronically, and the clerk prints paper, which goes into the file. Ms. Day answered that this is the procedure for serious traffic citations. The Reporter asked

what can be seen when a speeding ticket is filed. Judge Price answered that the docket sheet states when the ticket was given, the birthday of the person who got the ticket, what the citation was for, and the payable amount. The Chair asked whether the judge sees the citation itself. Judge Price replied negatively.

Judge Ellinghaus-Jones noted that Code, Transportation Article, §26-409, provides that the traffic citation is the charging document. It provides the details of the traffic violation. The Reporter asked whether there is a copy of the actual ticket that the person is served with. The ticket has all kinds of information, such as the rights of the person who got the ticket. What the judge sees in the file is a list of the charges, the speed measured by the police officer, the address of the person who was ticketed, etc. Judge Ellinghaus-Jones noted that the citations in serious traffic offenses are sent to traffic processing and forwarded to the court location in batches.

Ms. Day pointed out that the citations are in the courthouse building if the person ticketed had requested a trial or a waiver hearing to be held in the courthouse. If the citations are entered into the traffic processing center, they are housed at the center, but any court location can have access to them. The Chair asked whether this will not change until MDEC is in all of the jurisdictions. Ms. Day answered affirmatively. The Chair commented that with respect to citations, and the "Commissioner Assistant" system, it will be the way it is now. There will be

no change until the entire State is in MDEC. Ms. Day and Mr. Bittner agreed. Ms. Day added that only e-citations will be uploaded.

The Chair inquired whether Rule 20-204.2 should apply only to indictments, criminal informations, and statements of charges. Or should it even apply to statements of charges? Ms. Day responded that it should apply to statements of charges, because they are still going to be filed in paper form. The Chair inquired whether they are going to be e-filed. Ms. Day answered that only traffic e-citations will be e-filed.

The Chair clarified that his question was whether Rule 2-204.2 should apply to anything other than indictments and criminal informations. Judge Ellinghaus-Jones commented that the Rule should apply to everything but e-citations. The Chair asked about the commissioner documents. Judge Ellinghaus-Jones responded that the commissioners follow the process where the charging document is filed in paper form, and the clerk scans it. Then section (a) of Rule 4-211, Filing of Charging Document, provides that the original of a citation shall be filed in District Court promptly after its issuance and service. The language of section (a) is correct. The citations have already been served. The Rule applies to everything except for e-citations, because they are the only citations that are going to be uploaded from the police officer.

The Reporter questioned the use of the term "e-citation." Judge Ellinghaus-Jones noted that the Code uses the term

"electronic citation." By consensus, the Committee agreed to use the term "electronic citation."

Mr. Carbine said that he wanted to alert the Committee that the original version of Rule 20-204.2 had been more than three pages long. One of the decisions made by the Subcommittee was that the parallel Rule pertaining to original process in paper form, Rule 4-211, Filing of Charging Document, would not be changed at this time. It appears that different counties have different procedures. Mr. Carbine commented that section (c) of Rule 20-204.2 had not yet been discussed. Once the initial data entry problem is addressed, subsequent filings have to follow the Rules in Title 20. The State Court Administrator is given the ability to exempt out those cases which cannot be filed electronically.

Mr. Carbine commented that a motion to amend section (a) of Rule 20-204.2 was needed. Judge Ellinghaus-Jones moved that section (a) should read as follows: "The definitions in Rule 4-102 apply in this Rule, except that in this Rule 'charging document' does not include an electronic citation." The Reporter added that there would be a cross reference to Code, Transportation Article, §26-409. The motion was seconded and passed unanimously.

By consensus, the Committee approved Rule 20-204.2 as amended.

The Chair said that the discussion indicated how difficult it had been for the Subcommittee to draft Rule 20-204.2. The

people working at JIS are doing the best they can to deal with these issues. The issues are surfacing now as expected but not to the extent they will when MDEC is effective statewide. It has been a learning experience.

Agenda Item 2. Consideration of proposed amendments to: Rule 16-761 (Costs) and Rule 16-758 (Post-hearing Proceedings)

Mr. Frederick presented Rules 16-761, Costs and 16-758, Post-Hearing Proceedings for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 – DISCIPLINE, INACTIVE STATUS, RESIGNATION

AMEND Rule 16-761 by adding language modifying the word "costs" in section (a), by adding a new section (b) providing for a definition of "costs," and by making stylistic changes, as follows:

Rule 16-761. COSTS

(a) ~~Allowance and Allocation~~ Generally

Except as provided in Rule 16-781 (n), and unless the Court of Appeals orders otherwise, the prevailing party in proceedings under this Chapter is entitled to reasonable and necessary costs. By order, the Court~~, by order,~~ may allocate costs among the parties.

(b) Costs Defined

Costs include:

(1) ~~**reasonable and necessary**~~ court costs;

(2) reasonable and necessary **fees and** expenses paid to expert witnesses who ~~**testify**~~ **testified in the proceeding before the circuit court judge;**

(3) reasonable and necessary travel expenses of other witnesses;

(4) reasonable and necessary costs of transcripts prepared of proceedings before the circuit court judge;

(5) reasonable and necessary fees and expenses paid to a court reporter or reporting service for attendance at depositions and for preparing a transcript, **audio recording, or audio-video recording** of the deposition; and

(6) other reasonable and necessary expenses, excluding attorneys' fees, incurred in investigating the claims and in prosecuting or defending against the petition for disciplinary or remedial action before the circuit court judge and in the Court of Appeals.

~~(b)~~ (c) Judgment

Costs of proceedings under this Chapter, including the costs of all transcripts, shall be taxed by the Clerk of the Court of Appeals and included in the order as a judgment. On motion, the Court may review the action of the Clerk.

~~(c)~~ (d) Enforcement

Rule 8-611 applies to proceedings under this Chapter.

Source: This Rule is in part derived from former Rule 16-715 (BV15) and in part new.

Rule 16-761 was accompanied by the following Reporter's note.

The Court of Appeals requested that the Rules Committee study whether expert witness fees incurred by the Attorney Grievance Commission can or should be assessed as costs against a non-prevailing respondent attorney in a disciplinary proceeding. The Attorneys and Judges Subcommittee recommends amending Rule 16-761 to clarify which costs can be assessed and amending Rule 16-758 to provide a mechanism for a party to file exceptions to an assessment of costs against him or her.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 – DISCIPLINE, INACTIVE STATUS, RESIGNATION

AMEND Rule 16-758 by adding to section (b) language referring to exceptions to costs, as follows:

Rule 16-758. POST-HEARING PROCEEDINGS

(a) Notice of the Filing of the Record

Upon receiving the record, the Clerk of the Court of Appeals shall notify the parties that the record has been filed.

(b) Exceptions; Recommendations; **Statement of Costs**

Within 15 days after service of the notice required by section (a) of this Rule, each party may file (1) exceptions to the findings and conclusions of the hearing judge**,** ~~and~~ (2) recommendations concerning the appropriate disposition under Rule 16-759 (c)**,** and (3) ~~**exceptions to**~~ a statement of

costs **to which the party may be entitled under Rule 16-761**.

(c) Response

Within 15 days after service of exceptions**,** ~~**or**~~ recommendations, **or a statement of costs,** the adverse party may file a response.

(d) Form

The parties shall file eight copies of any exceptions, recommendations, and responses. The copies shall conform to the requirements of Rule 8-112.

Source: This Rule is derived in part from former Rule 16-711 (BV11) and is in part new.

Rule 16-758 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 16-761.

Mr. Frederick told the Committee that as worded, Rule 16-761 provides that the prevailing parties in an attorney discipline case (almost all of the time this will be the Attorney Grievance Commission) get to recover their costs. The Court of Appeals asked the Rules Committee to weigh in on what is included and excluded as costs and how this works. At present, when an attorney is charged with a violation of a disciplinary rule, and the matter goes all the way up to the Court of Appeals, ordinarily at the end of the proceeding, costs are assessed, and almost invariably, they are assessed against the attorney. On occasion, the Court will split or divide the costs. A self-

represented attorney or an attorney who is represented by someone unfamiliar with the procedure may not understand this.

Mr. Frederick said that Bar Counsel will usually accompany a statement of charges filed in the Court of Appeals with discovery, including interrogatories, requests for production, and depositions. The attorney who is familiar with the procedure understands that his or her client may end up having to pay those costs. If the client has his or her privilege to practice law permanently terminated, the costs will usually not be collected. If the attorney is suspended or is indefinitely suspended with the right to reapply within a time certain, and the attorney would like to return to the practice of law, he or she is going to have to pay the costs, as a condition precedent to returning to the practice of law. The Chair pointed out that the costs are entered as a judgment.

Mr. Frederick commented that the Attorneys and Judges Subcommittee looked at these issues, and the staff of the Rules Committee did an excellent job looking at how other states handle this. A summary of the procedures in six states was in the meeting materials. The vast majority of states appear to allow this procedure but most provide that the costs be reasonable and necessary. The Subcommittee had suggested that there be a procedure for Bar Counsel to set forth what his or her costs are with an opportunity for the respondent to reply. An example would be that the respondent could state that one of the expert witnesses did not need to testify for the length of time that he

or she actually did. The Court could then decide if the respondent would have to pay the fees of that expert witness.

Mr. Frederick said that a revised version of Rule 16-761 had been distributed at the meeting. The Reporter remarked that this version had been e-mailed to the Committee, but extra copies were available at the meeting. Mr. Frederick noted that the process now would be that the costs have to be reasonable and necessary. When Bar Counsel files, there can be either exceptions or suggestions for a disposition filed, as set forth in Rule 16-758, and the respondent has an opportunity to review that and reply as to whether he or she agrees with those costs. The attorney has a reasonable chance to resolve one of these cases without discipline before it goes public. After the case goes public, the chance is extremely small. Generally, when the case gets to the Court of Appeals, the result will not be a good one for the respondent. The Subcommittee believes that this is a reasonable approach. Mr. Grossman, Bar Counsel, concurred.

The Chair pointed out that the Court of Appeals' request was very limited. They had an actual case in which the question was whether the fees, not expenses, paid to an expert witness were recoverable as costs. The Rules do not address this. In looking at this issue, the Chair and the Reporter found other issues that the Rules did not address. They tried to clarify these issues, and the changes appear in the versions of Rules 16-758 and 16-761 that were distributed at the meeting.

Mr. Frederick explained that Rule 16-758 pertains to where

and when Bar Counsel or the attorney files a statement of costs. It is filed in the Court of Appeals, not in the trial court, because the trial court does not know who will ultimately prevail. It gives the Court of Appeals an opportunity to decide who the prevailing party is and what costs claimed by that party should be allowed.

Mr. Grossman noted that the Rule adds a reference to the respondent's costs as well. Both sides may very well weigh in on each other's costs. The Chair commented that the Subcommittee had discussed the fact that occasionally the circuit court judge does not find a violation on every charge. This may happen in the Court of Appeals as well. The question can be raised as to who the prevailing party is, and the Court of Appeals would ultimately have to make that determination in terms of an assessment.

By consensus, the Committee approved Rules 16-761 and 16-758 as presented.

Agenda Item 3. Consideration of proposed amendments to Rule 7.4 (Communication of Fields of Practice) of the Maryland Lawyers' Rules of Professional Conduct

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Mr. Frederick presented Rule 7.4, Communication of Fields of Practice, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX: THE MARYLAND LAWYERS' RULES OF

PROFESSIONAL CONDUCT

AMEND Rule 7.4 by adding language to paragraph (a) referring to paragraph (d), by adding a new paragraph (c) pertaining to Admiralty practice, and by adding a new paragraph (d) pertaining to the requirements for lawyer certification as a specialist, as follows:

Rule 7.4. COMMUNICATION OF FIELDS OF PRACTICE

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law, subject to the requirements of Rule 7.1. ~~A~~ Except as **otherwise** provided in ~~**paragraph (d) of**~~ this Rule, a lawyer shall not hold himself or herself out publicly as a specialist.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or a substantially similar designation.

(d) A lawyer shall not state or imply that the lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

COMMENT

[1] This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services; for example, in a telephone directory or other advertising. If a lawyer practices only in such fields, or

will not accept matters except in such fields, the lawyer is permitted so to indicate.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office.

[3] Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[4] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is accredited by the American Bar Association. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. In order to ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in an communication regarding the certification.

Model Rules Comparison. -- ~~This Rule substantially retains existing Maryland language and does not adopt Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, with the exception of: 1) adding ABA Rule 7.4(c) (incorporated as Rule 7.4(b) above); 2) the first sentence of ABA Comment [2] (included as Comment [2] above).~~ This Rule adopted the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct with the following exceptions. Language has been added to paragraph (a) referring to Rule 7.1 and referring to the prohibition against an attorney holding himself or herself out as a specialist, noting the exception in section (d). Certification granted by appropriate

state authority has been eliminated from section (d).

Rule 7.4 was accompanied by the following Reporter's note.

> To address the issue of whether attorneys are allowed to hold themselves out to the public as a specialist in certain areas of the law, the Attorneys and Judges Subcommittee recommends tracking ABA Model Rule 7.4, which sets out the requirements for an attorney to be certified as a specialist. The Subcommittee decided that certification would only be allowed by organizations accredited by the ABA, and not by organizations approved by an appropriate state authority, which is permitted by the ABA rule. This would eliminate the expense of, and problems associated with, establishing an attorney specialist certification bureaucracy in Maryland or determining the efficacy of the attorney specialist certification procedures used in other States.

The Reporter told the Committee that a revised version of Rule 7.4 had been distributed at the meeting. Mr. Frederick explained that Rule 7.4 is somewhat of an anomaly. It will not allow an attorney to claim that he or she specializes or is certified to practice in any particular area absent certain very narrow constraints. Interestingly, attorneys can say that they concentrate their practice. While an attorney may not say that he or she specializes in the defense of plaintiffs' personal injury cases, the attorney can say that he or she concentrates in the defense of plaintiffs' personal injury cases. It had been proposed that there may be ways that attorneys could legitimately hold themselves out as having a certified specialization. They really should be certified, so that the public is protected,

because this is the object of the Rules of Professional Conduct. It is better to inform the public as to what attorneys can and cannot do.

Mr. Frederick noted that the Honorable Kathryn Grill Graeff, a judge on the Court of Special Appeals and a member of the Maryland Professionalism Commission, and Thomas Dolina, Esq., of the Specialization Committee of the Maryland State Bar Association ("MSBA") were present at the meeting. Mr. Dolina said that he was at the meeting at the behest of Debra Schubert, Esq., President of the MSBA. He and a group of attorneys had met to study this issue, but they had not yet formed an opinion. They were hoping to poll the MSBA members through the various MSBA Sections to get an opinion as to whether specialization is appropriate. Generally, there is interest in amending Rule 7.4. Mr. Dolina's interest in coming to the meeting was to state that he and his colleagues appreciate the effort made by the Subcommittee, but they would like additional time to form their opinion.

Mr. Frederick said that the Subcommittee had considered some information. The American Bar Association ("ABA") has recognized 49 specialties. The ABA will accredit other organizations in whom they have confidence to certify attorneys as having sufficient expertise to advertise themselves as specialists. It is a rigorous qualification process to certify competence in a specialty. The impetus for this change was a program that was put on by the Professionalism Center two weeks ago. He asked

Judge Graeff to explain to the Committee about the program.

Judge Graeff told the Committee that she had been in charge of the program concerning certification by specialty. The proponents of this indicate that it is beneficial to attorneys, the public, and the legal profession as a whole. It is beneficial to attorneys to be certified as a specialist, so that they can advertise. Maryland is one of only two states that do not allow advertising of an attorney's certification. Advertising as a specialist is helpful as a tool for attorneys to let people know that they have taken courses and practiced extensively in a certain area of the law and that they are regarded by peers and judges to have special knowledge of a certain area. It is helpful to attorneys both to market themselves and also for attorneys to refer clients to other attorneys.

Judge Graeff pointed out that the procedure for certification is very rigorous. It is helpful to attorneys and to the public who may not know which attorney to go to when they have a legal problem. Certification also helps the legal profession as a whole, to the extent that it encourages attorneys to take educational classes and to keep up-to-date on current law. It enhances the quality of the practice and allows the public to know who is a specialist. Attorneys can get certified now, but if advertising is not allowed, there is no incentive to become certified.

Mr. Zarbin said that the Maryland Association for Justice

("MAJ") is concerned that this is a backdoor attempt at mandatory Continuing Legal Education ("CLE"). He expressed the opinion that this matter should be deferred. He agreed with Mr. Dolina that there has been no input from the MSBA. He moved to table this issue. Attorneys are encouraged to take CLE classes. The majority of the states have mandatory CLE. The motion was seconded. The Chair asked for a vote on the motion to table, and it passed on a vote of nine to eight.

The Chair asked Mr. Dolina if he had any idea when the MSBA would have a recommendation on certification. Mr. Dolina responded that the next committee meeting will be in January. However, he and his colleagues plan on circulating a letter to all Section Council members within the next week. It is not their intention to hinder this process at all. Their concerns were that they wanted to make sure that this is not an indirect approach to instituting mandatory CLE, which the MSBA has taken a position on. They also have an interest in young attorneys, who are particularly concerned that this would be an inhibitor in terms of marketing their practice because they would not be eligible for certification for three to five years.

The Chair said that there is a very serious question as to whether the current total prohibition is constitutional. The U.S. Supreme Court has weighed in on this in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 110 S. Ct. 2281 (1990) as has the U.S. Court of Appeals for the 2nd Circuit in *Hayes v. New York Attorney Grievance Committee of the Eighth*

Judicial Circuit, 672 F 3rd 158 (2012).

Agenda Item 4. Consideration of proposed new Rule 16-738 (Permanent Retired Status) and amendments to Rule 16-811.5 (Obligations of Attorneys)

Mr. Frederick presented Rule 16-738, Permanent Retired Status, and 16-811.5, Obligations of Attorneys, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

ADD new Rule 16-738, as follows:

Rule 16-738. PERMANENT RETIRED STATUS

(a) Purpose

Permanent retired status is intended to enable an attorney whose alleged conduct (1) meets the criteria set forth in section (b) of this Rule and (2) was predominantly the product of the attorney's ill health or decline, to retire permanently from the practice of law with dignity and to ensure the protection of the public. Permanent retired status is not a sanction, and no record of any investigation by Bar Counsel, documents associated therewith, or proceedings in connection with the determination that the attorney be placed on permanent retired status, shall be made public except with the written consent of the attorney, a duly authorized representative of the attorney, or, upon good cause shown, by the Court of Appeals.

(b) Criteria

Upon completing an investigation and upon agreement of the attorney, Bar Counsel may recommend to the Commission that the attorney be placed on permanent retired status if Bar Counsel concludes that:

(1) the attorney is the subject of a complaint or allegation which if found meritorious, could lead to the attorney being disciplined or placed on inactive status;

(2) the alleged conduct was **predominantly** a result of the attorney's ill health or decline;

(3) the alleged conduct does not involve misconduct so serious that, if proven, would likely result in the suspension or disbarment of the attorney or placement of the attorney on inactive status;

(4) the alleged conduct does not reflect adversely on the attorney's honesty or involve conduct that could be the basis for an immediate Petition for Disciplinary or Remedial Action pursuant to Rules 16-771 or 16-773;

(5) the alleged conduct either did not result in actual loss or harm to a client or other person, or, if it did, full restitution has been made;

(6) because of the **effect of the** attorney's ill health or decline **on the attorney's ability to comply fully with the Maryland Lawyers' Rules of Professional Conduct**, the attorney should no longer engage in the practice of law; and

(7) the attorney has take all appropriate actions to wind-up his or her practice or will do so within a time established by the Commission in any approval of permanent retired status.

(c) Action by Commission

If the attorney agrees to permanent retired status, Bar Counsel or the attorney

may submit any explanatory materials that either believes relevant and shall submit any further material that the Commission requests. Upon submission, the Commission may take any of the following actions:

(1) the Commission may approve permanent retired status for the attorney, if satisfied that it is appropriate under the circumstances, in which event the attorney, upon notice of the Commission's written approval and upon the date specified by the Commission, shall take the actions set forth in section (f) of this Rule, and Bar Counsel shall terminate the disciplinary or remedial proceeding; or

(2) the Commission may disapprove permanent retired status for the attorney if not satisfied that it is appropriate under the circumstances and direct Bar Counsel to proceed in another manner consistent with the Rules in this Chapter.

(d) Effect of Disapproval

If permanent retired status is not approved by the Commission, any investigation or proceeding shall resume as if permanent retired status had not been recommended, and the fact that permanent retired status was recommended or that it was not approved may not be entered into the record of any proceeding.

(e) Effect of Permanent Retired Status

An attorney who has been placed on permanent retired status:

(1) shall, upon receipt of the Commission's determination that the attorney be placed on permanent retired status, cease the practice of law in this State and in all other jurisdictions in which the ~~**retiree**~~ **attorney** was admitted on or before the date specified by the Commission;

(2) shall, by such date, notify the Client Protection Fund, in writing, of the Commission's approval of permanent retired

status, and shall include with such notice a copy of the Commission's approval;

(3) shall not apply for admission **to the bar of this State or any other jurisdiction** or **for** revocation of permanent retired status ~~**to the bar of this State or any other jurisdiction**~~; and

(4) shall, by such date, comply with the provisions of Rule 16-760 (d).

Committee note: The name of a permanently retired attorney must be removed from the letterhead of any law firm with which the attorney was associated, but if the attorney's last name was part of a firm name that consisted of two or more last names, the firm is not required to remove the last name of the attorney from the name of the firm.

(f) Extension

Upon a showing of good cause and consideration of any objection by Bar Counsel, the Commission may permit an extension of the period to complete one or more of the tasks itemized in section (e) of this Rule.

Source: This Rule is new.

Rule 16-738 was accompanied by the following Reporter's note.

Attorneys who are charged with misconduct because of the attorney's ill health or decline may prefer to permanently retire from the practice of law rather than face sanctions. As long as the misconduct does not reflect adversely on the attorney's honesty or involve conduct that could be the basis for an immediate Petition for Disciplinary or Remedial Action pursuant to Rule 16-771 or 16-773, the attorney may be eligible to retire under new Rule 16-738. The new Rule provides a mechanism for the attorney to stop practicing law yet retain his or her dignity by not being exposed to

sanctions. Rule 16-811.5 is proposed to be amended to provide an exception to the procedure for trustees of the Client Protection Fund to approve attorneys for retired status. The exception is the permanent retired status allowed by proposed new Rule 16-738.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-811.5 by adding language to subsection (a)(2) referring to a certain rule, as follows:

Rule 16-811.5. OBLIGATIONS OF ATTORNEYS

(a) Conditions Precedent to Practice

(1) Generally

Except as otherwise provided in this section, each attorney admitted to practice before the Court of Appeals or issued a certificate of special authorization under Rule 15 of the Rules Governing Admission to the Bar of Maryland, as a condition precedent to the practice of law in this State, shall (A) provide to the treasurer of the Fund the attorney's Social Security number, (B) provide to the treasurer of the Fund the attorney's federal tax identification number or a statement that the attorney has no such number, and (C) pay annually to the treasurer of the Fund the sum, and all applicable late charges, set by the Court of Appeals.

(2) Exception

~~Upon~~ Unless the attorney is on permanent retired status pursuant to Rule 16-738, upon timely application by ~~an~~ the attorney, the trustees of the Fund may approve an attorney for inactive/retired status. By regulation, the trustees may provide a uniform deadline date for seeking approval of inactive/retired status. An attorney on inactive/retired status may engage in the practice of law without payment to the Fund if (A) the attorney is on inactive/retired status solely as a result of having been approved for that status by the trustees of the Fund and not as a result of any action against the attorney pursuant to the Rules in Title 16, Chapter 700, and (B) the attorney's practice is limited to representing clients without compensation, other than reimbursement of reasonable and necessary expenses, as part of the attorney's participation in a legal services or pro bono publico program sponsored or supported by a local bar association, the Maryland State Bar Association, Inc., an affiliated bar foundation, or the Maryland Legal Services Corporation.

(3) Bill; Request for Information; Compliance

For each fiscal year, the trustees by regulation shall set dates by which (A) the Fund shall send to an attorney a bill, together with a request for the information required by subsection (a)(1) of this Rule, and (B) the attorney shall comply with subsection (a)(1) by paying the sum due and providing the required information. The date set for compliance shall be not earlier than 60 days after the Fund sends the bill and requests the information.

(4) Method of Payment

Payments of amounts due the Fund shall be by check or money order, or by any additional method approved by the trustees.

(b) Change of Address

Each attorney shall give written

notice to the trustees of every change in the attorney's resident address, business address, e-mail address, telephone number, or facsimile number within 30 days of the change. The trustees shall have the right to rely on the latest information received by them for all billing and other correspondence.

Source: This Rule is derived from former Rule 16-811 (2013).

Rule 16-811.5 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 16-738.

Mr. Frederick told the Committee that he termed Rule 16-738 "the retirement with dignity" proposal. This issue had come up in the Professionalism Symposiums. A Committee of the Professionalism Section of the MSBA is titled "the Aging Lawyer Subcommittee." Statistically speaking, the vast numbers of members of the Bar are "baby boomers." Equally statistically speaking, the chances of something inhibiting a baby boomer's physical or mental ability to continue to practice law are fairly high. Currently, if there are pending disciplinary claims filed against an attorney, the attorney may not retire from the practice of law. Proposed Rule 16-738 suggests that as long as the charges pending against the attorney are not related to lying, cheating, or stealing, and Bar Counsel concurs, the attorney would be allowed to retire from the practice of law notwithstanding the pendency of the charges, which would be disposed of.

Mr. Frederick said that the idea is to allow someone who has served his or her profession long and ably to retire with dignity. The person could tell anyone that he or she had been an attorney, and would not have to say that he or she had been suspended, disbarred, or reprimanded.

Judge Graeff commented that Thomas Lynch, Esq., who is the Chair of the Aging Lawyer Subcommittee, had asked Judge Graeff to give his statement, because he was unable to attend the meeting. His statement was that the Subcommittee supported the proposed Rule. By adopting the Rule, Maryland will follow the recommendations of the National Organization of Bar Counsel, which had suggested that each state create a Rule allowing attorneys to retire with dignity.

By consensus, the Committee approved new Rule 16-738 and the proposed change to Rule 16-811.5, which creates an exception for attorneys applying for inactive/retired status when they are on permanent retired status pursuant to Rule 16-738.

Agenda Item 5. Consideration of a proposed "housekeeping" amendment to Rule 2-703 (Attorneys' Fees Allowed by Law)

The Reporter presented Rule 2-703, Attorneys' Fees Allowed by Law, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 700 - CLAIMS FOR ATTORNEYS' FEES AND RELATED EXPENSES

AMEND Rule 2-703 to correct a reference in a Committee note, as follows:

Rule 2-703. ATTORNEYS' FEES ALLOWED BY LAW

. . .

(f) Determination of Award

(1) If No Award Permitted

If, under applicable law, the verdict of a jury or the findings of the court on the underlying cause of action do not permit an award of attorneys' fees, the court shall include in its judgment entered on the underlying cause of action the denial of such an award.

(2) If Award Permitted or Required

If, under applicable law, the verdict of the jury or the findings of the court on the underlying cause of action permit but do not require an award of attorneys' fees, the court shall determine whether an award should be made. If the court determines that a permitted award should be made or that under applicable law an award is required, the court shall apply the standards set forth in subsection (f)(3) of this Rule and determine the amount of the award.

Committee note: Where the claim for attorneys' fees is based on law, rather than a contract, the determination of whether, in light of the verdict or findings on the underlying cause of action, an award must or should be made and, if so, the amount thereof is for the court. See *Admiral Mortgage v. Cooper*, 357 Md. 533, 550-53 (2000); *Friolo v. Frankel*, 373 Md. 501, 519 (2003); *Friolo v. Frankel*, 403 Md. 443, 457, n.12 (2008).

(3) Factors to be Considered

In making its determinations under subsection (f)(2) of this Rule, the court shall consider, with respect to the claims for which fee-shifting is permissible:

(A) the time and labor required;

(B) the novelty and difficulty of the questions;

(C) the skill required to perform the legal service properly;

(D) whether acceptance of the case precluded other employment by the attorney;

(E) the customary fee for similar legal services;

(F) whether the fee is fixed or contingent;

(G) any time limitations imposed by the client or the circumstances;

(H) the amount involved and the results obtained;

(I) the experience, reputation, and ability of the attorneys;

(J) the undesirability of the case;

(K) the nature and length of the professional relationship with the client; and

(L) awards in similar cases.

Committee note: The factors listed in subsection (f)(3) of this Rule have been approved by the Court of Appeals in statutory fee-shifting cases, where the "lodestar method" is applied in determining an award. See *Monmouth Meadows v. Hamilton*, 416 Md. 325, 333-34 (2010). See Rule ~~2-704 (f)~~ 2-705 (f) for the factors to be applied in contractual fee-shifting actions.

(g) Judgment

Except as provided in subsection (f)(1) of this Rule, the grant or denial of an award of attorneys' fees may be included in the judgment on the underlying cause of action or in a separate judgment, as directed

by the court. The court shall state on the record or in a memorandum filed in the record the basis for its grant or denial of an award.

Source: This Rule is new.

The Reporter explained that the proposed change to Rule 2-703 was a "housekeeping" amendment to correct a reference to a Rule in the Committee note after section (f) of Rule 2-703.

By consensus, the Committee approved Rule 2-703 as presented.

The Chair said the next Rules Committee meeting would be in January. There would be some Subcommittee meetings before then.

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