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COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100A of the People's Resource Center, 100 Community Place, Crownsville, Maryland, on February 14, 2003.

Members present:

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

F. Vernon Boozer, Esq.
Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Robert L. Dean, Esq.
Hon. James W. Dryden
Hon. Ellen M. Heller
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Hon. John F. McAuliffe
Hon. William D. Missouri
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Roger W. Titus, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Professor John Lynch, University of Baltimore School of Law
Nancy Forster, Esq., Office of the Public Defender
Glenn Grossman, Esq., Deputy Bar Counsel, Attorney Grievance Commission
David D. Downes, Esq., Chair, Attorney Grievance Commission
Elizabeth B. Veronis, Esq., Court Information Office
Una M. Perez, Esq.
Steven P. Lemmey, Esq., Investigative Counsel, Commission on Judicial Disabilities

The Chair convened the meeting. He told the Committee that again this year, the House Judiciary Committee voted against draft legislation that would amend §8-306 of the Courts Article to allow more than six jurors in a civil action, so that

alternate jurors could be eliminated. Kelley O'Connor of the Court Information Office who is the legislative liaison for the Judiciary, has indicated that a majority of the Judiciary Committee concluded that there is not enough discontent with alternate jurors to require a change in the law. The Chair pointed out that the Judiciary Committee does not consist of a majority of lawyers. Judge Missouri remarked that Albert "Buz" Winchester of the Maryland State Bar Association told the Judiciary Committee that it would be useful to negotiate with the Rules Committee as to how to handle this issue. The Chair announced that Agenda Item 3 would be considered first due to accommodate the schedule of Mr. Brault, the Chair of the Attorneys Subcommittee.

Agenda Item 3. Reconsideration of proposed amendments to: Rule 16-751 (Petition for Disciplinary or Remedial Action), Rule 16-771 (Disciplinary or Remedial Action Upon Conviction of Crime), and Rule 16-773 (Reciprocal Discipline or Inactive Status)

Mr. Brault presented Rules 16-751, Petition for Disciplinary or Remedial Action, 16-771, Disciplinary or Remedial Action Upon Conviction of Crime, and 16-773, Reciprocal Discipline or Inactive Status, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

AMEND Rule 16-751 (a) to allow Bar Counsel to file a Petition for Disciplinary or Remedial Action without the prior approval of the Attorney Grievance Commission under certain circumstances, as follows:

Rule 16-751. PETITION FOR DISCIPLINARY OR REMEDIAL ACTION

(a) Commencement of Disciplinary or Remedial Action

(1) Upon Approval of Commission

Upon approval of the Commission, Bar Counsel shall file a Petition for Disciplinary or Remedial Action in the Court of Appeals.

(2) Conviction of Crime; Reciprocal Action

If authorized by Rule 16-771 (b) or 16-773 (b), Bar Counsel may file a Petition for Disciplinary or Remedial Action in the Court of Appeals. Bar Counsel promptly shall notify the Commission of the filing.

Cross reference: See Rule 16-723 (b)(7) concerning confidentiality of a petition to place an incapacitated attorney on inactive status.

(b) Parties

The petition shall be filed in the name of the Commission, which shall be called the petitioner. The attorney shall be called the respondent.

(c) Form of Petition

The petition shall be sufficiently clear and specific to inform the respondent of any professional misconduct charged and the basis of any allegation that the respondent is incapacitated and should be placed on inactive status.

Source: This Rule is derived from former Rules 16-709 (BV9) and 16-711 b 2 (BV11 b 2).

Rule 16-751 was accompanied by the following Reporter's Note.

The proposed amendments to Rules 16-751, 16-771, and 16-773 allow Bar Counsel to file a Petition for Disciplinary or Remedial Action without obtaining the prior approval of the Attorney Grievance Commission when an attorney has been convicted of a serious crime or, in another jurisdiction, disciplined or placed on inactive state. Proceeding without prior approval allows serious cases to proceed more quickly. Because there may be situations in which a more thorough investigation into the underlying facts of the discipline in another jurisdiction or conviction is warranted, the proposed amendments to Rules 16-771 and 16-773 give Bar Counsel discretion as to the filing of a Petition under proposed new subsection (a)(2) of Rule 16-751.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

AMEND Rule 16-771 (b) to make discretionary the filing of a Petition for Disciplinary or Remedial action that is based on a conviction of a serious crime, as follows:

Rule 16-771. DISCIPLINARY OR REMEDIAL ACTION UPON CONVICTION OF CRIME

. . .

(b) Petition in Court of Appeals

Upon receiving and verifying information from any source that an attorney has been convicted of a serious crime, Bar Counsel ~~shall~~ may file a Petition for Disciplinary or Remedial Action in the Court of Appeals pursuant to Rule 16-751 (b) and serve the attorney in accordance with Rule 16-753. The petition ~~shall~~ may be filed whether the conviction resulted from a plea of guilty, nolo contendere, or a verdict after trial and whether an appeal or any other post-conviction proceeding is pending. The petition shall allege the fact of the conviction and include a request that the attorney be suspended immediately from the practice of law. A certified copy of the judgment of conviction shall be attached to the petition and shall be prima facie evidence of the fact that the attorney was convicted of the crime charged.

. . .

Rule 16-771 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 16-751.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

AMEND Rule 16-773 (b) to make discretionary the filing of a Petition for Disciplinary or Remedial Action that is based on corresponding discipline or inactive status in another jurisdiction, as follows:

Rule 16-773. RECIPROCAL DISCIPLINE OR INACTIVE STATUS

. . .

(b) ~~Duty of Bar Counsel~~ Petition in Court of Appeals

Upon receiving and verifying information from any source that in another jurisdiction an attorney has been disciplined or placed on inactive status based on incapacity, Bar Counsel ~~shall obtain a certified copy of the disciplinary or remedial order and~~ may file ~~it with~~ a Petition for Disciplinary or Remedial Action in the Court of Appeals pursuant to Rule 16-751 (b)~~, and shall serve copies of the petition and order upon the attorney in accordance with Rule 16-753~~. A certified copy of the disciplinary or remedial order shall be attached to the Petition, and a copy of the Petition and order shall be served on the attorney in accordance with Rule 16-753.

. . .

Rule 16-773 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 16-751.

Mr. Brault told the Committee that the three Rules for consideration today have been before them previously. The Rules have the same common predicate -– if an attorney is convicted of a serious crime or disciplined in another jurisdiction, Bar Counsel would be able to file a Petition for Disciplinary or Remedial Action in the Court of Appeals without being required to get authorization from the Maryland Attorney Grievance Commission. The request for this change came from Bar Counsel

and the Commission, whose rationale is that the matter may be pressing, and the Commission only meets once a month. Judge McAuliffe had expressed the view that the Rules should require Bar Counsel to file the Petition for Disciplinary or Remedial Action immediately if an attorney has been disciplined in another jurisdiction or convicted of a serious crime. The remainder of the Subcommittee is of the opinion that this should be discretionary. Before the decision to file the Petition is made, there should be some investigation to ascertain if filing the Petition is appropriate. The Subcommittee recommendation is to change the word "shall" to the word "may."

Mr. Brault noted that subsection (a)(2) of Rule 16-751 provides: "... Bar Counsel may file a Petition for Disciplinary or Remedial Action ... ." The word "shall" in Rule 16-771 (b) has been changed to the word "may." He pointed out a typographical error in section (b) -– the reference to "Rule 16-751 (b)" should be changed to "Rule 16-751 (a)(2)." Rule 16-773 contains changes similar to the other Rules. The same correction of a typographical error –- changing "Rule 16-751 (b)" to "Rule 16-751 (a)(2)" –- should be made in Rule 16-773, also. The Vice Chair asked if the beginning language in subsection (a)(2) of Rule 16-751 which reads, "[i]f authorized" means if all of the conditions have been met, and Mr. Brault replied in the affirmative. The Chair told the Committee that there is an alternate version of Rule 16-751 in the meeting materials which is not recommended by the Subcommittee. The Reporter explained

that this version did not change the word “shall” to “may.” It reflects the dissenting opinion. Judge McAuliffe expressed the view that the Rule should be couched as mandatory, because conviction of a serious crime or discipline in another jurisdiction is such a serious matter.

Mr. Downes said that he had attended the Attorneys Subcommittee meeting at which these Rules were discussed, and he endorsed the changes. The Vice Chair asked if there would be any reason not to file the Petition if Bar Counsel received information from any source that an attorney has been convicted of a serious crime. Mr. Grossman replied that it would be unlikely that Bar Counsel would not file a Petition. He stated that he did not feel strongly about whether the Rules should be mandatory or discretionary as to the filing of the petition.

Judge McAuliffe pointed out that language should be added to subsection (a)(2) of Rule 16-751 to indicate that Bar Counsel may proceed “without the prior approval of the Commission.” The Committee agreed by consensus to make this change. The Committee approved Rules 16-751, 16-771, and 16-773 as amended. The Chair thanked Mr. Grossman and Mr. Downes for attending the meeting.

Agenda Item 1. Consideration of proposed amendments to Rule 8-608 (Computation of Costs)

Mr. Titus presented Rule 8-608, Computation of Costs, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 8 - APPELLATE REVIEW IN THE COURT OF APPEALS AND COURT OF SPECIAL APPEALS

CHAPTER 600 - DISPOSITION

AMEND section (a) of Rule 8-608 to provide for the Clerk to identify if a transcript was paid for by the Office of the Public Defender, as follows:

Rule 8-608. COMPUTATION OF COSTS

(a) Costs Generally Allowed

The Clerk shall include in the costs the allowance determined pursuant to section (c) of this Rule for reproducing the briefs, the record extract, and any necessary appendices to briefs and any other costs prescribed by these rules or other law. Unless the case is in the Court of Appeals and was previously heard and decided by the Court of Special Appeals, the Clerk shall also include the amount paid by or on behalf of the appellant for the original and the copies of the stenographic transcript of testimony furnished pursuant to section (a) of Rule 8-411. If the transcript was paid for by the Office of the Public Defender, the Clerk shall so state.

(b) Costs Generally Excluded

Unless the Court orders otherwise, the Clerk shall exclude from the costs the costs of reproducing the record if it was reproduced without order of the Court.

(c) Allowance for Reproduction

The Clerk shall determine the allowance for reproduction by multiplying the number of pages in the briefs, the record extract, and any necessary appendices to briefs by the standard page rate established from time to time by the Court of Appeals.

> Source: This Rule is derived from former Rules 1080, 880, 1081, and 881.

Rule 8-608 was accompanied by the following Reporter's Note.

> Nancy S. Forster, Esq., Deputy Public Defender, sent in a letter explaining that there are cases in which the Office of the Public Defender pays $3.75 per page for the transcripts of the case when a defendant notes an appeal, but if private counsel later enters an appearance, he or she does not reimburse the Office of the Public Defender for the costs of the transcript, and private counsel is able to obtain a copy of the transcript from the court reporter at a much reduced rate of 75 cents per page. Ms. Forster requested changing Rule 8-402 (b) so that private counsel must certify that he or she has already reimbursed the Office of the Public Defender for the costs of the transcript before the attorney is permitted to enter an appearance. Instead of this change, the Appellate Subcommittee recommends that Rule 8-608 (a) be amended to require the Clerk of the Court of Special Appeals, when computing costs, to state that the Office of the Public Defender paid for the transcript, so that this cost can be reimbursed to that office, if possible.

Mr. Titus explained that Nancy Forster, Esq., Deputy Public Defender had written a letter concerning a problem with getting reimbursement for trial transcripts previously secured by the Office of the Public Defender ("OPD") after the defendant later changes to private counsel. This issue has been discussed before at several Appellate Subcommittee and Rules Committee meetings. The OPD had requested that Rule 8-402 (b) be amended so that a written request to enter an appearance on appeal must include a certification that the attorney has reimbursed the OPD for the

full cost of preparing the transcript paid for by the OPD. The Subcommittee concluded that this certification would be a harsh remedy. The members of the Subcommittee did not like the idea that private counsel cannot enter an appearance without doing something else first. Mr. Titus noted that when private counsel is obtained, the OPD is relieved of a burden of providing representation to the defendant. If the defendant cannot afford to pay for the transcript and private counsel is not allowed to enter an appearance until the OPD has been reimbursed for the cost of the transcript, the OPD has to remain as counsel. The amendment to Rule 8-608 (a) proposed by the Appellate Subcommittee provides information for the court to use when it includes in the mandate the assessment of costs taxable to each party.

The Chair introduced Ms. Forster, who thanked the Committee for the opportunity to speak with them. She said at the time she wrote the letter explaining the problem, she was the Chief of the Appellate Division of the OPD. The impetus for the initial letter was a series of cases that included a costly transcript. One of these was a transcript costing $12,000, paid by the OPD. Then the defendant secured private counsel and refused to reimburse the cost of the transcript to the OPD. It was not clear whether the defendant had the funds to reimburse. He had challenged the OPD to sue him for the money. It is difficult for the OPD to track cases once private counsel takes over. Being forced to absorb the cost of the transcripts is very burdensome.

The OPD is open to suggestions as to how to solve this problem. The proposed change to Rule 8-608 (a) does not go far enough and is not a viable method to ensure reimbursement.

The Chair commented that the way this is handled in the Court of Special Appeals is that the OPD files a motion for reimbursement. If the case is reversed, the costs portion of the mandate includes reimbursement for the transcript. If the case is affirmed, the appellant has to pay the costs. The danger is that the defendant will approach private counsel who tells the defendant to get the OPD to pay for the transcript and file a brief, at which point private counsel will look at the case to decide whether to take it. Ms. Forster remarked that she has tried to work with private counsel with some success, but usually has no success when the transcript is very costly. She has attempted to file a motion asking the court to assess the cost of the transcript, but in one case, the appeal was dismissed and the motion denied as moot. However, it was not moot, because there were still costs to pay.

The Vice Chair noted that if the transcript costs $12,000, and the defendant loses on appeal, the OPD has to absorb the cost. The OPD saves resources if private counsel takes over the appeal. Ms. Forster said that the fact that the OPD did not handle the case saves resources is not allowed to be taken into account in determining who pays for the transcript. This has been pointed out by the trilogy of cases, Miller v. State, 98 Md. App. 634 (1993), State v. Miller, 337 Md. 71 (1994,

reconsideration denied 1995), and Miller v. Smith, 115 F. 3d 1136 (1997).

The Vice Chair remarked that she was not sure this situation can be fixed by a change to a rule. Mr. Titus commented that the Subcommittee was of the view that the Rule should provide for a flag as to the situations where the OPD paid for the transcript, rather than an absolute prohibition against private counsel entering an appearance if the OPD has not been reimbursed for the cost of the transcript. The Chair noted that the reversals take care of the costs, but when there are affirmances, the costs of the transcripts may fall through the cracks. The question is whether private counsel taking over a case provides sufficient savings for the OPD. Ms. Forster observed that this is a slippery slope. Their office pays for the transcripts, then the defendant finds the money for private counsel. This is in direct conflict with the Miller cases.

Judge Dryden inquired as to how much money the OPD loses per year because of this situation. Ms. Forster answered that the year she wrote the letter to the Rules Committee her office lost between $25,000 and $50,000. Judge Dryden asked if that included the $12,000 case to which she had previously referred, and she replied that it did. The Chair noted that the proposed Rule change provides that the Court of Special Appeals will take notice of these cases without the OPD having to file a motion. If the Court reverses the case, it will mandate that the OPD be reimbursed for the cost of the transcript. Ms. Forster inquired

if this is mandatory or discretionary on the part of the Court. The Chair responded that the Rule does not speak to this, but it could be added in. Ms. Forster remarked that the proposed Rule is a step toward solving the problem as opposed to taking no action. The Chair commented that if the proposed Rule does not help the problem, Ms. Forster can request further action by the Rules Committee. Ms. Forster said that any attempt to solve the problem is appreciated. The Chair pointed out that the appellate staff of the OPD are vigorous advocates for their clients, and with Ms. Forster as deputy, the OPD will improve even more.

The Committee approved the Rule as presented.

Agenda Item 2. Consideration of certain proposed rules changes, recommended by the Management of Litigation Subcommittee: Amendments to Rule 2-231 (Class Actions) and Proposed new Rule 2-232 (Derivative Actions)

Mr. Titus presented Rule 2-231, Class Actions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 200 - PARTIES

AMEND Rule 2-231 to add a new section (k), as follows:

Rule 2-231. CLASS ACTIONS

(a) Prerequisites to a Class Action

One or more members of a class may sue

or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
Cross reference: See Code, Courts Article, §4-402 (d), regarding aggregation of claims for jurisdictional amount.

(b) Class Actions Maintainable

Unless justice requires otherwise, an action may be maintained as a class action if the prerequisites of section (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available

methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions, (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class, (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum, (D) the difficulties likely to be encountered in the management of a class action.

(c) Certification

On motion of any party or on the court's own initiative, the court shall determine by order as soon as practicable after commencement of the action whether it is to be maintained as a class action. A hearing shall be granted if requested by any party. The order shall include the court's findings and reasons for certifying or refusing to certify the action as a class action. The order may be conditional and may be altered or amended before the decision on the merits.

(d) Partial Class Actions; Subclasses

When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or a class may be divided into subclasses and each subclass treated as a class.

(e) Notice

In any class action, the court may require notice pursuant to subsection (f)(2). In a class action maintained under subsection (b)(3), notice shall be given to members of the class in the manner the court directs. The notice shall advise that (1) the court will exclude from the class any member who so requests by a specified date, (2) the judgment, whether favorable or not, will include all members who do not request exclusion, and (3) any member who does not

request exclusion and who desires to enter an appearance through counsel may do so.

(f) Orders in Conduct of Actions

In the conduct of actions to which this Rule applies, the court may enter appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument, (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in the manner the court directs to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action, (3) imposing conditions on the representative parties or intervenors, (4) requiring that the pleadings be amended to eliminate allegations as to representation of absent persons, and that the action proceed accordingly, (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 2-504, and may be altered or amended as may be desirable from time to time.

(g) Discovery

For purposes of discovery, only representative parties shall be treated as parties. On motion, the court may allow discovery by or against any other member of the class.

(h) Dismissal or Compromise

A class action shall not be dismissed or compromised without the approval of the court. Notice of a proposed dismissal or compromise shall be given to all members of the class in the manner the court directs.

(i) Judgment

The judgment in an action maintained as a class action under subsections (b)(1) and (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subsection (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subsection (e)(1) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(k) Appeals

A party may appeal an order of a circuit court granting or denying class action certification under this Rule if a notice of appeal is filed within 30 days after entry of the order. An appeal does not stay proceedings in the circuit court unless the circuit court or the appellate court so orders.

Source: This Rule is derived as follows:
Section (a) is derived from FRCP 23 (a) and former Rule 209 a.
Section (b) is derived from FRCP 23 (b)(1), (2) and (3).
Section (c) is derived from FRCP 23 (c)(1).
Section (d) is derived from FRCP 23 (c)(4).
Section (e) is derived from FRCP 23 (c)(2).
Section (f) is derived from FRCP 23 (d).
Section (g) is new.
Section (h) is derived from FRCP 23 (e) and former Rule 209 d.
Section (i) is derived from FRCP 23 (c)(3).
Section (k) is new.

Rule 2-231 was accompanied by the following Reporter's Note.

The Management of Litigation Subcommittee recommends amending Rule 2-231 by adding a new section dealing with interlocutory appeals of orders granting or denying class action certification. This

> conforms the Rule to Fed. R. Civ. Proc. 23, Class Actions, which was amended in 1998 by the addition of a similar provision. The federal decision to allow interlocutory appeals from orders denying or granting class action certification stemmed from an effort to avoid the situation (1) where a plaintiff who has been denied certification is forced to proceed to final judgment on the merits of an individual claim that is far smaller than the costs of litigation or (2) where a defendant in a class action suit which has been certified is forced to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. Based on the federal experience, James K. Archibald, Esq. wrote a letter suggesting that the Maryland rule be conformed to the federal rule. He noted that currently in Maryland, interlocutory appeals of class action certification rulings can only be accomplished by a petition for a writ of mandamus and that following the federal procedure would provide significant guidance to practitioners and to the Maryland courts.
>
> Another method of effecting such appeals is to amend Code, Courts Article, §12-303, Appeals From Certain Interlocutory Orders. A copy of a proposed amendment to the statute is included in the meeting materials. The Committee must decide whether it would be appropriate to proceed by a change to Rule 2-231 or to ask the legislature for a statutory change.

Mr. Titus explained that Rule 2-231 is similar to the federal rule, Fed. R. Civ. P. 23, but the two Rules are not identical. There was little judicial precedent for class actions in Maryland until the case of Philip Morris, Inc. v. Angeletti, 358 Md. 689 (2000), in which the Honorable Irma Raker interpreted the federal analogue to class action suits. James Archibald, Esq., had suggested that Rule 2-231 be amended to add a new

provision allowing interlocutory appeals. A similar provision was added to the federal rule in 1998 as section (f). Mr. Titus noted that the Management of Litigation Subcommittee wrestled with the question of whether this form of appeal can be permitted by rule. The Subcommittee also drafted an amendment to Code, Courts Article, §12-303 as an alternative to changing Rule 2-231. If the Committee is in favor of adding a provision similar to Fed. R. Civ. P. 23 (f), the policy question for the Committee is whether to add a new section to Rule 2-231 or to amend the statute. The certification of a case as a class action has enormous consequences. If the certification or the decision not to certify is not appealable, there could be substantial damage to the parties. A majority of the Subcommittee agrees that the change should be made by amending the Rule.

Mr. Klein commented that he is a member of the Subcommittee, and he is of the opinion that the change could be made to the Rule. There is no statute authorizing a trial court to certify all or part of a judgment as ripe for appeal, but it is permitted by Rule 2-602. Even if the Committee chooses to amend the statute, Rule 2-231 would need a stay provision. The Vice Chair pointed out that there is no statutory authority for the federal rule pertaining to appeals to certifications of class actions. Ms. Ogletree responded that the federal system is very different, and Mr. Brault added that there are different rights of appeal in the federal system. He noted a case in which a television seller advertised by fax, not realizing that a federal statute bars this

type of advertising and carries with it a penalty of $500 per fax. The seller advertised by faxing to people all over Maryland, and a judge certified the case as a class action. If the seller could not appeal the certification, the damages could amount to $2 billion.

Ms. Ogletree expressed the view that certifications should be immediately appealable. Case law provides that appellate jurisdiction is conferred by the Constitution and by statute. Mr. Brault remarked that the statute provides that all final judgments are appealable, but an opinion by the Court of Appeals is needed stating that certification is a final judgment. The Chair commented that it may be too late to submit a bill to the legislature to amend Code, Courts Article, §12-303. This is not a controversial issue. Mr. Titus responded that this may not be true because of the case involving the advertisements that had been faxed and the risk of a $2 billion judgment.

Judge Heller expressed the view that it might be preferable to amend the statute instead of taking the chance that the Court of Appeals will refuse to adopt the Rule because there is no statutory authority. She also noted that the federal rule provides that: "... a court of appeals may in its discretion permit an appeal...", and she asked why the language referring to the court's discretion was left out of the language proposed for addition to Rule 2-231. Mr. Titus replied that the Subcommittee felt that this would create an administrative burden on the Court of Special Appeals, because it would introduce a whole new

category of discretionary review cases. Mr. Brault noted that in the federal system, there is discretion in many kinds of cases as to allowing interlocutory appeals.

Mr. Bowen expressed the view that the proposed language is a good addition to Rule 2-231 and that the Committee should approve the Rule as amended. If legislation is passed to add a similar provision to the Code, then there would be no need for the change to the Rule. Otherwise, the Court of Appeals, if it so chooses, can approve the amended Rule. Ms. Ogletree agreed with Mr. Bowen, and Judge Missouri also agreed, adding that he had ruled on a case involving a request for class action certification which took five days. Although he did not certify the case, the parties certainly deserved the right to appeal instead of being forced to settle. The number of class action suits are increasing. The Chair said that the downside to the dual approach is that a rule could be passed, and then the legislature could disagree with it. He suggested that the Committee approve the Rule, and then the legislature should be asked to clarify it. The Committee agreed with this suggestion by consensus. Judge Dryden pointed out a typographical error in Rule 2-231 -- the new section should be labeled as section (j), not section (k). The Committee approved the Rule as corrected.

Mr. Titus presented Rule 2-232, Derivative Actions, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 200 - PARTIES

ADD new Rule 2-232, as follows:

Rule 2-232. DERIVATIVE ACTIONS

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Source: This Rule is new and derived from F.R.C.P. 23.1.

Rule 2-232 was accompanied by the following Reporter's Note.

The Management of Litigation

> Subcommittee recommends the addition of a new rule based on Fed. R. Civ. Proc. 23.1, Derivative Actions by Shareholders. Because shareholder derivative litigation is on the rise in Maryland, the Subcommittee believes that a rule governing shareholder derivative actions would be beneficial. See for example, *Werbowsky v. Collomb*, 362 Md. 581 (2001).

Mr. Titus explained that derivative actions are becoming more commonplace, and he had argued two such cases recently. The case of Werbowsky v. Collomb, 362 Md. 581 (2001), a copy of which is included in the meeting materials, involved a stockholders' derivative suit against directors of a corporation. It provided direction for the case Mr. Titus argued that involved a Delaware corporation. The Delaware law is substantially the same as the federal law. In Werbowsky, without making a prior claim, a minority shareholder sued the directors of the corporation derivatively on behalf of all the shareholders alleging breach of fiduciary duty, waste, and gross negligence that arose out of a transaction between the corporation and the majority shareholder. The law is that the suit can be brought if the prior demand for remedial action would have been futile. The case codifies the law. There is no rule in Maryland now on this subject. The proposed new rule is patterned almost word for word on Fed. R. Civ. P. 23.1. The rule in Delaware is also the same.

Mr. Brault commented that Mr. Titus had educated him on this subject. They both had litigated the Delaware demand futility rule, taking for granted that the Delaware law applied because the other side was a Delaware corporation. In the case in which

he and Mr. Titus were involved, the corporation loaned itself money through insider transactions, depriving the corporation of profit. The corporation had assigned individual directors to investigate the transactions, which were then renegotiated. They recommended to the board of directors that there should be no lawsuit, so the shareholders sued derivatively. In the judgment of Mr. Brault and Mr. Titus, the demand futility rule applied. This is the concept of the law in the Delaware and federal rules.

The Chair noted that in the next to the last sentence, the language "... may not be maintained" should be changed to "shall be dismissed." Mr. Bowen remarked that other style changes should be made as well. He agreed with the Chair's suggested change. The Committee approved the change by consensus. The Rule was approved as amended, subject to style changes.

Agenda Item 5. Consideration of "housekeeping" amendments to: Rule 2-327 (Transfer of Action) and Rule 3-326 (Dismissal or Transfer of Action)

The Reporter presented Rule 2-237, Transfer of Action, and Rule 3-326, Dismissal or Transfer of Action, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE--CIRCUIT COURT

CHAPTER 300 - PLEADINGS AND MOTIONS

AMEND Rule 2-327 (a)(3) to conform to a certain constitutional amendment and legislation, as follows:

Rule 2-327. TRANSFER OF ACTION

(a) Transfer to District Court

. . .

(3) If Circuit Court has Jurisdiction – Domestic Violence Actions

(A) In an action under Code, Family Law Article, Title 4, Subtitle 5, after entering a temporary protective order ~~granting ex parte relief~~, a circuit court, on motion or on its own initiative, may transfer the action to the District Court for the final protective order hearing if, after inquiry, the court finds that (i) there is no other action between the parties pending in the circuit court, (ii) the respondent has sought relief under Code, Family Law Article, Title 4, Subtitle 5, in the District Court, and (iii) in the interests of justice, the action should be heard in the District Court.

(B) In determining whether a hearing in the District Court is in the interests of justice, the court shall consider (i) the safety of each person eligible for relief, (ii) the convenience of the parties, (iii) the pendency of other actions involving the parties or children of the parties in one of the courts, (iv) whether a transfer will result in undue delay, (v) the services that may be available in or through each court, and (vi) the efficient operation of the courts.

(C) The consent of the parties is not required for a transfer under this subsection.

(D) After the action is transferred, the District Court has jurisdiction for the purposes of enforcing and extending the temporary ~~ex parte~~ protective order as allowed by law.

Cross reference: See Code, Family Law Article, §4-505 (c) concerning the duration and extension of a temporary ~~ex parte~~

protective order.

. . .

Rule 2-327 was accompanied by the following Reporter's Note.

The proposed amendments to Rules 2-327 and 3-326 conform the terminology of the Rules to a recent Constitutional amendment (Chapter 587, Acts of 2002), which was ratified by the voters in the November 2002 election, and implementing legislation (Chapter 235, Acts of 2002). The Constitutional amendment and amendments to Code, Family Law Article, Title 4, Subtitle 5 allow a District Court Commission to issue an "interim protective order" under certain circumstances when the District Court clerk's office is not open for business. Only a judge may issue a "temporary protective order" or a "final protective order."

Rules 2-327 (a)(3) and 3-326 (c) allow domestic violence actions to be transferred from the District Court to a circuit court, or vice versa, under certain circumstances. The amendments conform the Rules to the new "temporary protective order" and "final protective order" terminology.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE -- DISTRICT COURT

CHAPTER 300 - PLEADINGS AND MOTIONS

AMEND Rule 3-326 (c) to conform to a certain constitutional amendment and legislation, as follows:

Rule 3-326. DISMISSAL OR TRANSFER OF ACTION

. . .

(c) Domestic Violence Action

(1) In an action under Code, Family Law Article, Title 4, Subtitle 5, after entering a temporary protective order ~~granting ex parte relief~~, the District Court, on motion or on its own initiative, may transfer the action to a circuit court for the final protective order hearing if, after inquiry, the District Court finds that (A) there is an action in the circuit court involving one or more of the parties in which there is an existing order or request for relief similar to that being sought in the District Court and (B) in the interests of justice, the action should be heard in the circuit court.

(2) In determining whether a hearing in the circuit court is in the interests of justice, the Court shall consider (A) the safety of each person eligible for relief, (B) the convenience of the parties, (C) the pendency of other actions involving the parties or children of the parties in one of the courts, (D) whether a transfer will result in undue delay, (E) the services that may be available in or through each court, and (F) the efficient operation of the courts.

(3) The consent of the parties is not required for a transfer under this section.

(4) After the action is transferred, the circuit court has jurisdiction for the purposes of enforcing and extending the temporary ~~ex parte~~ protective order as allowed by law.

Cross reference: See Code, Family Law Article, §4-505 (c) concerning the duration and extension of a temporary ~~ex parte~~ protective order.

. . .

Rule 3-326 was accompanied by the following Reporter's Note.

See the Reporter's note to the proposed amendment to Rule 2-327.

The Reporter explained that Rules 2-237 and 3-326 have housekeeping changes to conform the terminology of the Rules to a recent Constitutional amendment (Chapter 587, Acts of 2002) and implementing legislation (Chapter 235, Acts of 2002), which amended Code, Family Law Article, Title 4, Subtitle 5 to allow a District Court commissioner to issue an interim protective order under certain circumstances when the District Court clerk's office is not open for business.

By consensus, the Committee approved the Rules as presented.

The Reporter presented Rule 2-644, Sale of Property Under Levy, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 600 - JUDGMENT

AMEND Rule 2-644 (d) to correct an internal reference, as follows:

Rule 2-644. SALE OF PROPERTY UNDER LEVY

. . .

(d) Transfer of Real Property Following Sale

The procedure following the sale of an interest in real property shall be as prescribed by Rule 14-305, except that (1) the provision of Rule 14-305 ~~(c)(4)~~ (f) for referral to an auditor does not apply and (2) the court may not ratify the sale until the judgment creditor has filed a copy of the public assessment record for the real property kept by the supervisor of assessments in accordance with Code,

> Tax-Property Article, §2-211. After ratification of the sale by the court, the sheriff shall execute and deliver to the purchaser a deed conveying the debtor's interest in the property, and if the interests of the debtor included the right to possession, the sheriff shall place the purchaser in possession of the property. It shall not be necessary for the debtor to execute the deed.
>
> . . .

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

> The amendment to Rule 2-644 (d) corrects a reference to Rule 14-305 (c)(4), which should be a reference to Rule 14-305 (f).

The Reporter explained that Rule 2-644 had been handed out at today's meeting. The Vice Chair had discovered an error -- since 1996, section (c)(4) has not been in the Rules of Procedure. By consensus, the Committee approved the Rule as presented.

Agenda Item 4. Consideration and Reconsideration of certain rules changes pertaining to proposed revised Rule 16-813 (Code of Judicial Conduct); Reconsideration of: Canon 4G (Practice of Law), Canon 5D (Applicability; Discipline); Consideration of conforming amendments to: Rule 16-814 (Code of Conduct for Judicial Appointees) - (See Appendix 1).

The Reporter presented Canons 4G and 5D of the Maryland Code of Judicial Conduct for the Committee's consideration. (See Appendix 1).

The Reporter told the Committee that the historical background is that in 1999, the Rules Committee had recommended in its 145th Report to the Court of Appeals that a preamble be added to the Code of Judicial Conduct in conjunction with changes

to the Rules Governing the Commission on Judicial Disabilities. The Court did not want to adopt a preamble until the Rules Committee had conducted a review of the Code of Judicial Conduct, considering such issues as the use of the words "shall" and "may" and the 1990 version of the American Bar Association ("ABA") Model Code of Judicial Conduct. The Committee considered the 1990 ABA Code and the 2000 revisions to the ABA Model Code. The Maryland Judicial Ethics Committee also reviewed the Maryland Code of Judicial Conduct in light of the ABA Model Code revisions. When the Rules Committee finished redrafting the Maryland Code, it was sent, unpublished, to the Court of Appeals and to the Judicial Ethics Committee who had prepared a separate draft of the Code. A comparison of the two drafts revealed that many of the differences were stylistic. The Chair of the Rules Committee appointed Judge McAuliffe as chair of an *ad hoc* subcommittee to see if the two drafts could be reconciled. Where the *ad hoc* subcommittee could not agree with the Judicial Ethics Committee, two different versions of the same provision were prepared.

The Reporter and Elizabeth B. Veronis, Esq., staff to the Judicial Ethics Committee, had been working on a final product, but there were problems with Canons 4G and 5D, requiring substantive changes and reconsideration by the Rules Committee. When Canon 4G originally was drafted, part-time orphans' court judges had not been considered, so section (2) was added. The addition of section (2) made the Canon internally inconsistent

and confusing. It has been revised, but the new language may need style changes.

The Chair inquired as to what happens if a District Court judge gets a traffic ticket. Judge Missouri answered that a judge from another county would hear the case. The Chair said that if the judge appears *pro se* to argue the traffic ticket, he or she is not practicing law, but a colleague on the judge's court should not hear the case. Ms. Ogletree noted that the District Court is a statewide court. The Chair asked if section (3) should be deleted. Judge Missouri pointed out that a case involving a District Court judge can be sent to the circuit court, and vice versa. The Chair remarked that the Rule does not need this added to it. Ms. Veronis added that since the provision originally only applied to orphans' court judges, it may track statutory language.

Judge Heller questioned as to whether a retired judge who is recalled to sit temporarily pursuant to Article IV, §3A of the Constitution of Maryland is allowed to do private mediation and arbitration. Judge McAuliffe responded that this is not the practice of law. This issue had been discussed previously. Judge Heller noted that Canon 4H of the Code of Conduct for Judicial Appointees provides that a "full-time judicial appointee shall not act as an arbitrator or mediator...". Can a retired judge do so? The Chair replied that a retired judge may act as an arbitrator or mediator. Mr. Brault observed that the special committee appointed by the Court of Appeals to review and revise

the Maryland {Lawyers'] Rules of Professional Conduct, which is chaired by the Honorable Lawrence Rodowsky, retired judge of that Court, believes that this issue is a slippery slope. Mediation can be the practice of law. This came up in the context of a discussion of one of the Alternate Dispute Resolution rules in Title 17. The rule did not specifically state whether mediation is the practice of law. Alvin Frederick, Esq., who defends attorneys in discipline cases, had reported that many malpractice insurance policies provide coverage solely when someone is practicing law. He has cautioned that a lawsuit could be brought against an attorney who is mediating, and some malpractice carriers are trying to deny coverage based on the argument that the attorney is not practicing law.

Judge Heller remarked that if retired judges may act as mediators, it might be better to clarify this in the Code of Judicial Conduct. Judge McAuliffe commented that mediators and arbitrators are often non-attorneys. Mediation is not the practice of law. The attorney who also mediates may have to get a different insurance policy. Mr. Brault responded that this is very difficult.

The Vice Chair drew the Committee's attention back to Canon 4G. She suggested that in section (2) the following language should be added at the beginning: "Except as otherwise provided ... ." The Reporter asked if this should be added to the revised Rule or to the Rule that appears first in the memorandum, and the Vice Chair answered that the language should be added to the

first version. The Chair referred to subsection (2)(c) in the first version of the Rule. The Vice Chair remarked that this applies only to orphans' court judges. The Reporter pointed out that an orphans' court judge may have to appear in the court as an individual, for example if a member of the judge's family dies. The Vice Chair suggested that the addition of the following language to the beginning of section (1) which reads "[e]except as otherwise allowed by Canon 4G" will take care of any problems. The Committee approved this change by consensus. Ms. Veronis suggested that the word "judge" should be modified by the language "orphans' court" throughout section (2) of Canon 4G. The Chair suggested that the modifying language should be "part-time orphans' court" before the word "judge," and the Vice Chair said that this change would apply to section (c) as well. The Committee approved this change by consensus.

The Reporter explained that ABA Canon 5 contains prohibitions as to what an attorney cannot do and what a judge cannot do when campaigning. The Rules Committee has had numerous discussions on this issue. The decision was to divide up the Canon -- if it involves an attorney, Rule 8.2 of the Maryland [Lawyers'] Rules of Professional Conduct applies; if it involves a judge, Canon 5 applies. Following the decision in Republican Party of Minnesota v. White, 122 S. Ct. 2528 (2002), the Committee deleted the following clause from Canon 5B: "A judge who is a candidate for election, re-election, or retention to judicial office ... shall not announce the judge's views on

disputed legal or political issues." In conjunction with that change, the Rules Committee also directed that the first sentence of Canon 5D be deleted. After the Reporter had deleted the sentence, she and Ms. Veronis disagreed as to the content of the remaining two sentences. Ms. Veronis believed that the Judicial Ethics Committee's view would be that an attorney running for judicial office would have to follow the Judicial Canons. The Reporter disagreed because this would be applying the Canons *ex post facto*. At the time the attorney is running for judge, the attorney should follow the attorney discipline rules because the attorney does not know whether he or she will win the election.

The Chair commented that a judge who loses the election should still follow the judicial rules. He questioned whether an alleged campaign violation by a judge who lost the election should be handled by the Commission on Judicial Disabilities. The Reporter observed that after the person lost the election and is no longer a judge, there is no meaningful sanction that the Commission could impose. Rather, Bar Counsel could better deal with a judge who lost the election and who is an attorney, while the Commission on Judicial Disabilities would handle an alleged violation by a judge who won the election. She explained that her redraft of Canon 5D is directed to the status of the person at the time of the behavior as to the standard of behavior and to the status of the person at the time of initiation of disciplinary proceedings as to who initiates those proceedings.

Ms. Veronis said that she agreed with the Reporter's draft

of Canon 5D. She and the Reporter had disagreed as to what the Rules Committee had previously decided, so it will be up to the Committee to decide again or clarify its previous decision. The Chair stated that someone who has never become a judge or who is no longer a judge faces the Attorney Grievance Commission if charged with a violation. One who remains a judge faces the Commission on Judicial Disabilities. Mr. Karceski asked if the disciplinary proceeding shifts to one conducted pursuant to Rule 8.2 if a proceeding is initiated while the person is a judge and the judge loses the election before the proceeding is completed. Judge McAuliffe replied that the rules do not shift, the prosecutorial authority shifts.

Judge Heller remarked that the last sentence should be modified to clarify that an unsuccessful candidate who is a judge is subject to judicial discipline. The Vice Chair said that the last sentence applies to attorney candidates who are unsuccessful. Judge Heller observed that the provision clearly applies to attorney candidates, but it is not so clear that it applies to unsuccessful judicial candidates. The Vice Chair inquired as to the meaning of the language "a judicial candidate." The Reporter replied that an example would be a District Court judge running for the circuit court. Judge Heller added that it could also be a circuit court judge running again for re-election. The Chair stated that he agreed with the Reporter's redraft of Canon 5D. The Committee approved Canon 5D as amended.

The Reporter presented Rule 16-814, Code of Conduct for Judicial Appointees, for the Committee's consideration. (See Appendix 2).

The Reporter explained that the Code is behind the darker green sheet in the meeting materials, and the background materials are behind the lighter green sheet. Judicial appointees include masters, examiners, and District Court commissioners. The Judicial Ethics Committee went through the Judicial Canons to determine which ones should apply to judicial appointees and modified the Code of Conduct for Judicial Appointees accordingly. The Reporter said that she has conformed the changes to the decisions of the Rules Committee that were based upon the Report of the *Ad Hoc* Subcommittee chaired by Judge McAuliffe. Ms. Veronis pointed out that the Code of Conduct for Judicial Appointees contains fewer provisions than the Code of Judicial Conduct. The provisions common to both are in tandem.

Mr. Bowen asked about Alternatives A and B in section (j) of the Terminology section. He noted that Alternative B refers to ownership by a judicial appointee's spouse. The Reporter answered that this is a policy decision to be made by the Court. The former version of the statute did not refer to the spouse of the judicial appointee, but the current version does refer to it. The Judicial Ethics Committee prefers Alternate B, the current version of the statute. The Rules Committee prefers the older version, because at a Court conference on a comparable provision in the Code of Judicial Conduct, the Court of Appeals had

directed that the former statute be used. The Chair added that the Honorable John Eldridge felt strongly about this. He did not like the newer version. The Court can decide which version it prefers in both revised Codes.

Ms. Ogletree pointed out that Canon 4G is not appropriate. The prohibition against judicial appointees practicing law would mean that she cannot practice law, because she is considered a "full-time" examiner in Caroline County. Julia Freit Andrew, Esq., an Assistant Attorney General, had issued an opinion that no full-time auditor can practice law. In Caroline County, the full-time auditors are paid $50 per case and must earn a living through the practice of law, but Canon 4G would seem to prohibit them from practicing in circuit court.

The Chair pointed out that subsection (4) is a problem. He asked if subsection (4) could be deleted in light of subsection (2). He suggested that the word "part-time" could be deleted from subsection (2). Ms. Ogletree suggested that subsection (4) should be deleted entirely.

The Vice Chair inquired as to why Ms. Ogletree is not designated as a part-time examiner. Ms. Ogletree answered that she is listed by the county as a full-time examiner. The Vice Chair pointed out that no matter how Ms. Ogletree is listed, the practical effect of her job is that she works part-time for Caroline County. Judge Heller questioned as to the meaning of the term "part-time." The Vice Chair noted that there is a problem with the structure of subsections (1) and (2). Ms.

Ogletree suggested that this could be clarified by a definition. A person is a part-time employee of the court if part of the person's income does not come from the court.

Mr. Bowen suggested that subsection (2) be restructured. One possibility for the wording is as follows: "A part-time judicial employee may practice law to the extent not expressly prohibited by law or the appointing authority and subject to other applicable provisions of this Code." The Chair cautioned that Ms. Ogletree is not defined as a part-time standing examiner. She remarked that she receives $50 for each case she hears. Mr. Bowen pointed out that this is piece work and is not full-time. The Vice Chair expressed her agreement that the provision should be restructured, taking into account the difference between part-time and full-time work. The Committee agreed by consensus that Mr. Bowen would redraft Canon 4G.

The Reporter referred to the letter dated February 13, 2003 from the Honorable Sally D. Adkins, Judge of the Court of Special Appeals and Chair of the Commission on Judicial Disabilities. (See Appendix 3). Judge Adkins expressed concern about Canons 3E, Non-Recusal by Agreement, and 4C, Charitable, Civic, and Governmental Activities. The proposed revised Canons and the comments to each read as follows:

Canon 3E

E. NON-RECUSAL BY AGREEMENT.–

If recusal would be required by Canon 3D, the judge may disclose on the record the

reason for the recusal. If the lawyers, after consultation with their clients and out of the presence of the judge, all agree that the judge ought to participate notwithstanding the reason for recusal, the judge may participate in the proceeding. If after disclosure of any reason for recusal other than as required by Canon 3D (1)(a), the parties and lawyers, out of the presence of the judge, all agree that the judge need not recuse himself or herself, and the judge is willing to participate, the agreement of the parties shall be incorporated in the record, and the judge may participate in the proceeding.

COMMENT

This procedure gives the parties an opportunity to waive the recusal if the judge agrees. To ensure that consideration of the question of waiver is made independently of the judge, a judge must not hear, seek, or solicit comment on possible waiver unless the lawyers jointly propose waiver after consultation. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the waiver agreement.

Canon 4C

C. CHARITABLE, CIVIC, AND GOVERNMENTAL ACTIVITIES.-

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

COMMENT

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

The first item in the letter from Judge Adkins refers to Canon 3E, Non-Recusal by Agreement. The Reporter noted that the second sentence of this Canon is a remnant of a previous draft of the Code and should be deleted. The third sentence includes the second sentence. The Committee agreed by consensus.

The Vice Chair commented that Judge Adkins' suggested approach is that a judge could ask for responses to the disclosure of the reason for recusal or at least notify the attorneys that they may affirmatively seek waiver of the judge's conflict of interest. The Chair explained that a judge cannot sit and listen while the parties decide whether the judge should recuse himself or herself. Judge Adkins' concern is the untenable position the judge is placed in after disclosing the conflict of interest -- either recusal or waiting for action by the attorneys who may not be aware they are able to take action to waive the recusal.

Judge Missouri noted that in reality, every judge violates this prohibition by telling the parties about the possible conflict of interest and then saying to the parties that the judge needs to know their position. The Vice Chair expressed the opinion that the Comment is poorly drafted. The Chair suggested

that it be deleted. Judge McAuliffe pointed out that the purpose of the Comment is to keep a judge from exercising undue influence.

The Chair suggested that the language of the Comment be changed to provide that a judge must ensure that consideration of the question of waiver is made independently of the judge. Mr. Titus remarked that most judges simply state that they are recusing themselves. Following the language of the Canon to the letter might result in the judge discussing the reasons for recusal for fifteen minutes. The Reporter noted that the intended purpose of this is to avoid putting an attorney in the situation of being forced to tell a judge that the attorney does not feel that the judge has accurately assessed the judge's ability to ignore the conflict of interest and render a fair and impartial decision. The problem is the wording of the Comment, which is taken from the Comment to Canon 3F in the American Bar Association (ABA) Model Code. The Vice Chair observed that the wording of the Canon is appropriate and that the Comment should be revised.

Judge Heller suggested that the following language should be added to the Comment: "A judge may advise the parties of the possibility of waiver, but to ensure ... ." Mr. Bowen expressed the opinion that the Comment should contain the language "a judge must ensure." The Chair suggested that the language of the second sentence of the Comment read as follows: "The judge may comment on possible waiver, but must ensure that consideration of

the question of waiver is made independently of the judge." The words, "a judge must not hear, seek, or solicit comment on possible waiver unless the jointly proposed waiver after consultation" are deleted from the Comment. The Committee agreed by consensus to the Chair's suggested changes. Mr. Titus pointed out that what the judge discloses, such as the fact that opposing counsel was the judge's law clerk several years ago, often is not a basis for recusal under Canon 3D, Recusal. Would this disclosure trigger a consultation? Judge Heller answered that this would not trigger the consultation under Canon 3E. Judge Missouri remarked that he always notifies counsel if the other attorney had been his law clerk. It is preferable to err on the side of caution.

The Reporter pointed out that the second issue raised by Judge Adkins in her letter involves Canon 4C, Charitable, Civic, and Governmental Activities. She asked if a judge at a social gathering where a legislator also is present is prohibited from expressing the judge's personal feelings on an issue to the legislator. The Chair responded that he did not think that speaking to a legislator would constitute consultation "with an executive or legislative body or official." Judge Heller commented that she shared Judge Adkins' concern. This provision may infringe on First Amendment rights.

The Chair said that the Preamble to the Code states: "the Canons are rules of reason that should be applied in the context of all relevant circumstances ... ." The Vice Chair inquired as

to why the words “consult with” appear in the Canon. Judge Heller suggested that these words be deleted. The Reporter explained that this language comes from the ABA Code. The Vice Chair expressed the view that the words “or otherwise consult with” should be taken out. Ms. Veronis remarked she would have to show this to the Judicial Ethics Committee. The Chair observed that the real evil being addressed by the Canon is a judge expressing his or her opinions at a public hearing. Judge McAuliffe added that the language of the Canon is trying to prevent the situation where the judge uses the power of his or her office privately to influence a matter. The Vice Chair noted that this language is open to many interpretations. Judge McAuliffe pointed out that judges are limited as to their speech in other provisions in the Code. He said that he would not like to see this provision taken out, if it is in the corresponding ABA Canon, unless the Judicial Ethics Committee approves the deletion.

The Chair asked if the ABA defines the word “consult.” The Reporter replied that the word is not defined. Mr. Titus noted that pursuant to Canon 4B, a judge may lecture, speak, teach, and write. The word “consultation” is a narrower term. Canons 4B and 4C need to be harmonized. The word “consult” should mean “lobby.” The Reporter suggested that the word “confer” could be used. Judge McAuliffe suggested that this matter be deferred until the Judicial Ethics Committee can consider this. The Chair recommended that this provision be left as it appears. He said

that people can be trusted to draw the appropriate distinction between protected conversation and public consultation.

The Reporter announced that Una Perez, Esq., a former Reporter to the Rules Committee has become a part-time temporary Special Reporter to assist with the revision of Title 16. This is the last step in the 1984 revision of the Rules of Procedure.

The Chair adjourned the meeting.