COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Conference Room 1100A of the People's Resource Center, 100 Community Place, Crownsville, Maryland on October 15, 2004.

Members present:

Linda M. Schuett, Esq., Vice Chair

F. Vernon Boozer, 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.
J. Brooks Leahy, Esq.
Hon. John F. McAuliffe
Robert R. Michael, Esq.
Hon. William D. Missouri
Hon. John L. Norton, III
Larry W. Shipley, Clerk
Twilah S. Shipley, Esq.
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Professor John Lynch, University of Baltimore School of Law
Jack L. B. Gohn, Esq.

The Vice Chair convened the meeting. The Reporter announced that the Report of the Judicial Ethics Committee and 153rd Report of the Rules Committee will be heard by the Court of Appeals on November 8, 2004 at 2:00 p.m. She said that Mr. Maloney was a winner of a Leadership in Law Award, and that the Vice Chair had won the Fannie Lou Hamer Award, named for a civil rights activist. The Reporter also stated that the mother-in-law of

Cathy Cox, Administrative Assistant to the Rules Committee, had passed away, so Ms. Cox would not be present for the meeting.

Agenda Item 1. Consideration of proposed new Title 7, Chapter 400, Administrative Mandamus. New Rule 7-401 (General Provisions), New Rule 7-402 (Procedures), New Rule 7-403 (Disposition); Amendments to: Rule 7-301 (Certiorari in the Circuit Court) and Rule 15-701 (Mandamus)

Mr. Sykes, Chair of the Specific Remedies Subcommittee, told the Committee that the Office of the Attorney General had sent comments about the proposed new Administrative Mandamus Rules that were received this morning. A copy of the comments was distributed. (See Appendix 1). The problems with the current Certiorari and Mandamus Rules were set out in a July 2, 2001 memorandum by Jack L. B. Gohn, Esq., a copy of which is in the meeting materials for today. (See Appendix 2). Because there is an overlap between certiorari and mandamus, practitioners often file petitions for both, sometimes not knowing which one to file. Each remedy has procedures that are different and peculiar from procedures in ordinary litigation. There has been a great deal of dispute over discovery in these cases, both as to what kind is appropriate and when it is available. The Court of Appeals considered this issue in *Montgomery County v. Stevens*, 337 Md. 471 (1995). Discovery was one of the issues that caused the proposed Rules to be remanded to the Subcommittee.

Another question that arose was about damages in mandamus actions. It is difficult to know what acts are reviewable and

what remedy is appropriate. The Subcommittee suggests that certiorari review in the circuit courts be eliminated except for review of actions of the District Court and the Orphans' Court. Mandamus has been divided into two categories, administrative mandamus for review of a quasi-judicial order or action of an administrative agency and regular mandamus.

Mr. Sykes presented Rule 7-401, General Provisions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 400 - ADMINISTRATIVE MANDAMUS

ADD new Rule 7-401, as follows:

Rule 7-401. GENERAL PROVISIONS

(a) Applicability

The rules in this Chapter govern actions for judicial review of a quasi-judicial order or action of an administrative agency where review is not authorized by statute or by local law.

Committee note: Where judicial review of an order or action of an administrative agency is authorized by statute, see Rule 7-201 et seq. For review of quasi-judicial actions other than those involving a review of an action by the District Court or an orphans' court, a writ of mandamus is the appropriate remedy.

(b) Definition

> As used in this Chapter, "administrative agency" means any agency, board, department, district, commission, authority, Commissioner, official, or other unit of the State or of a political subdivision of the State.
>
> Committee note: This Rule does not apply to writs of mandamus in aid of appellate jurisdiction.
>
> Source: This Rule is new.

Rule 7-401 was accompanied by the following Reporter's Note.

> Consistent with Jack L. B. Gohn's suggestions to improve the Mandamus Rules, the Subcommittee proposes creating a new set of Rules entitled "Administrative Mandamus" for review of quasi-judicial actions of administrative agencies where review is not authorized by statute. Rule 7-401 is patterned after Rule 7-201 with the necessary distinctions. A Committee note explaining that mandamus is the appropriate remedy for review of quasi-judicial actions other than an action by the District Court or orphans' court has been added for clarity.

Mr. Sykes stressed that section (a) of Rule 7-401 applies only to actions for judicial review of a quasi-judicial order or action. In these cases, there will be a record and a hearing that can be reviewed. It is similar to ordinary appellate review by a circuit court. The Vice Chair asked whether there is a requirement of finality of the decision below. Mr. Sykes replied that for an action or order to be quasi-judicial, it must be final. Mr. Gohn added that the doctrine of exhaustion of administrative remedies applies. Mr. Brault remarked that mandamus involves ordering an entity to do something routine that

is not discretionary. Mandamus could be applicable to interlocutory non-appealable orders. Mr. Sykes said that some statutes have no provision for appeal of actions of administrative agencies. The only review available is by mandamus because of *Heaps v. Cobb*, 185 Md. 372 (1945), which provides that there must be a remedy for an unconstitutional action. Even though a statute does not provide for or forbid an appeal, appellate review cannot be foreclosed. Administrative mandamus is a substitute for an appeal where there is no statutory authority for an appeal.

Judge Kaplan commented that at-will employees who have been discharged from working for the State government use mandamus, since there is no appeal authorized for an at-will employee who has been wrongfully discharged. Mr. Sykes pointed out this would come under regular mandamus, which is applicable when there is no record. When an agency makes a final decision affecting the rights of parties, an appeal is effected by administrative mandamus if there is no statutory right of appeal.

Mr. Brault reiterated that nothing in the Rule requires that an order has to be final before a writ of mandamus is issued. The Vice Chair noted that the same issue arises in the Chapter 200 Rules of Title 7, Judicial Review of Administrative Agency Decisions. Rule 7-201, General Provisions, uses the same language as proposed Rule 7-401: “review of ... an order or action of an administrative agency ...”. Judge Heller suggested

that a reference to the *Heaps* case be added to Rule 7-401. She asked about the comment from Susan Howe Baron, Esq., Assistant Attorney General, which stated that the proposed rules decimate the exclusion of the Parole Commission from the Administrative Procedure Act ("the APA"). Mr. Zarnoch answered that the Parole Commission is excluded from the APA, because the process of petitioning for parole is simplified. Ms. Baron is concerned that the entire record will need to be filed under the proposed Rules. Judge Heller responded that this is not correct. Most of the parole petitions were filed in the Circuit Court for Baltimore City up until eighteen months ago. About 90% of the inmates simply filled out a form. The Attorney General does not always file memoranda in these cases. Judge Heller suggested that memoranda be filed in these cases. Mr. Gohn noted that he did not believe that under administrative or regular mandamus, there would be the necessity to file the entire file. Ms. Baron may have been looking at the certiorari rule, which does not apply.

Judge McAuliffe pointed out a problem in the first Committee note. He suggested that a second sentence be added that would state: "This applies to judicial review not authorized by statute only where there is no other right of appeal provided by statute." Mr. Gohn commented that the language in the Committee note that reads "other than those involving a review of an action by the District Court or an orphans' court" is surplusage, since

these actions are judicial and not quasi-judicial. By consensus, the Committee agreed to delete the language. Mr. Sykes suggested that a reference to the case of *Heaps v. Cobb* should be added to the Committee note. The Committee agreed by consensus to this suggestion.

The Vice Chair questioned as to why adopting administrative mandamus Rules is necessary, instead of amending the current rules of judicial review. Mr. Gohn answered that the Subcommittee's thinking was that there is more of a problem with discovery where the review is not authorized by statute, and the form of action traditionally recognized by the Court of Appeals for non-statutory review is mandamus, which is the common nomenclature and separate from judicial review. The Vice Chair remarked that the proposed new Rules seem to incorporate many of the procedures from Title 7, Chapter 200 of the Rules. In her experience as the County Attorney for Anne Arundel County, suits are filed with no right of review, and they are called a variety of names, including a petition for declaratory relief. Her opinion is that the practice is more akin to judicial review.

Mr. Sykes noted that historically, the *Heaps* case uses certain terminology. Changes to this are sufficiently controversial. It may be necessary to change the nomenclature to eliminate the name of the traditional remedy.

Mr. Sykes drew the Committee's attention to section (b). The Vice Chair asked about the issue of finality to which Mr.

Brault had referred earlier in the discussion. Mr. Sykes responded that there is case law pertaining to exhaustion of administrative remedies. Mr. Gohn said that occasionally, there are situations recognized in case law where there is no finality before judicial review is obtained. If a requirement of finality is put into the Rules, this would not be consistent with the rare cases in which administrative finality is not required as evidenced in *Prince George's County v. Blumberg*, 288 Md. 275 (1980). The issue of finality should be left to case law. Judge McAuliffe suggested that the Committee note could refer to exhaustion of remedies. The Reporter suggested that the language could be to the effect that "ordinarily exhaustion of administrative remedies is required, but see *Prince George's County v. Blumberg*." Mr. Zarnoch suggested that *Holiday Spas v. Montgomery County Human Relations Commission*, 315 Md. 390 (1989), could also be cited in the Committee note. By consensus, the Committee agreed with these suggestions.

By consensus, the Committee approved the Rule as amended.

Mr. Sykes presented Rule 7-402, Procedures, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW

IN CIRCUIT COURT

CHAPTER 400 - ADMINISTRATIVE MANDAMUS

ADD new Rule 7-402, as follows:

Rule 7-402. PROCEDURES

(a) Complaint and Response

An action for a writ of administrative mandamus shall be commenced by the filing of a complaint, the form, contents, and timing of which shall comply with Rules 7-202 and 7-203. The response to the filing of the writ shall comply with the provisions of Rule 7-204.

(b) Stay

The filing of the writ does not stay the order or action of the administrative agency. The court may grant a stay pursuant to Rule 7-205.

(c) Discovery

The court may permit discovery, in accordance with the provisions of Title 2, Chapter 400 that the court finds to be appropriate, but only in cases where the party challenging the agency action makes a strong showing of the existence of fraud or extreme circumstances which occurred outside the scope of the administrative record, and a remand to the agency is not a viable alternative.

(d) Record

If a record exists, the record shall be filed pursuant to Rule 7-206. If no record exists, the agency shall provide (1) a verified response that shall fully set forth the grounds for its decision below and (2) any written materials supporting the decision. The court may remand the matter to the agency for further supplementation of materials supporting the decision.

(e) Memoranda

Memoranda shall be filed pursuant to

Rule 7-207.

(f) Hearing

The court may hold a hearing pursuant to Rule 7-208.

Source: This Rule is new, except that subsection (c) codifies the decision in *Montgomery County v. Stevens*, 337 Md. 471 (1995).

Rule 7-402 was accompanied by the following Reporter's Note.

Rule 7-401 is designed to incorporate many of the procedures of Title 7, Chapter 200. The Subcommittee recommends adding a provision for discovery to be available only upon a showing of fraud or extreme circumstances which occurred outside the scope of the administrative record, and if a remand to the agency is not a viable alternative. This is consistent with the decision in *Montgomery County v. Stevens*, 337 Md. 471 (1995). The Subcommittee has added a provision that would apply if no record exists below.

Mr. Sykes explained that the procedures for this Rule are derived from Title 7, Chapter 200. The Vice Chair asked why a response to a complaint is verified, but the complaint is not. Mr. Sykes replied that when there is an administrative record, the best evidence of the agency proceedings is in the administrative record, which is filed with the court. If no record exists, the verification requirement provides some assurance as to the authenticity of the matters set forth in the response. There is no similar need for verification of the complaint.

Mr. Sykes pointed out that the word "writ" in section (b) should be changed to the word "action," and the Committee agreed by consensus to this change.

Turning to section (c), Mr. Sykes observed that there had been a dispute about the availability of discovery in administrative mandamus cases. After much discussion, the Subcommittee decided to codify the rule in *Montgomery County v. Stevens*, 337 Md. 471 (1995), against the recommendation of Mr. Gohn. This is reflected in the language of section (c). Discovery is limited only to cases where the party challenging the agency action makes a strong showing of fraud or extreme circumstances not reflected in the administrative record.

Judge Heller noted that the APA allows additional evidence to be considered. She asked why section (c) does not follow the APA. Mr. Sykes remarked that the APA allows additional evidence that is generally confined to the merits of the case. This does not take into consideration new developments. It is related to whether the decision below is correct. Mr. Gohn pointed out that the agency may be unprepared to create a record. It may be difficult to establish what happened and to determine the facts. Because administrative decision-makers think that their actions may not be scrutinized, improprieties may occur. The decision in *Stevens* protects the integrity of the process. The Vice Chair observed that the law permits the introduction of additional evidence into a hearing in the administrative mandamus process.

The Title 7, Chapter 200 Rules do not permit extra evidence. Mr. Gohn said that the statutory or APA law gives one a basic framework of evidence available to insure the integrity of the process. This is not so with administrative mandamus, because there is no enabling statute. Rule 7-208 provides: "Additional evidence in support of or against the agency's decision is not allowed unless permitted by law." The Vice Chair inquired as to the source of the language that states that discovery is permitted only in cases where the party challenging the agency action makes a strong showing of the existence of fraud or other extreme circumstances. Mr. Gohn replied that this comes from the *Stevens* decision. Mr. Brault pointed out that Rule 2-535, Revisory Power, provides that the circuit court may exercise revisory power at any time in case of fraud, mistake, or irregularity. He asked why more discovery is allowed when there is no rule or statute available. Mr. Gohn responded that there is not more discovery. The Vice Chair noted that there are disputes over whether discovery is available in the Title 7, Chapter 200 Rules. It might be better to also state in those Rules that discovery is available. Mr. Sykes suggested that a cross reference to the *Stevens* case be added to the appropriate Title 7, Chapter 200 Rule. The Committee agreed by consensus to this suggestion.

The Vice Chair pointed out that section (f) of Rule 7-402 provides that the court <u>may</u> hold a hearing, although it is not

required. Rule 7-208 requires that a hearing be held. Mr. Leahy commented that the word "may" could be changed to the word "shall." Mr. Gohn referred to the written comment from Ms. Baron, who indicated that she was not pleased that sometimes in the Parole Commission cases, a hearing is not held. Mr. Sykes remarked that there should be a hearing in every parole matter. Judge Missouri pointed out that the petition for parole may be totally frivolous. Mr. Gohn responded that it may be difficult to determine if the petition is frivolous. Judge Missouri said that the pleadings may indicate this. The Vice Chair noted that there may be no agency record. Judge Kaplan observed that on its face, the petition may have no merit. The Vice Chair commented that one could make the same argument about the Title 7, Chapter 200 Rules. Mr. Sykes noted that the federal rules permit disposition, including summary judgment motions, without a hearing if the court determines one is not necessary.

Mr. Leahy suggested that the word "may" be changed to the word "shall" in section (f) of Rule 7-402, tracking Rule 7-208 (a) which states: "Unless a hearing is waived in writing by the parties, the court shall hold a hearing." The Vice Chair responded that the intent is not to require a hearing if the claim appears frivolous, but the idea of a dispositive ruling without a hearing is troubling. Judge Missouri remarked that one can rely on the circuit court judge's discretion. The Vice Chair said that she does rely on this, but Rule 7-208 requires a hearing. Judge Heller observed that the Parole Commission cases

automatically have hearings. This will not make more work for the Office of the Attorney General, because these cases are automatically on the fast track. Some judges decide that they may not want a hearing, but Judge Heller said that she always holds a hearing, even if it is a very brief one. Most of the cases are affirmed, but a few are remanded to the Parole Commission. Mr. Sykes inquired as to whether Parole Commission cases are exempted from the APA. Judge Heller replied in the affirmative. Mr. Sykes referred to the concern expressed by Ms. Baron that the exemption of Parole Commission cases from the APA has been decimated. Mr. Zarnoch suggested that the word "may" should be retained. Mr. Leahy commented that section (f) of Rule 7-402 should not refer to Rule 7-208 in its entirety if "may" is not changed to "shall." If "may" is retained, section (f) should refer only to the applicable sections of Rule 7-208. The Reporter suggested that the language of section (f) could read: "The court may hold a hearing in accordance with the procedures set forth in Rule 7-208 (b) and (c)." Judge Norton suggested that the word "shall" should be in section (f), with the waiver language of Rule 7-208 (a) included.

By consensus, the Committee decided to retain the word "may." Mr. Sykes reiterated the Reporter's suggestion that section (f) refer to sections (b) and (c) of Rule 7-208. Mr. Gohn noted that circuit court judges examine petitions for mandamus on their face, so a compromise position could be that different criteria for assessing the petitions could be added to

the Rule. It should not be that judges never hold hearings, but the word "may" appears to make this permissible. Judge McAuliffe added that the petitions on which hearings are held should not be "demurrable" or frivolous. Judge Missouri agreed with Judge McAuliffe. The Reporter suggested that the language of former Rule 345, Demurrer, could be obtained. The Vice Chair suggested that parts of Rule 7-208 should be incorporated into Rule 7-402, including setting the date, rather than simply referring to sections (b) and (c) of Rule 7-208. Judge McAuliffe remarked that the Style Subcommittee could redraft the Rule.

Judge Missouri commented that to require a hearing in all cases is a waste of time. Referring back to the Title 7, Chapter 200 Rules, yet using the word "may" in section (f) may be confusing. Mr. Sykes responded that Rule 7-402 is not using the Title 7, Chapter 200 Rules as authority, just as a model. There is a distinction between the nature of the cases under Rule 7-402 compared to the Title 7, Chapter 200 Rules. The Reporter asked if the Committee agreed with the suggestion to retain the word "may" and incorporate the pertinent parts of Rule 7-208 into Rule 7-402. The Committee agreed by consensus to make these changes.

The Committee approved the Rule as amended.

Mr. Sykes presented Rule 7-403, Disposition, for the Committee's consideration.

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW

IN CIRCUIT COURT

CHAPTER 400 - ADMINISTRATIVE MANDAMUS

ADD new Rule 7-403, as follows:

Rule 7-403. DISPOSITION

The court may issue an order denying the writ of mandamus, or may issue the writ (1) remanding the case for further proceedings, or (2) reversing or modifying the decision if any substantial right of the plaintiff may have been prejudiced because a finding, conclusion, or decision of the agency:

(A) is unconstitutional,

(B) exceeds the statutory authority or jurisdiction of the agency,

(C) results from an unlawful procedure,

(D) is affected by any error of law,

(E) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted,

(F) is arbitrary or capricious, or

(G) is an abuse of its discretion.

Source: This Rule is new.

Rule 7-403 was accompanied by the following Reporter's Note.

Rule 7-403 is patterned after Rule 7-209. The proposed Rule provides for the issuance of a writ of mandamus in place of the order issued pursuant to Rule 7-209. The language in subsections (A) through (F) is taken from the Administrative Procedure Act, State Government Article, §10-222 (h). The

> language of subsection (G) is taken from the concurring opinion by the Honorable Glenn T. Harrell, Jr. in the case MTA v. King, 369 Md. 274 (2002). The Subcommittee is in agreement with Judge Harrell that abuse of discretion should be added to the list of grounds for issuing the writ in judicial review of agency decisions.

Mr. Sykes explained that the list of grounds in Rule 7-403 is taken from the APA, except for the last ground in subsection (G), which is derived from a concurring opinion by the Honorable Glenn T. Harrell in *MTA v. King*, 369 Md. 274 (2002).

Judge McAuliffe inquired as to whether the litany of reasons in Rule 7-403 is consistent with the common law. Mr. Sykes answered that only subsection (D) does not reach constitutional dimensions -- it is an addition. Judge McAuliffe asked if the laundry list is different from the APA. Mr. Gohn replied that only subsection (G) is different. Judge McAuliffe pointed out that an appeal is being created on every ground that is available from the APA, and he asked why there has to be a separate procedure. Mr. Gohn responded that the constitutional and judicial tradition is to title the proceeding "mandamus." Judge McAuliffe observed that legislative bodies create a statutory right of appeal in some situations but not in others, and he questioned the extent of the non-statutory review created by the proposed new Rules. Mr. Gohn replied that the *Heaps* case provides that one gets a genuine review of his or her case regardless of whether the legislature has provided for an appeal.

There is no reason why non-statutory review should not get the benefit of the best practices drawn from the APA and the Title 7, Chapter 200 Rules. Mr. Gohn said that he was unaware of a case that provides that review pursuant to *Heaps* or *Bucktail v. Talbot County*, 352 Md. 530 (1999) is of a lesser magnitude than Title 7, Chapter 200 or APA review.

The Committee, by consensus, approved the Rule as presented.

Mr. Sykes presented Rule 7-301, Certiorari in the Circuit Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW

IN CIRCUIT COURT

CHAPTER 300 - CERTIORARI

AMEND Rule 7-301 to change the word "defendant" to "respondent," to add language to section (a) defining the word "party," to add a Committee note after section (a), to add new language to section (d), and to eliminate the reference to a "show cause order" in section (e), as follows:

Rule 7-301. CERTIORARI IN THE CIRCUIT COURT

(a) Applicability; Definitions

This Rule governs applications in the circuit court for a writ of certiorari. As used in this Rule, ~~"defendant"~~ "respondent" means the ~~person or body~~ District Court or the Orphans' Court whose acts are sought to be reviewed. As used in this Rule, "party" means any party to a proceeding in the District Court or Orphans' Court other than the petitioner or petitioners in the circuit court.

Committee note: For review of quasi-judicial actions other than those involving a review of an action by the District Court or an orphans' court, a writ of mandamus is the appropriate remedy.

(b) Petition

An application for a writ of certiorari shall be by petition filed in the circuit court for the county where the acts sought to be reviewed take, have taken, or

would take effect. ~~and~~ The petition shall name as ~~defendant~~ respondent the ~~person or body~~ court whose acts are sought to be reviewed and the names and addresses of all known parties in the proceeding with respect to which the review by the circuit court is sought. The petition shall be under oath and shall contain (1) ~~a description~~ the name of the ~~defendant~~ respondent, ~~and of~~ (2) the matter sought to be reviewed, ~~(2)~~ (3) a statement of the interest of the ~~plaintiff~~ petitioner in the matter, and ~~(3)~~ (4) ~~a statement of~~ the facts relied on to show that the ~~defendant~~ respondent lacked jurisdiction or committed unconstitutional acts reviewable by writ of certiorari.

(c) Action on Petition; Bond

Upon the filing of a petition, the court shall (1) issue an order requiring the ~~defendant~~ respondent to file a response by a specified date ~~stated in the order~~ showing cause why the writ should not issue, or (2) issue a writ of certiorari to the ~~defendant~~ respondent, requiring the production by a specified date of all records of the ~~defendant~~ respondent in the matter by a date stated in the writ, or (3) dismiss the petition if the court determines from the petition that it lacks jurisdiction. Before issuing a writ of certiorari, the court may require the ~~plaintiff~~ petitioner to file a bond conditioned on the payment to any person of any damages sustained because of the issuance of the writ if the court ultimately determines that the writ should not have issued.

Cross reference: Title 1, Chapter 400.

(d) Service and Notice

~~A copy of the petition, any show cause order, and any writ of certiorari shall be served upon the defendant, or if the defendant is not an individual, upon an official of the defendant in the manner provided by Rule 2-121. Service of a writ of certiorari shall stay all further proceedings by the defendant. The court may require~~

~~notice of the certiorari proceeding to be given to any other person.~~ Upon filing the petition, the petitioner shall deliver to the clerk one additional copy of the petition for the respondent and one additional copy for each party. The petitioner shall also notify the other parties in conformity with Rule 1-351 (b). The clerk shall promptly mail copies of the petition to the clerk of the respondent and to the parties, informing the respondent and the parties of the date the petition was filed and the civil action number assigned to the petition. Along with the copy to the respondent and to each party, the clerk of the circuit court shall give written notice that:

(1) a petition for certiorari has been filed, the date of the filing, the name of the court, and the civil action number; and

(2) a respondent or party wishing to oppose the petition must file a response within 30 days after the date the clerk's notice was mailed unless the court shortens or extends the time.

(e) Hearing

(1) When No Response is Filed

If no response to a petition is filed, the court may issue the writ without a hearing.

~~(1)~~ (2) When ~~Show Cause Order Issued~~ a Response is Filed

If the ~~defendant~~ respondent or a party files a response to a ~~show cause order~~ petition, the court shall hold a hearing to determine its own jurisdiction and whether to issue the writ. ~~If no response is filed, the court may issue the writ without a hearing.~~

~~(2)~~ (3) When Writ Issued

Upon the return of the writ and the production by the ~~defendant~~ respondent of its records, the court shall first determine if it has jurisdiction and, if so, shall review

the jurisdiction and constitutionality of the acts of the ~~defendant~~ respondent.

(f) Motion to Intervene

Any person whose interest may be affected adversely by the certiorari proceeding may move to intervene pursuant to Rule 2-214.

Source: This Rule is derived from former Rules K41 through K48.

Rule 7-301 was accompanied by the following Reporter's Note.

Jack L. B. Gohn, Esq., proposed changes to the Rules governing certiorari and mandamus. After considering his thorough research and drafting, the Specific Remedies Subcommittee recommends narrowing the scope of certiorari so that it applies only to review of actions of a judicial rather than an administrative tribunal. The recommendation is that review of administrative agency actions where review is not authorized by statute, will be pursuant to a set of new rules proposed for addition to Title 7, Chapter 400, entitled Administrative Mandamus.

The Subcommittee proposes to change the word "defendant" to "respondent" in Rule 7-301 since the Rule is proposed to apply to review of actions of the District Court or orphans' court only. Language has been added explaining that the term "party" will now be used in the Rule to mean someone involved in the proceeding other than the petitioners. A Committee note is proposed which will direct the bar to the new Administrative Mandamus Rules for review of quasi-judicial actions other than those reviewing District Court or orphans' court actions.

Section (d) has been changed to set out in more detail the procedures for service and notice which are currently very limited and to eliminate a show cause order procedure.

> In section (e) the Subcommittee proposes adding a new subsection (1) which provides that a court may issue the writ of certiorari without a hearing if no response to the petition is filed, using the language now in current subsection (e)(1). A provision for a hearing when a show cause order is issued is in the current rule. The Subcommittee recommends deleting the language referring to the show cause order and substituting in its place a provision for a hearing when a response is filed consistent with the proposed changes to section (d).
>
> The Subcommittee is also proposing style changes to sections (b) and (c).

Mr. Sykes explained that the proposed amendment to the Rule limits it to the review of actions of the Orphans' Court and the District Court. The filing of the petition initiates the procedure. The new language fills in some gaps, such as the addition of a notice provision, but there are no substantive changes. Judge McAuliffe pointed out that there is a change in subsection (d)(1). Previously, the writ of certiorari was served on the parties, but this has been changed to indicate that the clerk is to mail copies of the petition. Mr. Sykes noted that the term "party" is defined in section (a). Anyone who took part in the case below gets notice. Mr. Gohn said that the new language ensures that anyone who is not the petitioner will get notice, and this is an improvement.

Mr. Michael asked why the clerk, and not the petitioner, is required to serve process. Mr. Gohn answered that this procedure works well in the Title 7, Chapter 200 Rules. This is a matter of notice and not service. Judge McAuliffe added that the clerk

has the most current address for each of the parties, and the procedure works well. He pointed out that the Committee note after section (a) needs to be changed to conform to the changes to the Committee note after section (a) of Rule 7-401. The Committee approved the Rule as presented, except for amending the Committee note after section (a).

Mr. Sykes presented Rule 15-701, Mandamus, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 - OTHER SPECIAL PROCEEDINGS

CHAPTER 700 - MANDAMUS

AMEND Rule 15-701 to add a Committee note after section (a) and to delete section (d), as follows:

Rule 15-701. MANDAMUS

(a) Commencement of Action

Except as provided in Rules 7-401 et seq., an action for a writ of mandamus shall be commenced by the filing of a verified complaint, the form and contents of which shall comply with Rules 2-303 through 2-305. The plaintiff shall have the right to claim and prove damages, but a demand for general relief shall not be permitted.

Committee note: Except for the requirement of filing a verified complaint, because a mandamus action is similar to an ordinary civil proceeding, the Discovery Rules and the Title 5 Rules apply. Code, Courts Article, §3-8B-02 provides: "An action for a writ of mandamus shall be tried by a jury on request of either party." This has been judicially

interpreted to apply to fact questions. See *Cicala v. Disability Review Board for Prince George's County*, 288 Md. 254 (1980).

For review of quasi-judicial rulings of administrative agencies where judicial review is not authorized by statute, see Rule 7-401.

This Rule does not apply to writs of mandamus in aid of appellate jurisdiction.

(b) Defendant's Response

The defendant may respond to the complaint as provided in Rule 2-322 or Rule 2-323. An answer shall be verified and shall fully and specifically set forth all defenses upon which the defendant intends to rely~~, but the defendant shall not assert any defense that the defendant might have relied upon in an answer to a previous complaint for mandamus by the same plaintiff for the same relief~~.

(c) Amendment

Amendment of pleadings shall be in accordance with Rule 2-341.

~~(d) Ex Parte Action on Complaint~~

~~(1) Upon Default by Defendant~~

~~If the defendant is in default for failure to appear , the court, on motion of the plaintiff, shall hear the complaint ex parte. The plaintiff shall be required to introduce evidence in support of the complaint. If the court finds that the facts and law authorize the granting of the writ, it shall order the writ to issue without delay. Otherwise, the court shall dismiss the complaint.~~

~~(2) Upon Striking of Defendant's Answer~~

~~If the court grants a motion to strike an answer filed pursuant to Rule 2-322 (c) and the court does not permit the filing of an amended answer, the court may enter an~~

~~order authorizing the writ to issue without requiring the plaintiff to introduce evidence in support of the complaint.~~

~~(e)~~ (d) Writ of Mandamus

(1) Contents and ~~Time for~~ Compliance

The writ shall be peremptory in form and shall require the defendant to perform immediately the duty sought to be enforced~~. For~~ , unless for good cause shown~~, however,~~ the court ~~may~~ extends the time for compliance. ~~It shall not be necessary for the writ to~~ The writ need not recite the reasons for its issuance.

(2) Certificate of Compliance

Immediately after compliance, the defendant shall file a certificate stating that all the acts commanded by the writ have been fully performed.

(3) Enforcement

Upon application by the plaintiff, the court may proceed under Rule 2-648 against a party who disobeys the writ.

~~(f)~~ (e) Adequate Remedy at Law

The existence of an adequate remedy in damages does not preclude the issuance of the writ unless the defendant establishes that property exists from which damages can be recovered or files a sufficient bond to cover all damages and costs.

Source: This Rule is derived from former Rules BE40, BE41, BE43, BE44, BE45, and BE46.

Rule 15-701 was accompanied by the following Reporter's Note.

The Specific Remedies Subcommittee proposes changes to Rule 15-701, Mandamus, including a reference to proposed new Rules 7-401 et seq., and the addition of a

> Committee note to section (a) that clarifies that the Discovery Rules and the Title 5 Rules apply to mandamus actions and that refers to the case of *Cicala v. Disability Review Board*, 288 Md. 254 (1980) to make clear when a jury trial is appropriate in mandamus cases. The Subcommittee is also proposing style changes to section (d). Section (d), Ex Parte Action on Complaint, has been stricken, because issues involving default or motions to strike are governed by the general civil rules.

Mr. Sykes commented that form and contents of the complaint are like a civil action governed by the Rules in Title 2, except that the complaint must be verified. The Rule also provides for a verified answer and for amendments. The part of the Rule that provides for an ex parte action has not been included in Rule 7-301 and is proposed to be deleted from Rule 15-701. The Vice Chair noted that the Honorable Paul Niemeyer, Circuit Judge for the United States Court of Appeals for the Fourth Circuit, who was formerly a member of the Rules Committee and who collaborated with the Vice Chair on the book, Maryland Rules Commentary, wrote the section in the book on injunctions and mandamus. He and the Vice Chair had discussed the fact that a demand for general relief is not permitted in mandamus actions because mandamus is not an ordinary civil action. Mr. Sykes added that there is no demand for general relief in mandamus actions because the purpose of the writ is very limited – commanding someone to do something.

The Vice Chair asked whether the Subcommittee considered eliminating the verification requirement. Mr. Sykes responded

that the verification requirement is similar to the affidavit requirement in a motion for summary judgment. If one makes his or her case in the complaint, it may not be necessary to introduce evidence, especially if the respondent does not file an answer. The verified complaint is an historical remnant. The Subcommittee was hesitant to change it. Mr. Zarnoch said that taking out the requirement of a verified complaint would not hurt anything. Mr. Brault remarked that the verification requirement forces the attorney to make sure that the client reads the complaint. Mr. Sykes observed that the requirement could be removed. Mr. Zarnoch added that the requirement could also be removed for answers. The Committee agreed by consensus to remove the verification requirement for complaints and answers.

Mr. Klein inquired as to whether the exception referred to in section (a) is necessary. Mr. Gohn replied that it should remain in the Rule, because administrative mandamus is on a different track. Otherwise, an ambitious plaintiff will want all of the discovery available under conventional mandamus. Judge McAuliffe suggested that the phrase "Except as provided in Rules 7-401 et seq." should not be included in section (a) and that the phrase "other than administrative mandamus" should be added between the phrases "writ of mandamus" and "shall be commenced." Alternatively, a new "applicability" section could be added at the beginning of the Rule, and appropriate modifications made to the proposed new Committee note. The Committee agreed by consensus with Judge McAuliffe's suggestions.

The Committee approved Rule 15-701 as amended.

Agenda Item 2. Consideration of proposed amendments to certain Rules recommended by the Process, Parties, & Pleading Subcommittee: Rule 2-202 (Capacity), Rule 2-506 (Voluntary Dismissal), Rule 3-202 (Capacity), and Rule 3-506 (Voluntary Dismissal)

Mr. Brault presented Rules 2-202, Capacity; 2-506, Voluntary Dismissal; 3-202, Capacity; and 3-506, Voluntary Dismissal, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 200 - PARTIES

AMEND Rule 2-202 by adding a new section (c), as follows:

Rule 2-202. CAPACITY

(a) Generally

Applicable substantive law governs the capacity to sue or be sued of an individual, a corporation, a person acting in a representative capacity, an association, or any other entity.

(b) Suits by Individuals Under Disability

An individual under disability to sue may sue by a guardian or other like fiduciary or, if none, by next friend, subject to any order of court for the protection of the individual under disability. When a minor is in the sole custody of one of its parents, that parent has the exclusive right to sue on behalf of the minor for a period of one year following the accrual of the cause of action,

and if the custodial parent fails to institute suit within the one year period, any person interested in the minor shall have the right to institute suit on behalf of the minor as next friend upon first mailing notice to the last known address of the custodial parent.

(c) Settlement of Suits on Behalf of Minors

A next friend who brings an action for the benefit of a minor may settle the claim. If the next friend is not a parent or person *in loco parentis* of the child, the settlement is not effective unless approved by the parent or person *in loco parentis*. If both parents are dead and there is no person responsible for the care and custody of the child, the settlement is not effective unless approved by the court in which the suit is pending. Approval may only be granted on written application by the next friend under oath, stating the facts of the case and why the settlement is in the best interest of the child.

~~(c)~~ (d) Suits Against Individuals Under Disability

In a suit against an individual under disability, the guardian or other like fiduciary, if any, shall defend the action. The court shall order any guardian or other fiduciary in its jurisdiction who fails to comply with this section to defend the individual as required. If there is no such guardian or other fiduciary, the court shall appoint an attorney to represent and defend the individual.

Source: This Rule is derived as follows:
Section (a) is new.
Section (b) is derived from former Rule 205 c and d.
Section (c) is new.
Section ~~(c)~~ (d) is derived from former Rule 205 e 1 and 2.

Rule 2-202 was accompanied by the following Reporter's note.

Chapter 553, (HB 1520), Acts of 2004 added a provision which allows a parent of a minor or a person *in loco parentis* of the minor to settle a claim under a liability insurance policy brought by the parent or person *in loco parentis* for the benefit of the minor before suit is filed. The Process, Parties & Pleading Subcommittee recommends adding a new section to Rule 2-202.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE — CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-506 by adding a cross reference, as follows:

Rule 2-506. VOLUNTARY DISMISSAL

. . .

Cross reference: For settlement of suits on behalf of minors, see Code, Courts Article, §6-405. For settlement of a claim under a liability insurance policy brought by a parent as person *in loco parentis* but not yet in suit, see Code, Insurance Article, §9-113.

. . .

Rule 2-506 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 2-202.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 200 - PARTIES

AMEND Rule 3-202 by adding a new section (c), as follows:

Rule 3-202. CAPACITY

(a) Generally

Applicable substantive law governs the capacity to sue or be sued of an individual, a corporation, a person acting in a representative capacity, an association, or any other entity.

(b) Suits by Individuals Under Disability

An individual under disability to sue may sue by a guardian or other like fiduciary or, if none, by next friend, subject to any order of court for the protection of the individual under disability. When a minor is in the sole custody of one of its parents, that parent has the exclusive right to sue on behalf of the minor for a period of one year following the accrual of the cause of action, and if the custodial parent fails to institute suit within the one year period, any person interested in the minor shall have the right to institute suit on behalf of the minor as next friend upon first mailing notice to the last known address of the custodial parent.

(c) Settlement of Suits on Behalf of Minors

A next friend who brings an action for the benefit of a minor may settle the claim. If the next friend is not a parent or person *in loco parentis* of the child, the settlement is not effective unless approved by the parent or person *in loco parentis*. If both

parents are dead and there is no person responsible for the care and custody of the child, the settlement is not effective unless approved by the court in which the suit is pending. Approval may only be granted on written application by the next friend under oath, stating the facts of the case and why the settlement is in the best interest of the child.

~~(c)~~ (d) Suits Against Individuals Under Disability

In a suit against an individual under disability, the guardian or other like fiduciary, if any, shall defend the action. The court shall order any guardian or other fiduciary in its jurisdiction who fails to comply with this section to defend the individual as required. If there is no such guardian or other fiduciary, the court shall appoint an attorney to represent and defend the individual.

Source: This Rule is derived as follows:
Section (a) is new.
Section (b) is derived from former M.D.R. 205 c and d.
Section (c) is new.
Section ~~(c)~~ (d) is derived from former M.D.R. 205 e.

Rule 3-202 was accompanied by the following Reporter's Note.

The proposed amendments to Rules 3-202 and 3-506 conform the Rules to the proposed amendments to Rules 2-202 and 2-506, respectively.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 500 - TRIAL

AMEND Rule 3-506 by adding a cross reference as follows:

Rule 3-506. VOLUNTARY DISMISSAL

. . .

Cross reference: For settlement of suits on behalf of minors, see Code, Courts Article, §6-405. For settlement of a claim under a liability insurance policy brought by a parent as person *in loco parentis* but not yet in suit, see Code, Insurance Article, §9-113.

. . .

Rule 3-506 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 3-202.

Mr. Brault explained that Mr. Zarnoch had advised the Legislative Subcommittee of a new statute, Chapter 553 (HB1520), Acts of 2004, that added §19-113 to the Insurance Article of the Code, allowing a parent of a minor to settle a claim under a liability insurance policy brought by the parent for the benefit of the minor before suit is filed. The Process, Parties, and Pleading Subcommittee had considered how the statute would affect the Rules of Procedure. Mr. Brault had pointed out to the Subcommittee that there is a statute, Courts and Judicial Proceedings, §6-405, Settlement of Suit by Infant, which allows

an action brought by a next friend for the benefit of a minor to be settled by the next friend without court approval. Very few people know about the statute, and it is difficult to find. No existing Rule pertains to settlement of claims for the benefit of minors before litigation. The Rules in Chapter 2 relate to litigation.

A reference to the old statute could be placed in with the Rules pertaining to litigation, and a Cross reference or Committee note concerning the new statute could be placed somewhere in the Rules. Since the new statute does not pertain to litigation, the question is where to put these changes. There are three possibilities: in Rule 2-202, Capacity; in Rule 2-506, Voluntary Dismissal; or in both Rules. The language in Rule 2-202, that appears in the meeting materials, is the language of Code, Courts Article, §6-405, verbatim. A cross reference to Code, Insurance Article, §19-113, which is applicable when no suit has been filed, could be worthwhile addition to this Rule.

Mr. Michael commented that the legislation refers to three classes of people: parents, persons *in loco parentis*, and next friends. Cases in suit can be settled by any of the three classes of persons, not only next friends. Mr. Sykes inquired as to whether there can be a next friend if the case is not in suit. Mr. Brault replied that if the case is not in suit, there can only be a parent or a person *in loco parentis*. Mr. Michael added that the remedy of a suit by a next friend is available only

where there is no parent or person *in loco parentis*. Mr. Sykes noted that one cannot be a next friend unless one goes to court. Mr. Brault pointed out that the Insurance Code requires that settlement money that is more than $2000 must be invested. Judge Heller suggested that Rule 2-202 should contain a reference to Code, Courts Article, §6-405.

The Vice Chair observed that the subject of Rule 2-202 is the capacity to sue. A rule on settlement of the action does not belong in Rule 2-202. She asked whether a cross reference could provide what the underlined language currently provides in Rule 2-202. Mr. Brault responded that the problem is whether to use Rule 2-202 or 2-506. The dismissal rule may be appropriate because a case is being dismissed based upon the settlement. The Vice Chair asked whether it would be sufficient to put the proposed new language in Rule 2-506. Mr. Brault answered that it would be sufficient along with the addition of a cross reference or Committee note in Rule 2-202. The Vice Chair said that the proposed new cross reference that appears in Rule 2-506 in the meeting materials can be used as a cross reference in Rule 2-202. Mr. Brault agreed, stating that the cross references will alert people to the new statute and the current statute in the Courts Article.

Judge McAuliffe suggested that the second sentence of new section (c) of Rule 2-202 should read as follows: “If the next friend is not a parent or person *in loco parentis* of the child,

the settlement is not effective unless approved by the parent or person *in loco parentis* or approved by the court after notice to any parent." Mr. Brault pointed out that the current language is taken directly from the statute. Judge McAuliffe inquired as to whether the court should have the right to approve the settlement, if the next friend brings the suit. Judge Heller remarked that the next friend could be the parent or person *in loco parentis*. The statute provides that the court can approve the settlement. Judge McAuliffe observed that if the next friend is not the parent, this is the way to have the settlement approved. Mr. Sykes commented that this is not appropriate as a cross reference, because the procedures regarding the oath need to be in the Rule.

Judge McAuliffe suggested that the Rule could augment the statute and give the court the authority to approve the settlement without parental approval. The Committee agreed to this suggestion by consensus. Mr. Brault suggested that in place of Judge McAuliffe's suggested language, the following language could be added: "...unless the parent or person *in loco parentis* does not approve the settlement." Judge McAuliffe commented that the Style Subcommittee can draft the appropriate language.

Mr. Sykes remarked that often one parent approves the settlement, while the other one does not. Mr. Brault noted that the more common situation is that the parents are fighting over who gets control of the settlement money. The court can take

steps, such as setting up a guardianship or a trust. The Vice Chair pointed out that if a parent can not be found, it can be a difficult situation. Judge McAuliffe added that if the parent did not bring the action, there is a built-in conflict. Some kind of mechanism is needed in the Rule. Mr. Michael said that anyone can apply to be next friend and go to court to seek approval of the settlement. Mr. Brault suggested that the following language be added after the word "child" and before the words "the settlement" in section (c) "or one or both parents do not approve of the settlement." The Committee agreed by consensus to this change.

The Reporter asked if the language of the statute should be left in the Rule. Mr. Brault answered that it should be left in the Rule, and he inquired as to where the language should go. Mr. Sykes commented that one may not know to look in Rule 2-506 to find this. Mr. Brault asked where the suggested cross references should be placed. The Vice Chair said that the cross references can go in Rule 2-506, and the explanatory language can stay in Rule 2-202. Judge McAuliffe commented that a Committee note could be added at the end of Rule 2-202 pointing out that Code, Insurance Article, §19-113 applies when a case is not in suit. The Vice Chair remarked that it is logical to refer to settlement of a claim in Rule 2-506. Judge McAuliffe suggested that a cross reference to Rule 2-202 be added to Rule 2-506. The Committee agreed by consensus to the proposed changes to Rules 2-202 and 2-506 and to parallel changes to Rules 3-202 and 3-506.

Agenda Item 3. Consideration of a proposed amendment to Rule 2-401 (General Provisions Governing Discovery)

Mr. Klein presented Rule 2-401, General Provisions Governing Discovery, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-401 to require the prompt filing of a certain notice, as follows:

Rule 2-401. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods

Parties may obtain discovery by one or more of the following methods: (1) depositions upon oral examination or written questions, (2) written interrogatories, (3) production or inspection of documents or other tangible things or permission to enter upon land or other property, (4) mental or physical examinations, and (5) requests for admission of facts and genuineness of documents.

(b) Sequence and Timing of Discovery

Unless the court orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery. The court may at any time order that discovery be completed by a specified date or time, which shall be a reasonable time after the action is at issue.

(c) Discovery Plan

The parties are encouraged to reach agreement on a plan for the scheduling and completion of discovery.

(d) Discovery Material

(1) Defined

For purposes of this section, the term "discovery material" means a notice of deposition, an objection to the form of a notice of deposition, the questions for a deposition upon written questions, an objection to the form of the questions for a deposition upon written questions, a deposition transcript, interrogatories, a response to interrogatories, a request for discovery of documents and property, a response to a request for discovery of documents and property, a request for admission of facts and genuineness of documents, and a response to a request for admission of facts and genuineness of documents.

(2) Not to be Filed with Court

Except as otherwise provided in these rules or by order of court, discovery material shall not be filed with the court. Instead, the party generating the discovery material shall serve the discovery material on all other parties and shall promptly file with the court a notice stating (A) the type of discovery material served, (B) the date and manner of service, and (C) the party or person served. The party generating the discovery material shall retain the original and shall make it available for inspection by any other party. This section does not preclude the use of discovery material at trial or as exhibits to support or oppose motions.

Cross reference: Rule 2-311 (c).

Committee note: Rule 1-321 requires that the notice be served on all parties. Rule 1-323 requires that it contain a certificate of

service. Parties exchanging discovery material are encouraged to comply with requests that the material be provided in a word processing file or other electronic format.

(e) Supplementation of Responses

Except in the case of a deposition, a party who has responded to a request or order for discovery and who obtains further material information before trial shall supplement the response promptly.

(f) Substitution of a Party

Substitution of a party pursuant to Rule 2-241 does not affect the conduct of discovery previously commenced or the use of the product of discovery previously conducted.

(g) Stipulations Regarding Discovery Procedure

Unless the court orders otherwise, the parties by written stipulation may (1) provide that a deposition may be taken before any person, at any time or place, upon any notice, and in any manner and, when so taken, may be used like other depositions and (2) modify the procedures provided by these rules for other methods of discovery, except that the parties may not modify any discovery procedure if the effect of the modification would be to impair or delay a scheduled court proceeding or conference or delay the time specified in a court order for filing a motion or other paper.

Source: This Rule is derived as follows:
Section (a) is derived from FRCP 26 (a).
Section (b) is derived from FRCP 26 (d).
Section (c) is new.
Section (d) is new.
Section (e) is derived from former Rule 417 a 3.
Section (f) is derived from former Rule 413 a 5.
Section (g) is derived in part from FRCP 29 and former Rule 404 and is in part new.

Rule 2-401 was accompanied by the following Reporter's Note.

> In *Attorney Grievance v. Hermina*, 379 Md. 503 (2004), a party claimed that it had served "discovery material" (as defined in Rule 2-401 (d)(1)) on the opposing party a year earlier than the date on which the serving party actually filed the "notice of service of discovery materials." The Court observed that Rule 2-401 (d)(2) is silent as to when such a certificate of service must be filed, but the Court stated that "the Court certainly anticipated that the notice would be filed contemporaneously with service of the material, not a year later. The purpose of the notice filed with the court is to document both the fact that the discovery was served and when it was served. An *ex post facto* filing of the notice hardly serves either purpose and, indeed, can lead to considerable mischief, if not outright fraud." *Attorney Grievance v. Hermina*, 379 Md. 503 (2004) (at p. 514, footnote 3).
>
> The Discovery Subcommittee considered an amendment to Rule 2-401 that would have added the word "contemporaneously" to subsection (d)(2). The Subcommittee reviewed the results of a search of the Maryland Rules for the use of the word "contemporaneously." There are eight uses of the word, all but one of which deal with witnesses statements that are "contemporaneously recorded" and the other (Rule 5-106) deals with contemporaneous consideration of related writings or witnesses statements.
>
> The Subcommittee instead recommends that Rule 2-401 (d)(2) be amended by adding the word "promptly" to it. The Subcommittee believes the proposed addition is consistent with the 196 other instances in which the word "promptly" is used in the Maryland Rules and addresses the concerns that the Court expressed in footnote 3 of *Hermina*.

Mr. Klein told the Committee that the proposed change is a

result of the decision in *Attorney Grievance Commission v. Hermina*, 379 Md. 503 (2004). The respondent in that case claimed that discovery materials were served on the opposing party a year before the date on which the respondent actually filed the notice of service of discovery materials. The Honorable Alan M. Wilner, of the Court of Appeals, who authored the opinion, pointed out in a footnote that the Rule does not specify when the notice must be filed with the court. The Discovery Subcommittee discussed this problem and recommended that the word "promptly" be added to subsection (d)(2). Judge Wilner's footnote stated:

> ... in adopting the Rule, the Court certainly anticipated that the notice would be filed contemporaneously with service of the material, not a year later. The purpose of the notice filed with the court is to document both the fact that the discovery was served and when it was served. An *ex post facto* filing of the notice hardly serves either purpose and, indeed, can lead to considerable mischief, if not outright fraud. (*Hermina*, at p. 514, footnote 3).

The Subcommittee had considered adding the word "contemporaneously" instead of the word "promptly." The Reporter noted that a computer search of the Rules of Procedure revealed that the word "contemporaneously" is used eight times in the Rules, while the word "promptly" appears 196 times. The word "contemporaneously" is used mostly in Rules that pertain to "contemporaneously recorded" statements of witnesses, which is not applicable to this situation.

Mr. Brault said that he had been counsel in the *Hermina* disciplinary proceeding. This was a situation where no one had realized that the notice had not been filed around the time the discovery was served. Mr. Brault inquired as to the penalty if the notice is not filed. The purpose of the notice is so that the court can review the files to see if discovery is outstanding. There is no impact on the parties, because the discovery has been served on them. The court does not read the notice until the pretrial setting. Forgetting the notice is simply a secretarial error. Mr. Klein observed that a benefit of filing the notice is that an attorney can check the docket entries and contact the opposing party if there is a problem.

The Vice Chair suggested that the new language could be "... shall promptly mail for filing ...". Judge Heller remarked that it is important to use the word "promptly," because some attorneys wait a week or a month to file the notice. The Vice Chair questioned as to whether the notice requirement is being deleted in the federal rules. Mr. Sykes pointed out that omission of the notice does not preclude the use of the discovery material. There is no substantive effect if no notice is filed. The Vice Chair added that she has never found the notice to be of help to anyone, and there is no sanction in the Rule if the notice is not filed. Mr. Brault noted that in his office, interrogatories are sent every day, and he does not check to see if his secretary has filed the notice required by the Rule.

Judge McAuliffe suggested that language be added to the Rule to avoid the claim that the discovery material was served earlier. Mr. Brault observed that the filing of the notice does not prove that the attorney sent the discovery material. The question of whether a failure to file the notice renders the discovery ineffective even if the discovery material was otherwise served has to be discussed. Mr. Sykes remarked that this could be a terrible trap for attorneys. Judge McAuliffe commented that this is not the intended sanction for a failure to file the notice. The Rule should state when the notice is to be filed. Mr. Sykes added that with no sanction or a failure to file the notice, this time frame is aspirational.

Mr. Michael commented that since discovery material is served, the notice should also be served, not filed. The Vice Chair suggested that this matter be deferred so that federal practice can be researched. Mr. Klein expressed the view that the Rule needs to explicitly state when the notice should be filed. The Vice Chair pointed out that 99.9% of these notices have no meaning, since discovery no longer is filed. The Reporter commented that a promptly filed notice provides some evidence as to service of the discovery. Mr. Michael added that to the extent that the judge reviews the file, the status of the case is available. Mr. Klein noted that it is part of the court checklist. He agreed that the matter could be held for further research. Judge Norton remarked that Rule 3-401 contains a parallel provision. Judge McAuliffe suggested that the matter be

brought back to a later meeting. By consensus, the Committee agreed to this suggestion.

Agenda Item 4. Consideration of a proposed "housekeeping" amendment to Rule 9-202 (Pleading)

The Reporter presented Rule 9-202 for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 200 - DIVORCE, ANNULMENT, ALIMONY,

CHILD SUPPORT, AND CHILD CUSTODY

AMEND Rule 9-202 (b) to conform to a recent statutory change, as follows:

Rule 9-202. PLEADING

. . .

(b) Child Custody

When child custody is an issue, each party shall provide in the party's first pleading the information required by Code, Family Law Article, ~~§9-209~~ §9.5-209 (a).

. . .

Rule 9-202 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 9-202 conforms the Rule to Chapter 502, Acts of 2004 (HB400), which repealed the Uniform Child Custody Jurisdiction Act and enacted the Uniform Child Custody Jurisdiction and Enforcement Act.

The Reporter explained that section (b) has an incorrect

citation to the Uniform Child Custody Jurisdiction Act which was repealed in 2004. The new citation is to the current Uniform Child Custody Jurisdiction and Enforcement Act, enacted in 2004.

The Committee agreed by consensus to this change.

The meeting was adjourned.