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-D Commerce Park Drive, Annapolis, Maryland on April 11, 2008.

Members present:

Hon. Alan M. Wilner, Chairperson

F. Vernon Boozer, Esq.
Albert D. Brault, Esq.
Hon. Ellen L. Hollander
Hon. Michele D. Hotten
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Frank M. Kratovil, Jr., Esq.
J. Brooks Leahy, Esq.
Hon. Thomas J. Love
Zakia Mahasa, Esq.
Timothy F. Maloney, Esq.
Hon. Albert J. Matricciani
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Kathy P. Smith, Clerk

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Leigh Darrell, Rules Committee Intern
David P. Sutton, Esq.
Debra Gardner, Esq., Public Justice Center
Justin Sasser, Esq.
Bedford T. Bentley, Jr., Esq., Secretary, State Board of Law Examiners
Barbara Gavin, Esq., Director of Character and Fitness, State Board of Law Examiners
Melvin Hirshman, Esq., Bar Counsel, Attorney Grievance Commission
Glenn M. Grossman, Esq., Deputy Bar Counsel, Attorney Grievance Commission
David R. Durfee, Jr., Esq., Executive Director, Legal Affairs, Administrative Office of the Courts

The Chair welcomed the members of the Rules Committee as well as the guests in attendance. He said that on April 7, 2008, there was an open hearing on the Supplement to the 158th Report

that pertained to Rules 4-262 and 4-263. The Court disagreed with the Committee on the issue of disclosure of defense witnesses and adopted in effect the language in Standard 11-2.2 of the Criminal Justice Discovery Standards of the American Bar Association (ABA). The Standards were sent to the Court as an appendix to which the Court could refer. There were three different motions made, proposing various changes, but none of them commanded four votes. Finally, the fourth motion, which included defense disclosure, passed on a vote of four in favor, two opposed. There was also a minor conforming amendment to section (k) of Rule 4-263 that concerned the implementation of discovery. The substantive provision required the State to afford the defense an opportunity to inspect certain kinds of evidence. Section (k), which contains the mechanism for this, provided that in the absence of an agreement, the State shall serve the discovery material on the defendant. This works for documents, but not for drugs, guns, and other such items that the police have in their possession. The amendment to section (k) was the addition of language providing for the State to serve copies of documents but also to serve notice of the time and place at which the other material can be inspected, photographed, and copied to the extent that it can be copied. With those two amendments, Rules 4-262 and 4-263 were adopted with an effective date of July 1, 2008.

The Chair stated that there are two loose ends to these Rules. One involved a debate at the Committee level between the

Public Defender and one of the State's Attorneys as to the extent to which the prosecution could disclose criminal history information from the Criminal Justice Information System (CJIS) database. This issue was raised before the Court. Nancy Forster, Esq., Public Defender, sent a letter to the Court citing Section 12.15.01.12 of COMAR, which she believes allows disclosure to defense counsel, although it does not expressly authorize the State's Attorney to provide the information to defense counsel. There will be a meeting of prosecutors, defense attorneys, representatives from the State Police, and the Assistant Attorney General who represents the State police to see if this matter can be resolved. If it cannot, the issue will be for the Court of Appeals to resolve. The State agencies probably can come to an agreement; the question is the extent to which the State's Attorney is relying on the FBI database, which involves dealing with the federal government.

The Chair told the Committee that the other loose end is related to the retention of discovery material, an issue that affects both Rules 4-262 and 4-263. Both Rules require the parties to retain the originals of discovery material for certain periods of time that could be fairly lengthy. Both the State and the defense are affected by this. One issue that was not addressed in the Rule is that much of this material is going to get into evidence as exhibits. It would no longer be classified as discovery material but as exhibits. The retention policy must be in conformance with the retention policy of exhibits. There

is no stated procedure for this. In Baltimore County, as soon as the trial is over, the documents are scanned and the originals are destroyed. The 24 counties have various procedures relating to physical exhibits and documents. There are no uniform procedures. Code, Criminal Procedure Article, §8-201 pertains to preservation of DNA evidence, requiring the State to retain it for certain periods of time. The Chair said that he had asked Ms. Darrell, the Rules Committee intern, to contact the prosecutors in the 24 jurisdictions in the State, or the police in those jurisdictions, whichever is responsible for preserving discovery material, and find out how each jurisdiction handles this. The information gleaned could require a new Rule.

The last topic that the Chair presented before turning to the items on today's agenda concerned Standards promulgated by the ABA. Ms. Susan Hillenbrand of the ABA keeps track of the States' adoption of ABA standards. She called the Chair after she learned of the changes to the Maryland criminal discovery Rules. The Chair pointed out to her that when the Rules Committee first discussed possible changes to Rules 4-262 and 4-263, the Committee was not aware of the ABA Standards for Criminal Justice Discovery and Trial by Jury. The ABA has many Standards, covering the entire criminal justice process. Ms. Hillenbrand agreed that organizations such as the Rules Committee need to be apprised when the ABA publishes material, including the Standards, that would be helpful. She said that she would tell the ABA that whenever it considers or adopts new Standards,

it should notify the Reporter to the Rules Committee and others in similar situations. This would let the Committee know about the development of the Standards and provide an opportunity for prosecutors, defense counsel, and other interested persons to weigh in. The Chair added that the Criminal Subcommittee, when considering issues, except for very minor ones, will find out if the ABA has a policy on it.

Agenda Item 1. Reconsideration of the proposed Rules changes in Category 10 of the 158th Report - Revised recommendations of the Attorneys Subcommittee: New Rule 16-778 (Referral from Child Support Enforcement Administration), Amendments to Rule 16-751 (Petition for Disciplinary or Remedial Action), and Amendments to Rule 19 (Confidentiality) of the Rules Governing Admission to the Bar of Maryland

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Mr. Brault presented new Rule 16-778, Referral from Child Support Enforcement Administration, 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 16-778, as follows:

Rule 16-778. REFERRAL FROM CHILD SUPPORT ENFORCEMENT ADMINISTRATION

(a) Referral

When the Child Support Enforcement

Administration makes a referral to the Attorney Grievance Commission pursuant to Code, Family Law Article, §10-119.3 (e)(3), the Commission promptly shall transmit the referral to Bar Counsel, and Bar Counsel shall file a Petition for Disciplinary or Remedial Action in the Court of Appeals pursuant to Rule 16-751 (a)(3). A copy of the Administration's notice of referral shall be attached to the Petition, and a copy of the Petition and notice shall be served on the attorney in accordance with Rule 16-753.

Committee note: The procedures set out in Code, Family Law Article, §10-119.3 (f)(1), (2), and (3) shall have been completed before the referral is made to the Attorney Grievance Commission.

(b) Show Cause Order

When a petition and notice of referral have been filed, the Court of Appeals shall order that Bar Counsel and the attorney, within 15 days from the date of the order, show cause in writing why the attorney should not be suspended from the practice of law.

(c) Action by the Court of Appeals

Upon consideration of the petition and any answer to the order to show cause, the Court of Appeals may immediately enter an order indefinitely suspending the attorney from the practice of law, may enter an order designating a judge pursuant to Rule 16-752 to hold a hearing in accordance with Rule 16-757, or may enter any other appropriate order. The provisions of Rule 16-760 apply to an order under this section that suspends an attorney.

(d) Presumptive Effect of Referral

A notice of referral from the Child Support Enforcement Administration directed to the Attorney Grievance Commission is presumptive evidence that the attorney has met the criteria specified in Code, Family Law Article, §10-119.3 (e)(1). The

introduction of such evidence does not preclude Bar Counsel or the attorney from introducing additional evidence or otherwise showing cause why no suspension should be imposed.

(e) Termination of Suspension

Upon notification by the Child Support Enforcement Administration that the suspension of the attorney should be terminated because the attorney has complied with the provisions of Code, Family Law Article, 10-119.3 (j), the Court of Appeals shall order the attorney reinstated to the practice of law, unless other grounds exist for the suspension to remain in effect.

(f) Other Disciplinary Proceedings

Proceedings under this Rule shall not preclude (1) the use of the facts underlying the referral from the Child Support Enforcement Administration when relevant to a pending or subsequent disciplinary proceeding against the attorney or (2) prosecution of a disciplinary action based upon a pattern of conduct adverse to the administration of justice.

Source: This Rule is new.

Rule 16-778 was accompanied by the following Reporter's Note.

Chapter 256, Acts of 2007 (HB 792) amended Code, Family Law Article, §10-119.3 to include the Court of Appeals as one of the licensing authorities that can issue a sanction against someone who is in arrears of paying child support. The statute provides that if the person in arrears is an attorney, the Child Support Enforcement Administration (CSEA) may refer the matter to the Attorney Grievance Commission for disciplinary action. If an attorney is found to be in arrears in paying child support, the Court of Appeals may suspend his or her license or take any other action authorized by the Rules in Title

16, Chapter 700.

To make the Rules consistent with the statutory change, the Attorneys Subcommittee recommends: (1) the addition of new Rule 16-778, establishing procedures to be followed after a matter has been referred by the CSEA, and (2) a conforming amendment to Rule 16-751, adding a new provision that lists a referral from the CSEA as a circumstance requiring Bar Counsel to file a Petition for Disciplinary or Remedial Action.

Sections (a), (b), (c), and (d) of proposed new Rule 16-778 are based on sections (b), (c), (f), and (g), respectively, of Rule 16-773, Reciprocal Discipline or Inactive Status, except that in Rule 16-778 (d), a referral from the CSEA has a "presumptive" effect, rather than the "conclusive" effect of an adjudication that is provided by Rule 16-773 (g). Sections (e) and (f) of Rule 16-778 are new.

Mr. Brault explained that the issue of lawyers who fail to pay child support is back for the Committee's reconsideration. Code, Family Law Article, §10-119.3 was amended last year to include the license to practice law as one of the licenses listed in the statute that can be suspended for failure to pay child support. New Rule 16-778 has been drafted to provide a mechanism to suspend a lawyer who is at least 120 days in arrears in child support payments. The statute provides that the Child Support Enforcement Administration (CSEA) makes a referral of the matter to the Attorney Grievance Commission (AGC). Originally, the idea was that the referral would trigger disbarment proceedings, but the AGC pointed out that this could take a very long time and would not be in compliance with the statute. The AGC recommended

that Rule 16-778 could set up a procedure treating the lawyer the same as the lawyer is treated when a petition for reciprocal discipline under Rule 16-773, Reciprocal Discipline or Inactive Status, is filed. Reciprocal discipline involves Bar Counsel filing in the Court of Appeals a petition and a certified copy of an order disbarring, suspending, or otherwise disciplining a lawyer in another jurisdiction. There is a show cause hearing but not a complete investigation and not all of the steps of an ordinary complaint.

Mr. Brault pointed out that section (a) of Rule 16-778 provides that after the referral by the CSEA, the Commission transmits the referral to Bar Counsel who files a Petition for Disciplinary or Remedial Action in the Court of Appeals. A copy of the notice of referral is attached and then served on the lawyer along with a show cause order. This will satisfy the statute in terms of timing. The next issue is termination of suspension. The proposed Rule provides that when the CSEA notifies the AGC that the arrearage has been satisfied, the Court of Appeals shall order that the lawyer be reinstated, unless other grounds exist for the suspension to remain in effect. Mr. Brault told the Committee that the Chair had pointed out a possible glitch in the Rule -- there is no way to control the speed and efficiency of the CSEA. There is an assumption built into the Rule that in all times in the future, the CSEA will act properly. Judge Matricciani expressed the opinion that this assumption should not be built into the Rule. Mr. Brault agreed

and remarked that the Reporter and he had discussed with the Chair a modification of section (e) that provides for notification from the CSEA or from the lawyer. Earlier today, the Chair had drafted some additional language that would allow the lawyer to file a petition for reinstatement under section (e). The proposed additional language reads as follows:

ALTERNATE LANGUAGE

Rule 16-778. REFERRAL FROM CHILD SUPPORT ENFORCEMENT ADMINISTRATION

. . .

(e) Termination of Suspension

(1) On Notification by the Child Support Enforcement Administration

Upon notification by the Child Support Enforcement Administration that the suspension of the attorney should be terminated because the attorney has complied with the provisions of Code, Family Law Article, §10-119.3 (j), the Court of Appeals shall order the attorney reinstated to the practice of law, unless other grounds exist for the suspension to remain in effect.

(2) On Verified Petition by Attorney

In the absence of a notification by the Child Support Enforcement Administration pursuant to subsection (e)(1) of this Rule, the attorney may file with the Court of Appeals a verified petition for reinstatement. The petition shall allege under oath and be supported by exhibits to show that (A) the attorney is in compliance with the provisions of Code, Family Law Article, §10-119.3 (j) and is not currently in arrears in the payment of child support, (B) at least 15 days prior to filing the

> **verified petition, the attorney gave written notice of those facts to the Child Support Enforcement Administration and requested that the Child Support Enforcement Administration notify the Court, (C) the Child Support Enforcement Administration has failed or refused to file such a notification, and (D) the attorney is entitled to be reinstated. A copy of the petition shall be served on Bar Counsel, who shall file an answer within 15 days after service. Upon consideration of the petition and answer, the Court of Appeals may enter an order reinstating the attorney, an order denying the petition, or any other appropriate order.**

Mr. Brault noted that the Court of Appeals is not limited by the Rule. After the Court issues a show cause order that notifies the lawyer of the contents of the referral from the CSEA, and the lawyer has the opportunity to file an answer to the show cause order, the Court can immediately suspend the lawyer or refer the matter to a judge for a hearing. Mr. Brault agreed that language should be added to the Rule providing that the lawyer may file a petition for reinstatement. Without this, there would be no way to overcome a delay in the bureaucracy of the CSEA, which may have a backlog of cases. Should the Rule require the lawyer to demonstrate that he or she is now current in child support payments? The CSEA referral does not require this. The CSEA referral is based on an arrearage of 120 days. It is possible that the lawyer could pay the arrearage of 120 days, yet be 60 days in arrears when he or she files the petition for reinstatement. If the lawyer is not current, this is a kind of presumptive contempt, because the lawyer is under an order to

make all of the child support payments when due. This is the rationale for requiring the lawyer not only to satisfy the arrearage but also to aver that he or she is no longer in any other way in constructive contempt. The Subcommittee did not have the opportunity to discuss the proposed Rule, so there is no recommendation.

Ms. Potter inquired whether there could be a referral from a presiding judge or an aggrieved parent. Mr. Brault responded that there would not be an immediate suspension, and the case would proceed on the regular route, rather than according to this Rule. Ms. Potter asked why the case would be treated differently if a presiding judge, rather than the CSEA, reported it. Mr. Brault answered that it would be a contempt matter and would go the ordinary route. The statute puts lawyers in the same category as all of the other license-holders whose license is immediately suspended. The agency can move fairly quickly if it is a serious matter.

Mr. Johnson referred to the alternative language in subsection (e)(1) that reads "...unless other grounds exist for the suspension to remain in effect." If the person satisfies the arrearage, what are the other grounds? The Reporter answered that the other grounds are grounds for suspension other than grounds within the ambit of Rule 16-778. For example, a lawyer may be in arrears in payments to the Client Protection Fund or may have other pending disciplinary actions against him or her. The language is to clarify that the lawyer's suspension arising

out of those other grounds is not necessarily terminated just because the lawyer paid his or her child support obligations. Mr. Brault added that there could be a complaint that the lawyer is stealing from a client's trust fund. When the referral comes in, Bar Counsel may notify the Court that the lawyer is involved in a serious matter that calls for his or her suspension to continue.

The Chair asked Mr. Hirshman if he had any comments. Mr. Hirshman replied that he was satisfied with the proposed Rule. The Chair stated that a motion to add the amendments to Rule 16-778 is necessary, because it did not come from the Subcommittee. Ms. Ogletree moved to add language suggested by the Chair. The motion was seconded, and it passed unanimously. Rule 16-778 was approved as amended.

Mr. Brault presented Rule 16-751, Petition for Disciplinary or Remedial Action, 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 by adding a new subsection (a)(3) pertaining to a certain referral from the Child Support Enforcement Administration, as follows:

Rule 16-751. PETITION FOR DISCIPLINARY OR REMEDIAL ACTION

(a) Commencement of Disciplinary or Remedial Action

. . .

(3) Upon Referral from the Child Support Enforcement Administration

If the Child Support Enforcement Administration makes a referral to the Attorney Grievance Commission pursuant to Code, Family Law Article, §10-119.3 (e)(3), Bar Counsel shall file a Petition for Disciplinary or Remedial Action in the Court of Appeals.

. . .

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

See the Reporter's note to proposed new Rule 16-778.

Mr. Brault told the Committee that the amendment to Rule 16-751 carries out the procedures in Rule 16-778. It instructs Bar Counsel to file a Petition for Disciplinary or Remedial Action in the event of a referral from the Child Support Enforcement Administration. The Chair stated that since no motion was forthcoming, Rule 16-751 was approved as presented.

Mr. Brault presented Rule 19, Confidentiality, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

RULES GOVERNING ADMISSION TO THE BAR

OF MARYLAND

AMEND Rule 19 of the Rules Governing Admission to the Bar by adding the Child Support Enforcement Administration to the list of entities to which the Board of Law Examiners may disclose certain information, as follows:

Rule 19. CONFIDENTIALITY

(a) Proceedings Before Committee or Board; General Policy

Except as provided in sections (b) and (c) of this Rule, proceedings before a Character Committee or the Board and the papers, evidence, and information relating to those proceedings are confidential and shall not be open to public inspection or subject to court process or compulsory disclosure.

(b) Right of Applicant

(1) Except as provided in paragraph (2) of this section, an applicant has the right to attend all hearings before a Character Committee or the Board pertaining to his or her application and be informed of and inspect all papers, evidence, and information received or considered by the Committee or the Board pertaining to the applicant.

(2) This section does not apply to (A) papers or evidence received or considered by a Character Committee of the Board if the Committee or Board, without a hearing, recommends the applicant's admission; (B) personal memoranda, notes, and work papers of members or staff of a Character Committee or the Board; (C) correspondence between or among members or staff of a Character Committee or the Board; or (D) an applicant's bar examination grades and answers, except as authorized in Rule 8 and Rule 13.

(c) When Disclosure Authorized

The Board may disclose:

(1) statistical information that does not

reveal the identity of any individual applicant;

(2) the fact that an applicant has passed the bar examination and the date of the examination;

(3) any material pertaining to an applicant that the applicant would be entitled to inspect under section (b) of this Rule, if the applicant has consented in writing to the disclosure;

(4) any material pertaining to an applicant requested by a court of this State, another state, or the United States for use in (A) a disciplinary proceeding pending in that court against the applicant as an attorney or judge; (B) a proceeding pending in that court for reinstatement of the applicant as an attorney after disbarment; or (C) a proceeding pending in that court for original admission of the applicant to the Bar;

(5) any material pertaining to an applicant requested by a judicial nominating commission or the Governor of this State, a committee of the Senate of Maryland, or a committee of the United States Senate in connection with an application by or nomination of the applicant for judicial office;

(6) to a law school, the names of persons who graduated from that law school who took a bar examination and whether they passed or failed the examination; ~~and~~

(7) to the National Conference of Bar Examiners, identifying information (including name, Social Security Number, birthdate, date of application, and date of examination) of persons who have filed applications for admission pursuant to Rule 2 or petitions to take the attorney's examination pursuant to Rule 13~~.~~; and

(8) upon its request, to the Child Support Enforcement Administration the name, Social Security number, and address of a

person who has filed an application pursuant to Rule 2 or a petition to take the attorney's examination pursuant to Rule 13.

Unless information disclosed pursuant to paragraphs (4) and (5) of this section is disclosed with the written consent of the applicant, an applicant shall receive a copy of the information and may rebut, in writing, any matter contained in it. Upon receipt of a written rebuttal, the Board shall forward a copy to the person or entity to whom the information was disclosed.

(d) Proceedings in the Court of Appeals

Unless the Court otherwise orders in a particular case, proceedings in the Court of Appeals shall be open.

Source: This Rule is new.

Bar Admission Rule 19 was accompanied by the following Reporter's Note.

Code, Family Law Article §10-119.3 (b) requires a "licensing authority," as defined in §10-119.3 (a)(3)(ii), to require each applicant for a license to disclose the applicant's Social Security number. Code, Family Law Article, §10-119.3 (d) requires the "licensing authority," upon request of the Child Support Enforcement Administration ("CSEA"), to provide certain information to the CSEA. Chapter 256, Acts of 2007 (HB 792) added the Court of Appeals to the list of licensing authorities to which the statute applies.

The proposed amendment to Rule 19 of the Rules Governing Admission to the Bar of Maryland adds a new subsection (c)(8) that allows the State Board of Law Examiners, upon request of the CSEA, to disclose to the CSEA the name, Social Security number, and address of a person who has filed an application to take the bar examination or petition to take the attorney's examination in Maryland.

Mr. Brault explained that another problem arose pertaining to matters before the Character Committee on applications for admission to the bar. It involves the ability of the Child Support Enforcement Administration ("CSEA") to be able to enforce payments for child support as a condition of applying to be admitted to the Bar. The problem is that under Bar Admission Rule 19, the CSEA is not entitled to know who is applying to the Bar; therefore, it is not able to compare the names of applicants to the list of those in arrears for child support. The proposed amendment to Rule 19 is in subsection (c)(8) and has been added as one of the exceptions to the confidentiality of the bar admission process. It would allow, upon request of the CSEA, release of the following information to the CSEA: the name, Social Security number, and address of a person who has filed an application to take the bar examination or the attorney's examination. The CSEA could then compare the information to their list of persons in default on child support payments and then notify the Character Committee or the Office of the Board of Law Examiners.

Mr. Bentley said that the Board of Law Examiners was in agreement with the proposed changes to Rule 19. Mr. Brault asked Mr. Bentley if this had been requested by the CSEA at the recent Subcommittee meeting, and Mr. Bentley replied affirmatively. Mr. Brault added that representatives of the various agencies involved in the changes to the Rules attended the Subcommittee meeting. The Chair commented that the CSEA has to make the

request of the Board of Law Examiners and then give the Board the names of the applicants who are in arrears, perhaps electronically. Mr. Bentley responded that this procedure can be worked out.

Mr. Johnson asked whether the information obtained from the CSEA about an applicant being in arrears would prevent the person from being admitted to the Bar of Maryland. Is this the purpose of the change to the Rule? Mr. Brault answered that the purpose is to get these individuals to comply with their obligations and satisfy their child support arrearages. If the arrearage is satisfied, this would be considered by the Character Committee. Mr. Bentley noted that another aspect of this matter is that an inquiry about child support obligations will be added to the application for admission to the bar. Mr. Johnson observed that if an applicant does not disclose his or her arrearage on the character application, it would be a reason not to admit the applicant. If the CSEA provides a list of names, and the person fails to disclose on the application to take the bar examination the fact that he or she is on the list, then this would be a disclose would be a reason to deny the person's admission. How would this be handled mechanically?

Mr. Maloney remarked that the application has a question pertaining to the person's involvement in litigation, but it currently does not have a specific question about arrearages. This will be changed. Mr. Johnson said that there is a catchall question that people typically do not answer asking the applicant

to list any unfavorable incidents, and it is this lack of disclosure that gets them into trouble. Mr. Maloney noted that up until now, the application did not ask about arrearages, which meant that a problem with an applicant might not surface. He expressed the opinion that the change to the Rule and to the application is very helpful. The Chair pointed out the problem of this being like a moving target, because the CSEA does not get involved until a lawyer is 120 days in arrears, and this can change from week to week. Mr. Brault added that when the application for admission to the bar was filed, the applicant may not have had an arrearage. Mr. Johnson remarked that there is a question as to whether one is more than 90 days in debt, but at the time the application is completed or when the person has his or her Character Committee interview, this may not be the situation. Mr. Bentley observed that applicants have a continuing obligation to report any changes in their status. When they are admitted, they have to affirm that nothing in the application has changed. If something has changed, they are obligated to disclose it to the Board.

The Chair asked if there were any other comments concerning Bar Admission Rule 19. None was forthcoming, and the Chair stated that the Subcommittee's recommendation was approved.

Agenda Item 2. Consideration of proposed amendments to: Rule 16-723 (Confidentiality) and Rule 16-760 (Order Imposing Discipline or Inactive Status)

Mr. Brault presented Rule 16-723, Confidentiality, 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 16-723 to change the words "Bar Counsel" to "the Commission," as follows:

Rule 16-723. CONFIDENTIALITY

. . .

(b) Other Confidential Matters

Except as otherwise provided in these Rules, the following records and proceedings are confidential and not open to public inspection and their contents may not be revealed by the Commission, the staff of the Commission, Bar Counsel, the staff and investigators of the Office of Bar Counsel, members of the Peer Review Committee, or any attorney involved in the proceeding:

(1) the records of an investigation by Bar Counsel, including the existence and content of any complaint;

(2) the records and proceedings of a Peer Review Panel;

(3) information that is the subject of a protective order;

(4) the contents of a warning issued by ~~Bar Counsel~~ the Commission pursuant to Rule 16-735 (b), but the fact that a warning was issued shall be disclosed to the complainant;

(5) the contents of a prior private reprimand or Bar Counsel reprimand pursuant to the Attorney Disciplinary Rules in effect prior to July 1, 2001, but the fact that a private or Bar Counsel reprimand was issued and the facts underlying the reprimand may be disclosed to a peer review panel in a proceeding against the attorney alleging similar misconduct;

Committee note: The peer review panel is not required to find that information disclosed under subsection (b)(5) is relevant under Rule 16-743 (c)(1).

(6) the contents of a Conditional Diversion Agreement entered into pursuant to Rule 16-736, but the fact that an attorney has signed such an agreement shall be public;

(7) the records and proceedings of the Commission on matters that are confidential under this Rule;

(8) a Petition for Disciplinary or Remedial Action based solely on the alleged incapacity of an attorney and records and proceedings other than proceedings in the Court of Appeals on that petition; and

(9) a petition for an audit of an attorney's accounts filed pursuant to Rule 16-722 and records and proceedings other than proceedings in the Court of Appeals on that petition.

. . .

Rule 16-723 was accompanied by the following Reporter's Note.

Kendall Ruffatto, Executive Secretary to the Attorney Grievance Commission, noticed a technical problem with subsection (b)(4) of Rule 16-723. Pursuant to Rule 16-735 (b) Bar Counsel "recommends," but the Commission "issues" the warning. The proposed amendment corrects the terminology in Rule 16-723.

Mr. Brault told the Committee that there is a technical change of wording required in Rule 16-723, because it is the Attorney Grievance Commission, and not Bar Counsel, that issues the warning to which subsection (b)(4) refers. By consensus, the Committee approved the change to Rule 16-723.

Mr. Brault presented Rule 16-760, Order Imposing 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 16-760 by adding a cross reference after section (a), as follows:

Rule 16-760. ORDER IMPOSING DISCIPLINE OR INACTIVE STATUS

(a) Effective Date of Order

Unless otherwise stated in the order, an order providing for the disbarment, suspension, or reprimand of a respondent or the placement of a respondent on inactive status shall take effect immediately. The order may provide that the disbarment, suspension, reprimand, or placement on inactive status be deferred for a specified period of time to allow the respondent a reasonable opportunity to comply with the requirements of section (c) of this Rule.

Cross reference: For the implementation of this Rule, see *Attorney Grievance Commission v. Maignan*, 402 Md. 39 (2007).

. . .

Rule 16-760 was accompanied by the following Reporter's Note.

> In *Attorney Grievance Commission v. Maignan*, 402 Md. 39 (2007), the Court of Appeals discussed the issue of when a suspended lawyer has to stop representing existing clients. The Court suggested that subsection (c)(2) of Rule 16-760 needs some clarification. To address this, the Attorneys Subcommittee recommends that a cross reference to the case be added after section (a) of Rule 16-760.

Mr. Brault explained that *Attorney Grievance Commission v. Maignan*, 402 Md. 39 (2007) involved a suspended lawyer who believed that to effectuate winding up his practice, he was still able to represent clients. The Court of Appeals held that he could not do this and noted that there should be clarification in Rule 16-760 to show that when a lawyer is suspended or disbarred from the practice of law, he or she is immediately not allowed to practice law. The Subcommittee decided to add a cross reference to *Maignan*, as opposed to putting language into the text of the Rule, which already states in section (a) that the order suspending or disbarring a lawyer "shall take effect immediately." The proposed cross reference states that *Maignan* should be looked at for implementation of the Rule. In that case, the Court said that a lawyer may be allowed to represent a client until the matter is ended, but the order of suspension or disbarment would have to so state. Winding up the case means

that it must be taken over by another lawyer immediately. The suspended or disbarred lawyer is not allowed to continue to represent the client until the case is over.

By consensus, the Committee approved the addition of a cross reference to Rule 16-760.

Agenda Item 3. Consideration of proposed amendments to: Rule 2-603 (Costs) and Rule 3-603 (Costs)

Mr. Brault presented Rules 2-603 and 3-603, Costs and Attorneys' Fees, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 600 - JUDGMENT

AMEND Rule 2-603 by adding language to the title, by adding language to section (a) pertaining to bills for costs, and by adding a new section (f) pertaining to attorneys' fees, as follows:

Rule 2-603. COSTS <u>AND ATTORNEYS' FEES</u>

(a) Allowance and Allocation

Unless otherwise provided by rule, law, or order of court, the prevailing party is entitled to costs. The court, by order, may allocate costs among the parties. <u>Bills for costs shall be filed within **[15] [30]** days after the entry of judgment or of the entry of an order denying a motion filed under Rules 2-532, 2-533, or 2-534. Noncompliance with these time limits shall be deemed a waiver of costs.</u>

Cross reference: Code, Courts Art., §7-202.

(b) Assessment by the Clerk

The clerk shall assess as costs all fees of the clerk and sheriff, statutory fees actually paid to witnesses who testify, and, in proceedings under Title 7, Chapter 200 of these Rules, the costs specified by Rule 7-206 (a). On written request of a party, the clerk shall assess other costs prescribed by rule or law. The clerk shall notify each party of the assessment in writing. On motion of any party filed within five days after the party receives notice of the clerk's assessment, the court shall review the action of the clerk.

(c) Assessment by the Court

When the court orders or requests a transcript or, on its own initiative, appoints an expert or interpreter, the court may assess as costs some or all of the expenses or may order payment of some or all of the expenses from public funds. On motion of a party and after hearing, if requested, the court may assess as costs any reasonable and necessary expenses, to the extent permitted by rule or law.

(d) Joint Liability

When an action is brought for the use or benefit of another as provided in Rule 2-201, the person for whom the action is brought and the person bringing the action, except the State of Maryland, shall be liable for the payment of any costs assessed against either of them.

(e) Waiver of Costs in Domestic Relations Cases - Indigency

In an action under Title 9, Chapter 200 of these Rules, the court shall waive final costs, including any compensation, fees, and costs of a master or examiner if the court finds that the party against whom the costs are assessed is unable to pay them by reason of poverty. The party may seek the

waiver at the conclusion of the case in accordance with Rule 1-325 (a). If the party was granted a waiver pursuant to that Rule and remains unable to pay the costs, the affidavit required by Rule 1-325 (a) need only recite the existence of the prior waiver and the party's continued inability to pay.

(f) Attorneys' Fees

(1) Motion

A claim for attorneys' fees and related nontaxable expenses shall be made by motion, unless the substantive law governing the action provides for the recovery of fees as an element of damages to be proved at trial. Unless otherwise provided by statute or court order, the motion shall be filed no later than **[15][30]** days after entry of (A) judgment by the circuit court, including a judgment in an appeal heard de novo, (B) the order disposing of the appeal in an appeal heard on the record, or (C) an order denying a motion filed under Rule 2-532, 2-533, or 2-534.

(2) Memorandum

(A) Time for Filing

A motion requesting an award of attorneys' fees shall be supported by a memorandum filed (i) no later than 30 days after the date the motion is filed, or (ii) unless otherwise ordered by the court, if an appeal is taken from the underlying judgment, no later than **[15][30]** days after the issuance of the mandate of the appellate court.

(B) Contents of Memorandum

The memorandum shall set forth:

(i) the nature of the case;

(ii) the claims permitting fee-shifting as to which the moving party prevailed;

(iii) the claims permitting fee-shifting as to which the moving party did not prevail;

(iv) to the extent practicable, a detailed description of the work performed, broken down by hours or factions thereof expended on each task;

(v) the attorney's customary fee for like work;

(vi) the customary fee for like work prevailing in the attorney's community;

(vii) a listing of any expenditures for which reimbursement is sought;

(viii) any additional factors that are required by the case law; and

(ix) any additional factors that the attorney wishes to bring to the court's attention.

(3) Guidelines

A motion for attorneys' fees shall be prepared in accordance with the Guidelines that are an Appendix to these Rules.

(4) Noncompliance with Time Limits

Noncompliance with the time limits set out in subsections (f)(1) and (f)(2)(A) of this Rule shall be deemed to be a waiver of any claim for attorneys' fees.

(5) Response to Motion for Attorneys' Fees

Any response to a motion for attorneys' fees shall be filed no later than **[15][30]** days after service of the memorandum required by subsection (f)(2) of this Rule.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 604 a.
Section (b) is in part new and in part

derived from former Rule 604 a.
Section (c) is new.
Section (d) is derived from former Rule 604 c.
Section (e) is new.
Section (f) is new.

Rule 2-603 was accompanied by the following Reporter's Note.

The Honorable Michael D. Mason, of the Circuit Court for Montgomery County, raised the issue of the lack of a rule providing guidance for judges on setting attorneys' fees. To address this, the Attorneys Subcommittee recommends amending Rule 2-603 by adding language borrowed from Fed. R. Civ. P. 54 and Local Rule 109.2 of the United States District Court for the District of Maryland.

The Subcommittee also recommends that guidelines for determining attorneys' fees [see proposed new subsection (f)(3) of Rule 2-603] be drafted and has requested input from the Maryland State Bar Association and local bar associations in this endeavor.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 600 - JUDGMENT

AMEND Rule 3-603 by adding language to the title and by adding a new section (d) pertaining to attorneys' fees, as follows:

Rule 3-603. COSTS AND ATTORNEYS' FEES

(a) Allowance and Allocation

Unless otherwise provided by rule, law, or order of court, the prevailing party is entitled to the allowance of costs. The court, by order, may allocate costs among the parties.

Cross reference: Code, Courts Art., §7-202.

(b) Assessment by the Court

When the court orders or requests a transcript or, on its own initiative, appoints an expert or interpreter, the court may assess as costs some or all of the expenses or may order payment of some or all of the expenses from public funds. On motion of a party and after hearing, if requested, the court may assess as costs any reasonable and necessary expenses, to the extent permitted by rule or law.

(c) Joint Liability

When an action is brought for the use or benefit of another as provided in Rule 3-201, the person for whom the action is brought and the person bringing the action, except the State of Maryland, shall be liable for the payment of any costs assessed against either of them.

(d) Attorneys' Fees

A claim for attorneys' fees and related nontaxable expenses, and any response thereto, shall be made in accordance with the provisions of Rule 2-603 (f), except that the time for filing the motion is not later than **[15][30]** days after entry of (1) judgment by the District Court or (2) an order denying a motion filed under Rule 3-533 or 3-534.

Source: This Rule is derived as follows:
Section (a) is derived from former M.D.R. 604.
Section (b) is new.
Section (c) is derived from former Rule 604 c.
Section (d) is new.

Rule 3-603 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 2-603.

The Reporter said that alternate language of Rule 2-603 (f)(1) and (f)(2)(A) was distributed today. The alternate language reads as follows:

ALTERNATE LANGUAGE

Rule 2-603. COSTS AND ATTORNEYS' FEES

. . .

(f) Attorneys' Fees

(1) Motion

A claim for attorneys' fees and related nontaxable expenses shall be made by motion, unless the substantive law governing the action provides for the recovery of fees as an element of damages to be proved at trial. **Unless otherwise provided by statute or court order, a motion for such fees and expenses incurred through the date of judgment shall be filed within [15][30] days after the later of the date (A) judgment was entered by the circuit court, or (B) an order disposing of a motion filed under Rule 2-532, 2-533, or 2-534 was filed. A motion for such fees and expenses incurred in connection with an appeal, application for leave to appeal, or petition for certiorari shall be filed within [15][30] days after the mandate or order disposing of the appeal, application, or petition is filed.**

(2) Memorandum

(A) Time for Filing

A motion filed pursuant to subsection (f)(1) of this Rule shall be

supported by a memorandum filed within 30 days after the motion is filed.

Mr. Klein inquired as to what is different in the version handed out. The Reporter replied that the revised version deals with attorney's fees and expenses in connection with appeals, applications for leave to appeal, and petitions for certiorari. The Chair remarked that there are many issues associated with these Rules. Each time he reads through the Rules, he finds more problems. The Subcommittee may have to look at them again.

The Chair asked whether the proposed change to the Rule 2-603 is intended to apply to domestic cases. Mr. Sutton, a consultant to the Attorneys Subcommittee, replied that fee-shifting in domestic cases is covered by statute, and there is no reason to treat this differently from other fee-shifting claims. Ms. Ogletree said that she read the proposed changes to the Rules as not including family law cases. Mr. Brault added that the attorney's fees in a family law action would be part of a party's case-in-chief at trial, and they would be adjudicated before the judgment. He observed that the Rule change is intended to apply to fee-shifting that is adjudicated after the judgment.

The Chair commented that section (f) of Rule 2-603 does not appear to be limited to statutory fee-shifting cases. Mr. Brault told the Committee that this issue had arisen in a federal case in Fourth Circuit. Fee-shifting can arise in a contract as opposed to a statutory fee-shifting. The changes to the Rule

apply to statutory fee-shifting. A more difficult situation is where the claim for attorneys' fees is in a breach of contract action. In *Carolina Power and Light Co. v. Dynegy Marketing and Trade*, 415 F. 3d 354 (4th Cir. 2005), the Fourth Circuit held that if the claim for attorneys' fees is part of the claim for relief in a breach of contract case, it is not subject to this type of rule. The matter of attorneys' fees has to be raised the same way as in a family law case -- it must be raised in the case-in-chief when a party claims to be entitled to damages under a breach of contract theory. The problem gets complicated, because sometimes contracts state that the winner of the judgment is entitled to attorneys' fees. The cases hold that those contract provisions are the same as statutory fee-shifting. Once the judgment is obtained, the winner applies for the fees. Many contracts state that in the event of a breach, one is entitled to indemnification for any costs, including attorneys' fees, to enforce the contract. The case involved a lawsuit between two corporations and a large sum of money was involved. The case went to the Fourth Circuit on appeal, where the appeal was dismissed on the ground that there was no final judgment. It was remanded to the trial court with instructions to re-open the evidentiary phase of the trial, including the claim for attorneys' fees.

The Chair said that what is being discussed today is shifting attorneys' fees after the judgment. The issue arose

because of problems Maryland trial judges are having in handling increasingly prevalent claims for fees. There are no rules and no appropriate procedures, and the judges have been making the decisions on the claims on an *ad hoc* basis. The Honorable Michael D. Mason, of the Circuit Court for Montgomery County, had written a letter about the lack of guidance in handling claims for attorneys' fees based on a major case he had heard. He said that he had followed the procedures set out in the local federal rule, Local Rule 109.2 of the United States District Court for the District of Maryland.

Mr. Sutton commented that he had written a three-part series on attorneys' fees in Maryland in the Prince George's County Bar Association NewsJournal in preparation for which he had read all of the relevant cases. In domestic cases, fees are awarded under fee-shifting statutes, including Code, Family Law Article, §§7-107, 8-214, 11-110, and 12-103. This is similar in civil rights and labor law cases. The Court of Appeals has conceptualized the procedure. They regard this as a collateral matter implementing the statutory right. A lawyer would have to file a claim for fees within the allotted period of time. There is no reason to treat this differently than any other fee claim with the possible exception of a contractual-based fee claim. The Chair commented that he disagrees. He said that he believes that the typical claim for attorneys' fees is part of the action itself, such as where the insurance company refuses to defend a claim that they

should defend, so that the insured has to hire counsel to defend the claim. When the insurance company is sued, the attorneys' fees are part of case-in-chief, and would not be covered by this Rule. Mr. Sutton inquired about discrimination claims. The Chair replied that 42 U.S.C. §§1983 and 1988 claims would be covered by the Rule because they involve statutory fee-shifting in which the substantive law does not require the fees to be proved at trial as an element of damages.

Judge Matricciani noted that in a family law action, attorney's fees sought early in the case to permit a party to be able to litigate the case. The alimony statute, Code, Family Law Article, §11-110, allows a party to seek fees and is a fee-shifting provision. Ms. Ogletree remarked that she is familiar with the situation where a party asks the judge for fees in a family law action. This usually is litigated as part of the trial, although she has seen the claim for fees litigated after the trial. Judge Matricciani added that judges often reserve on the claim for fees, so that they can consider the fees in light of other financial aspects of the case.

The Chair said that the Court of Appeals considered the same issue as the Fourth Circuit in *Maryland-National Capital Park and Planning Commission et al. v. Crawford*, 307 Md. 1 (1986). Another issue involved in these cases is whether there is a final judgment. Both the Court of Appeals and the Court of Special Appeals have addressed this. What has triggered the discussion

is statutory fee-shifting or contractual fee-shifting where it is not part of the action itself, but it is collateral and most particularly where the standard is "reasonable fees." When the contract states that a party is entitled to a certain amount of money, there is no problem. But the contract may say that a party is entitled to "reasonable fees," and the statutes almost always use that standard. The question is how and when this is effectuated.

Mr. Klein inquired what the intended impact is, if any, on fee-shifting under Rule 1-341, Bad Faith – Unjustified Proceeding or the impact on discovery sanction awards under Rule 2-433, Sanctions, given the breadth of the language of section (f) of Rule 2-603. Section (f) is so broadly worded that it sweeps in the fee-shifting aspect of these other Rules. Mr. Klein referred to a case in Baltimore City involving out-of-town attorneys who have been served with discovery motions from more than 60 defendants, and many of the motions contain a request for fees. The trial court does not have much guidance, except for a few intermediate appellate court decisions that are somewhat inconsistent. In Baltimore City, one of the orders denied Mr. Klein's request for fees, because he had not requested a definite amount of money. It should be a two-step process in which the attorney asks for fees and gives evidence of the fees. Mr. Brault expressed the view that this would have to be stated in Rule 2-433. Mr. Klein reiterated that section (f) of Rule 2-603 is so broadly worded that it covers any kind of request for fees.

If the proposed changes to the Rule are not intended to cover discovery and Rule 1-341 fees, the Rule should so state in section (f). Mr. Brault expressed the view that this exclusion should be expressly stated in Rules 2-433 and 1-341. A problem in Rule 1-341 is that it does not have language providing for a time deadline. Unless the three-year statute of limitations is invoked, Rule 1-341 can apply at any time. This problem has never been addressed.

The Chair said that Rule 1-341 can be invoked at any time during a circuit court proceeding. It is invoked not always because the action itself is frivolous. It can be invoked because of something that happens during the trial. Mr. Brault commented that Rule 1-341 should be considered on its own, and attorneys' fees for discovery violations should be considered in the context of Chapter 400 of Title 2. Imposition of those fees has nothing to do with the judgment. It occurs during the course of the litigation in the discovery phase, and there are appropriate Rules in Chapter 400.

Mr. Klein remarked that the language may be subject to several interpretations. Mr. Maloney recommended that a Committee note should be added, because there is enough ambiguity to suggest that this could apply to discovery and Rule 1-341 fees. The Chair said that if a judge wants to award fees, including for discovery violations, during the course of the trial but hold the amount awarded until the end of the trial, this has to be addressed. Judge Matricciani commented that a

Rule governing the award of attorneys' fees in discovery disputes would be helpful to trial judges. Mr. Klein added that this would have to be considered by the Discovery Subcommittee. Mr. Brault stated that there should not be a Committee note providing that this does not apply to discovery and Rule 1-341 fees, because conceptually, it ought to apply to how fees are determined.

Mr. Klein questioned whether Rule 2-603 should be considered but not transmitted to the Court of Appeals until the discovery issue is worked out. Mr. Brault responded that this Rule is not ready to go to the Court of Appeals until the guidelines for attorneys' fees are written. The federal system uses a parallel set of guidelines, and these will have to be written for Maryland. The Court, in several cases, including *Friolo v. Frankel*, 373 Md. 501 (2003) and *Diamond Point Plaza Limited Partnership v. Wells Fargo Bank, N. A.*, 400 Md. 662 (2007), set forth factors that can be incorporated into guidelines prepared in accordance with the decisions.

Mr. Klein asked whether the Maryland guidelines would be similar to the federal ones, which have fee ranges for different levels of seniority in the bar. The Rules Committee when addressing the issue of expert fees had made a policy decision not to put in specific amounts in the Rule. Mr. Brault replied that the Subcommittee has not debated this. The Court of Appeals had referred to seniority, but not in specific numbers. Mr.

Klein pointed out that the federal rule dealing with experts had assigned a specific fee. The Rules Committee chose not to do this, simply stating that the expert can charge whatever he or she charges for office time. Mr. Maloney said that the Rule and Guidelines should be comprehensive, and he suggested that there should be a meeting of members of the Discovery and Attorneys Subcommittees to discuss this. The Reporter stated that a meeting of the Attorneys Subcommittee is scheduled for May 15, and the Discovery Subcommittee members can be invited to this meeting.

The Chair said that it would be helpful to return the Rule to the Attorneys Subcommittee to clarify when it does and does not apply. Does it apply to statutory fee-shifting only, or does it also apply to contractual fee-shifting? Since the guidelines have to be drafted, the Subcommittee can consider those and the Rule. Mr. Brault pointed out the problem with Rule 1-341, which may apply in discovery, but if the attorney is sanctioned under the Rule, the appeal rights concerning imposition of the sanction are separate from the appeal rights concerning the underlying case. An attorney who is sanctioned under Rule 1-341 for filing a frivolous preliminary motion can immediately appeal the sanction. The Rule must be drafted with caution. Mr. Klein remarked that Rule 1-341 issues are handled by the General Provisions Subcommittee. The Chair added that some aspects of this may be under the aegis of the Judgments Subcommittee. The Reporter observed that there also are family law issues. Judge

Hollander commented that in an action for divorce some trial judges may think that in addition to considering whoever is the prevailing party and the needs and resources of both parties, this Rule is part of the process. Ms. Ogletree agreed that the Rule is not clear. Ordinarily, there is a claim in the complaint for suit money, and there are many old cases dealing with people who are entitled to suit money so that they can prosecute the case. This is fee-shifting, but it is not what Rule 2-603 is intended to cover. Judge Matricciani said that these are litigation expenses.

Judge Hollander noted that the Family Law Article provides for attorneys' fees if the court chooses to award them, and the question is at what stage, after the determination is made as to needs and resources, the court should award the fees. Ms. Ogletree observed that this is subsumed in the domestic litigation process already. It is not necessary to decide the fees after the fact unless it is a claim under Rule 1-341. Judge Hollander questioned as to how a judge would know that he or she does not have to do what is required by the Rule before attorney's fees are awarded in a divorce case.

The Chair noted that another issue lurking is attorneys' fees in appellate proceedings. The cases do not address this directly. There could be a Rule 1-341 issue with respect to appellate proceedings. If a statutory fee shifting case is on appeal and a petition is filed for work performed in the Court of Special Appeals or the Court of Appeals, it is assumed that the

matter would be heard in the circuit court so that there could be an evidentiary hearing. No rule addresses this situation. There are some issues related to Rule 2-603 that have not been considered. Mr. Brault said that the Subcommittee had discussed whether, in the situation where an attorney is awarded fees on appeal, the attorney also is awarded a fee for the time and expense to obtain the fee. This is fees on fees, and it can involve a considerable amount of time. It may require an evidentiary hearing or other kind of hearing on the amount of the fee award. The person requesting the fee may have to produce expert testimony. In talking with lawyers who do civil rights work, he asked about fees on fees, and they answered that those fees are obtained as a matter of course. Otherwise, the purpose of the statute would be frustrated.

Mr. Maloney commented that another issue is the scope of discovery. Mr. Brault responded that since this can get very complicated, the approach taken in drafting the changes to the Rule was to follow the federal rule which is already in place in federal court. Most of the Maryland judges are already following the federal rule, and more importantly, the federal decisions interpreting the federal rule would provide guidance in the future. The *Friolo* decision follows the federal rule. It is hard to imagine writing a rule that is better than the federal rule. This is why the proposed changes follow the federal rule with the exception of how much time to allow for requesting

costs.

Mr. Brault said that another aspect of the federal rule was considered by Mr. Sutton in the three articles that he wrote on attorneys' fees. These articles are included in the meeting materials for today's meeting. This is why the Subcommittee asked him to be a consultant. Mr. Sutton is concerned about the question of and the philosophy behind waiver. In the time rule, the time for filing is jurisdictional. It is similar to the time for filing an appeal or a post-trial motion. If one does not file, one loses the right. Mr. Sutton does not believe that this is now it should be. His view is that the Rule should be more flexible and give the court discretion to look at why there is a delay in filing for attorney's fees. Obviously, the federal philosophy is that the matter should be addressed promptly, most likely for the purpose of closing the file. This would avoid the case lingering, and then someone filing a motion much later.

Mr. Brault told the Committee that in his case in the Fourth Circuit, one of the lawyers did everything wrong procedurally. The court did not want to entertain any excuses, looking to end the case with a final judgment. Mr. Sutton had brought up the issue of waiver in the Subcommittee. Should there be a waiver if the request is not filed in time? This would affect the time period that would go into the Rule, which now has a choice of within 15 or 30 days. Is there anything wrong with requiring that the request be filed within a certain time? Mr. Brault expressed the opinion that having no time period in the Rule is

troublesome.

Mr. Sutton commented that the earlier discussion had focused on new dimensions, such as discovery violations. The main issue is at what point an attorney is awarded his or her fees after a successful trial at which the attorney prevails. Fees under Fed. R. Civ. P. 11 or Rule 1-341 are collateral. They are not part of the merits of the case. The fees can be requested after the case is over. In *Litty v. Becker*, 104 Md. App. 370 (1995), the court held that because a claim for counsel fees under Rule 1-341 is collateral in nature, it could be advanced even after the principal action had been terminated, and the appeal from a merits judgment in the action was concluded. In *Hicks v. Southern Maryland Health Systems Agency*, 805 F.2d 1165 (4th Cir. 1986), the person bringing the suit made a mistake in the underlying litigation, and the Fourth Circuit held that the U.S. District Court for the District of Maryland should adopt rules setting the time for seeking attorneys' fees. As a result of this case, the U.S. District Court in Maryland adopted a rule stating that attorney's fees are collateral and not part of the merits of the case. The request for the fees is not raised by a post-judgment motion. The only time criterion as to the award of fees is whether there is prejudice to an opposing party relating to laches. Whether it is a contract or a statute, the proposed Rule change provides for a certain number of days to seek attorney's fees. Two Maryland cases that conceptualize

attorney's fees as collateral matters are *Johnson v. Wright*, 92 Md. App. 179 (1992), a Rule 1-341 case, and *Blake v. Blake*, 341 Md. 326 (1996), a family law case. A rule would keep the collateral characteristic, but must have a provision that the fees would be sought by a time measured from the resolution of the case. It should provide for a certain number of days for the filing of the motion and a certain number for the filing of the memorandum.

The Chair pointed out that there is a gap in the language of the proposed Rule. The motion is to be filed within 15 or 30 days after the judgment, and the memorandum is to be filed within 30 days after the motion is filed, unless an appeal is filed. The memorandum does not have to be filed until the mandate is issued. The procedure works satisfactorily for a motion filed for fees incurred during a circuit court case when there is no appeal filed. However, an appeal could be filed based on the award of fees, which happened in *Friolo v. Frankel*, 403 Md. 443 (2008). There could also be an appeal from a judgment on the merits plus an appeal from the inadequacy or super-adequacy of the award of fees. These can get mixed up. There may be a gap, because the memorandum would not be due until after the appeal is concluded. Also, the motion may need to be amended, depending on what the appellate court does. The Chair suggested that the proposed Rule needs to be sufficiently clear to cover all of these issues. The Subcommittee should work on the Rule to define

it more precisely. There may be a need to amend other Rules.

Mr. Sutton noted that this is a highly technical area of the law. When there is an appeal causing more fees, does the appellate court award them, or does the trial court award them? Ms. Gardner said that she wanted to respond to some of the concerns that had been raised in the discussion. The importance of bringing cases to a close and finality of the litigation, as well as the judges' case management reports on open cases are very important, but the jurisdictional deadline in the proposed Rule will squelch settlement negotiations. The federal court's deadline for filing a motion and a memorandum frequently is extended by agreement of the parties and approval of the court, because the federal jurisprudence is that the time spend preparing the fee application itself is compensable. As a plaintiffs' lawyer, she would choose not to put in the time for that if the case can be settled. It is not beneficial to any one for the plaintiff's attorney to be forced by a jurisdictional deadline to expend time preparing the fee application if the case can be settled. She suggested that the Rule not have a jurisdictional deadline but that it have an explicit reference to an extension.

Mr. Brault pointed out that Rule 2-603 provides for an extension by court order. The second sentence of subsection (f)(1) begins: "[u]nless otherwise provided by statute or court order, the motion shall be filed ...". A consent order extending the time could provide for a different time. This gets into a

discourse with the courts. The details are in the scheduling rules, including Rule 2-504, Scheduling Order. Should the rules allow lawyers by stipulation to take control of the docket away from judges? In important scheduling matters, the judges prefer not letting lawyers stipulate in that way. Judge Matricciani remarked that the trial judge who heard the case has the best idea of how to allocate the fees. Another judge would not know how the litigation was conducted. Even the original judge who is now hearing the fee matter three years after the case was tried may not remember the exact details of the case. A request for fees should be filed fairly promptly, so that the trial judge can determine fees promptly. The Chair noted that whether the time period is 15 or 30 days, one side may take an appeal immediately, so the merits of the case go to the appellate court. The trial court has lost jurisdiction over this, and the fee issue is still alive. Mr. Maloney commented that a lawyer may not have the necessary bills, including the ones for the court reporter and for the expert witnesses, ready in 15 days.

Mr. Klein referred to the language in subsection (f)(2)(B)(vi) that reads: “the attorney’s customary fee for like work prevailing in the attorney’s community,” taken directly from the local federal rule, L. R. 109 2. b., and he asked if this would require an expert to attest to what is a reasonable fee. In the context of discovery violations, is more of a burden being created? Conceptually, the court must determine what a reasonable fee is. Mr. Brault said that he has been called on

many times as an expert on fees. The Chair added that good attorneys agree on the hourly rate. Ms. Gardner observed that what happens in practice is that a lawyer provides an affidavit as to what the prevailing fee is. The federal guidelines on attorney's fees are very helpful, so that there is no argument as to what the fee is. There is not much to argue about until the guidelines get very out of date. Mr. Klein inquired how often the guidelines are updated, and Ms. Gardner answered that they are revised every 10 years. They were updated this past January. She also pointed out that the Subcommittee may want to reconsider subsection (f)(1), because it is not clear what should be put into the motion. It would be difficult to state the amount of the fees, because the lawyer would not yet have incurred the fees for preparing a subsequent memorandum. It might be useful for the Rule to state what the contents of the motion itself should be, and this should be minimal, because the real work is in preparing the memorandum.

Mr. Sutton asked whether there should be a counterpart for Fed. R. Civ. P. 54 (d)(2)(C), which requires the court to make findings of facts and conclusions of law. The Court of Appeals has observed with disfavor the absence of findings, reasons, and conclusions. Rule 2-603 should expressly require that the trial court make findings, although the court should be doing this anyway. Mr. Brault said that he viewed the motion for attorneys' fees as relating to the issue of allowance, and the memorandum would relate to the amount of the fees. It is common knowledge

that attorneys' fees will be claimed in civil rights cases. In many cases the amount of the fees is not known, and the other side is entitled to know that there is a claim for attorneys' fees and to know it early in the litigation, because often the attorneys' fees are substantially greater than the award of damages. The Chair noted that there was a proposal to allow interim attorneys' fees to be sought during the case, so that the other side would be surprised by a request for a large fee at the end of the case. It does not mean that the fees would necessarily be awarded. Mr. Maloney pointed out that the Fourth Circuit requires quarterly reports on attorney's fees that are accruing.

Mr. Kratovil referred to the issue that was raised earlier in the discussion that there could be an immediate appeal on the merits of the case, and then later a claim for attorneys' fees, which would involve two separate proceedings. He asked if this could be limited. If there were a 15-day requirement to file for the fees, then an appeal could not be filed until after that 15-day period. The Chair responded that the other side, the one not seeking fees, could appeal. Mr. Kratovil reiterated that if there were a 15-day period, then the parties would know of any claim for attorneys' fees. The Chair said that there could be a request of the Court of Special Appeals to stay the judgment but resolution of the fee issue could take many months, during which time the case cannot proceed. Mr. Kratovil remarked that this may be preferable to the case going to the appellate court and

then coming back to the circuit court.

Mr. Brault referred to Mr. Maloney's comment that the federal system requires quarterly reports. There is an issue as to how much information must be disclosed as the case progresses. This would apply to contract as well as civil rights cases. What discovery is allowable -- is it only the amount the lawyer charged, or is it what the lawyer did? This may impinge on work product privilege. Should anything be added to the Rule pertaining to discovery or periodic reports? Mr. Klein noted that the federal guidelines that are included in the meeting materials have a reference to quarterly reports in subsection l. c. Judge Love commented that in the District Court for Prince George's County, about 20,000 to 25,000 debt collection cases are filed. These include credit card debt, leases, and breach of contract. Many of the cases are decided on affidavit. If attorneys' fees have to be applied for outside of the merits of the case, it would grind the District Court to a complete halt. The discussion seems to be concentrating on statutory fee-shifting schemes and Rule 1-341 situations, but the typical request for an attorney's fee in a credit card debt case is provided for in the credit card agreement and is part of the claim. There are not always hearings on these cases. The court shortcuts the matter by using a percentage of the debt. The Chair asked in how many of these cases the contract sets the amount. Judge Love replied that most of the contracts refer to "reasonable fees," which gets into the court's definition of what

is “reasonable.” In Prince George’s County, judges use a shorthand amount of 15% of the principal. Montgomery County uses 25% of the principal. The figure is not linked to anything. There is a provision in the Commercial Law Article that refers to reasonable attorneys’ fees being 15%.

The Chair said that Judge Love had raised a good question as to how this would play out in the District Court, because all of the cases that have triggered this issue have been circuit court cases. Judge Love reiterated that if the District Court had to make an in-depth analysis of the fee petition, the Court would break down. Judge Norton added that this is true even if the contract uses the term “reasonable fee” or suggests a particular number which is a percentage. Judge Love remarked that the contract may provide for fees of not less than 20% or 25%, but it is a problem defining what is “reasonable.” This issue arises in homeowners’ assessment cases where the suit is for $900, but the attorney’s fee is $1300. This has been discussed in the cases that pertain to the proportionality of the attorneys’ fees to what is being sought. He and his colleagues have trouble getting over the intellectual hurdle of awarding more money in attorneys’ fees that greatly exceed the amount of the assessment requested in the complaint. This is a separate issue from whether attorneys’ fees on contract are collateral. The judges subsume them within the case.

The Chair stated that Rule 2-603 will be remanded to the Attorneys Subcommittee. Mr. Brault asked whether the time

periods in the Rule should be 15 or 30 days. Judge Matricciani moved that the time periods be 30 days. The motion was seconded. Ms. Ogletree remarked that it may need to be longer than 30 days, so that the parties know whether there is going to be an appeal. Mr. Leahy noted that the Rule provides that the memorandum is not due until 30 days after the motion. Ms. Ogletree commented that the motion should not be filed until it is known whether there is going to be an appeal. The Chair said that once the motion is filed, the Rule contemplates waiting for the memorandum to be filed. Ms. Potter suggested not addressing the time issues today. Mr. Brault expressed his preference for the idea that liability for attorneys' fees is a separate issue from determination of the amount. The Chair pointed out that the appellate court could reverse the decision as to the fees. Mr. Brault said that the Rule has to be considered with and without an appeal. Judge Matricciani remarked that the judge's ruling on liability may in part depend on the amount of the fee.

Mr. Sutton stated that there are two types of liability. One is on the merits, which may reverse on appeal. The other is for fees. Just because there is liability on the merits of the underlying action does not mean that the attorney is entitled to fees. There are two hurdles to clear. An attorney has to win on the merits and then has to obtain a fee award. Fed. R. Civ. P. 54 (d)(2)(C) states: "The court may decide issues of liability for fees before receiving submissions on the value of services."

The Chair said that there is a motion on the floor to make

the time period 30 days in the Rule. Mr. Klein asked if this is distinguished from 15 days. He reiterated Ms. Ogletree's point that this may have to be longer to see if there is going to be an appeal. Mr. Maloney added that the Subcommittee should address this. The Chair noted that there was a motion on the floor to make the time period 30 days. Judge Matricciani withdrew the motion. The Reporter stated that the next Subcommittee meeting is on May 15, 2008. The Chair added that it would be helpful to have the chairs of the various subcommittees that are connected with this issue attend the meeting.

Mr. Brault raised an issue that he had discussed previously with Mr. Sutton -- who owns the fees? Is it the attorney or the client? Mr. Brault said that he did not think this could be addressed in the Rule. Disputes over this generally are resolved in favor of the client. Mr. Sutton remarked that he had researched this issue. This is addressed in the civil rights cases. The answer probably is that the client owns the fees. How does the attorney obtain an equitable division? The attorney may feel that he or she is entitled to a portion of the fees, or all of them, especially in a contingent fee recovery. Maryland law is different in domestic cases. The statute may specifically state that the fee goes to the attorney. It is helpful to be familiar with the cases and the law to achieve an equitable division. The Chair said that the later *Friolo* case dealt with this issue at the end of the case, holding that when there is an

appeal from the fee award, the client is the appellant. Judge Matricciani added that this is understandable, because if the court does not award the fees, it seems that the client is obligated. The Chair responded that this is a separate issue. Mr. Sutton commented that if the court awards fees in a civil rights case, and the attorney and client claim the fees, who owns the fees? The Ninth Circuit decided this issue in favor of the client.

Proposed Rules 2-603 and 3-603 were remanded to the Attorneys Subcommittee.

Agenda Item 5. Consideration of proposed amendments to: Rule 8-502 (Filing of Briefs) and Rule 8-501 (Record Extract)

Judge Hollander presented Rules 8-502, Filing of Briefs, and 8-501, Record Extract, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 500 - RECORD EXTRACTS, BRIEFS, AND ARGUMENT

AMEND Rule 8-502 (c) to conform to the current requirements of the Court of Special Appeals, as follows:

Rule 8-502. FILING OF BRIEFS

. . .

(c) Filing and Service

In an appeal to the Court of Special Appeals, 15 copies of each brief and ~~seven~~ 10 copies of each record extract shall be filed, unless otherwise ordered by the court. In the Court of Appeals, 20 copies of each brief and record extract shall be filed, unless otherwise ordered by the court. Two copies of each brief and record extract shall be served on each party pursuant to Rule 1-321.

. . .

Rule 8-502 was accompanied by the following Reporter's Note.

Michael Lytle, Esq. noted an inconsistency between Rules 8-501 (a) and 8-502 (c) concerning the number of record extracts to be filed when an appeal to the Court of Special Appeals is filed. Rule 8-501 (a) provides that the number of copies of record extracts to be filed is the same as the number of copies of the brief to be filed. Rule 8-502 (c) provides that 15 copies of each brief and seven copies of each record extract shall be filed. When Mr. Lytle asked a staff person at the Court of Special Appeals what the correct number is, he was told that an administrative order from the Chief Judge of the Court of Special Appeals dated November 1, 2006 is in effect that requires 10 copies of the record extract to be filed. Robert J. Greenleaf, Esq., Chief Deputy Clerk of the Court of Special Appeals, suggests that section (c) of Rule 8-502 be amended to change the number of copies from seven to 10 to conform to the practice in the Court. The Appellate Subcommittee also recommends changing section (a) of Rule 8-501 to refer to Rule 8-502 (c).

CHAPTER 500 - RECORD EXTRACT, BRIEFS,

AND ARGUMENT

AMEND Rule 8-501 (a) to conform to Rule 8-502 (c), as follows:

Rule 8-501. RECORD EXTRACT

(a) Duty of Appellant

Unless otherwise ordered by the appellate court or provided by this Rule, the appellant shall prepare and file a record extract in every case in the Court of Appeals, subject to section (k) of this Rule, and in every civil case in the Court of Special Appeals. The record extract shall be included as an appendix to appellant's brief, or filed as a separate volume with the brief in the ~~same~~ number of copies required by Rule 8-502 (c).

. . .

Rule 8-501 was accompanied by the following Reporter's Note.

See the Reporter's note to the proposed amendment to Rule 8-502.

Judge Hollander explained that there had been some confusion as to the number of copies of the record extract to be filed when an appeal to the Court of Special Appeals is filed. The proposal is to amend Rule 8-502 to clarify that 10 copies of each record extract is to be filed. There is a conforming amendment to Rule 8-501 so that it refers to Rule 8-502. By consensus, the Committee approved the changes to Rules 8-502 and 8-501.

Agenda Item 4. Consideration of a proposed amendment to Rule 15-207 (Constructive Contempt; Further Proceedings)

Ms. Ogletree presented Rule 15-207, Constructive Contempt; Further Proceedings, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 - OTHER SPECIAL PROCEEDINGS

CHAPTER 200 - CONTEMPT

AMEND Rule 15-207 by adding a cross reference following section (e), as follows:

Rule 15-207. CONSTRUCTIVE CONTEMPT; FURTHER PROCEEDINGS

. . .

(e) Constructive Civil Contempt - Support Enforcement Action

(1) Applicability

This section applies to proceedings for constructive civil contempt based on an alleged failure to pay spousal or child support, including an award of emergency family maintenance under Code, Family Law Article, Title 4, Subtitle 5.

Committee note: Sanctions for attorneys found to be in contempt for failure to pay child support may include referral to Bar Counsel pursuant to Rule 16-731. See Code, Family Law Article, §10-119.3.

(2) Petitioner's Burden of Proof

Subject to subsection (3) of this section, the court may make a finding of contempt if the petitioner proves by clear and convincing evidence that the alleged contemnor has not paid the amount owed, accounting from the effective date of the support order through the date of the contempt hearing.

(3) When a Finding of Contempt May Not be Made

The court may not make a finding of contempt if the alleged contemnor proves by a preponderance of the evidence that (A) from the date of the support order through the date of the contempt hearing the alleged contemnor (i) never had the ability to pay more than the amount actually paid and (ii) made reasonable efforts to become or remain employed or otherwise lawfully obtain the funds necessary to make payment, or (B) enforcement by contempt is barred by limitations as to each unpaid spousal or child support payment for which the alleged contemnor does not make the proof set forth in subsection (3)(A) of this section.

Cross reference: Code, Family Law Article, §10-102.

(4) Order

Upon a finding of constructive civil contempt for failure to pay spousal or child support, the court shall issue a written order that specifies (A) the amount of the arrearage for which enforcement by contempt is not barred by limitations, (B) any sanction imposed for the contempt, and (C) how the contempt may be purged. If the contemnor does not have the present ability to purge the contempt, the order may include directions that the contemnor make specified payments on the arrearage at future times and perform specified acts to enable the contemnor to comply with the direction to make payments.

Committee note: Section (e) modifies the holding in *Lynch v. Lynch*, 342 Md. 509 (1996), by allowing a court to make a finding of constructive civil contempt in a support enforcement action even if the alleged contemnor does not have the present ability to purge. In support enforcement cases, as in other civil contempt cases, after making a finding of contempt, the court may specify imprisonment as the sanction if the contemnor has the present ability to purge the

contempt.

If the contemnor does not have the present ability to purge the contempt, an example of a direction to perform specified acts that a court may include in an order under subsection (e)(4) is a provision that an unemployed, able-bodied contemnor look for work and periodically provide evidence of the efforts made. If the contemnor fails, without just cause, to comply with any provision of the order, a criminal contempt proceeding may be brought based on a violation of that provision.

Cross reference: See *Arrington v. Department of Human Resources*, 402 Md. 79 (2007).

Source: This Rule is derived in part from former Rule P4 c and d 2 and is in part new.

Rule 15-207 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 15-207 adds a cross reference to *Arrington v. Department of Human Resources*, 402 Md. 79 (2007).

Ms. Ogletree said that a cross reference to *Arrington v. Department of Human Resources*, 402 Md. 79 (2007) is proposed to be added to Rule 15-207. The case explains the meaning of the rules pertaining to constructive contempt and would be very helpful for the practitioner in child support proceedings.

By consensus, the Committee approved the addition of the cross reference to Rule 15-207.

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