COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100A of the People's Resource Center, 100 Community Place, Crownsville, Maryland, on February 15, 2002.

Members present:

Linda M. Schuett, Esq., Vice Chair

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Robert L. Dean, Esq.
Hon. James W. Dryden
Hon. Ellen M. Heller
Bayard Z. Hochberg, Esq.
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Joyce H. Knox, Esq.
Hon. John F. McAuliffe
Hon. William D. Missouri
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Larry W. Shipley, Clerk
Melvin J. Sykes, Esq.
Roger W. Titus, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
LaKeisha Wright (Intern for Harry S. Johnson, Esq.)
Albert Winchester, III, Maryland State Bar Association
Pamela J. White, Esq., Maryland State Bar Association
Elizabeth B. Veronis, Esq., Administrative Office of the Courts
M. Peter Moser, Esq.
Steve Lemmey, Esq., Investigative Counsel, Commission on Judicial Disabilities

In the absence of the Chair, the Vice Chair convened the meeting. She welcomed the newest member of the Rules Committee, the Honorable John L. Norton, III, a District Court judge from Dorchester County. The Vice Chair told the Committee about the

death of the son of Alexander G. Jones, Esq., a former member of the Committee.

The Vice Chair said that the Court of Appeals adopted Rule 6.1, Pro Bono Publico Service, and the other rules pertaining to pro bono practice of law by a four to three vote. The Style Subcommittee will consider the rules on February 22, 2002, and then the Court will review them on March 4, 2002.

Agenda Item 1. Reconsideration of proposed new Rule 16-205 (Business and Technology Case Management Program)

Judge Missouri presented Rule 16-205, Business and Technology Case Management Program, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 – COURTS, JUDGES, AND ATTORNEYS

CHAPTER 200 – THE CALENDAR – ASSIGNMENT AND DISPOSITION OF MOTIONS AND CASES

ADD new Rule 16-205, as follows:

Rule 16-205. BUSINESS AND TECHNOLOGY CASE MANAGEMENT PROGRAM

(a) Definitions

The following definitions apply in this Rule:

(1) ADR

"ADR" means "alternative dispute resolution" as defined in Rule 17-102.

(2) Program

"Program" means the business and technology case management program established pursuant to this Rule.

(3) Program Judge

"Program judge" means a judge of a circuit court who is assigned to the program.

(b) Program Established

Subject to the availability of fiscal and human resources, a program approved by the Chief Judge of the Court of Appeals shall be established to enable each circuit court to handle business and technology matters in a coordinated, efficient, and responsive manner and to afford convenient access to lawyers and litigants in business and technology matters. The program shall include:

(1) a program track within the differentiated case management system established under Rule 16-202;

(2) the procedure by which an action is assigned to the program;

(3) program judges who are specially trained in business and technology; and

(4) ADR proceedings conducted by persons qualified under Title 17 of these Rules and specially trained in business and technology.

Cross reference: See Rules 16-101 a and 16-103 a concerning the assignment of a judge of the circuit court for a county to sit as a program judge in the circuit court for another county.

(c) Assignment of Actions to the Program

On request of a party or on the court's own initiative, the ~~County~~ Circuit Administrative Judge of the circuit ~~court for the county~~ in which an action is filed or the Administrative Judge's designee may assign

the action to the program if the judge determines that the action presents commercial or technological issues of such a complex or novel nature that specialized treatment is likely to improve the administration of justice. Factors that the judge may consider in making the determination include: (1) the nature of the relief sought, (2) the number and diverse interests of the parties, (3) the anticipated nature and extent of pretrial discovery and motions, (4) whether the parties agree to waive venue for the hearing of motions and other pretrial matters, (5) the degree of novelty and complexity of the factual and legal issues presented, (6) whether business or technology issues predominate over other issues presented in the action, and (7) the willingness of the parties to participate in ADR procedures.

(d) Assignment to Program Judge

Each action assigned to the program shall be assigned to a specific program judge. The program judge to whom the action is assigned shall hear all proceedings until the matter is concluded, except that, if necessary to prevent undue delay, prejudice, or injustice, the Circuit Administrative Judge or the Circuit Administrative Judge's designee may designate another judge to hear a particular pretrial matter. That judge shall be a program judge, if practicable.

(e) Scheduling Conference; Order

Promptly after an action is assigned, the program judge shall (1) hold a scheduling conference under Rule 2-504.1 at which the program judge and the parties discuss the scheduling of discovery, ADR, and a trial date and (2) enter a scheduling order under Rule 2-504 that includes case management decisions made by the court at or as a result of the scheduling conference.

Source: This Rule is new.

REPORTER'S NOTE

Proposed new Rule 16-205 implements a recommendation of the Business and Technology Task Force, created by the Maryland legislature to further technology business in the State. In its Report, the Task Force concluded that the benefits of the specialization of judges to hear business and technology cases and a fair and equitable allocation of judicial resources can best be accomplished by the establishment of a Business and Technology Case Management Program in the circuit courts.

On behalf of the Conference of Circuit Judges, the Hon. William D. Missouri requested that section (c) be changed so that it is the Circuit Administrative Judge (or that judge's designee), rather than the County Administrative Judge, who assigns actions to the Program.

Judge Missouri explained that Rule 16-205 was approved at the October 12, 2001 Rules Committee meeting. The Conference of Circuit Judges has raised an issue concerning section (c), which provides that the County Administrative Judge or that judge's designee could assign an action to the Business and Technology Program if the County Administrative Judge or designee determines that the action should be so assigned. The problem is that in a one-judge county, there is no other judge who could be designated. This problem would be solved by substituting for the term "County Administrative Judge, the term "Circuit Administrative Judge," who would have the authority to designate another judge. The Committee approved the proposed amendment to the Rule as presented.

Agenda Item 2. Consideration of proposed amendments to Rules 2-541 (Masters) and 9-208 (Referral of Matters to Masters)

Mr. Johnson presented Rules 2-541, Masters, and 9-208, Referral of Matters to Masters, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-541 to clarify that no domestic relations matter may be referred to a master except in accordance with Rule 9-208, as follows:

Rule 2-541. MASTERS

OPTION 1

. . .

(b) Referral of Cases

(1) No domestic relations matter may be referred to a master under this Rule. Referral of domestic relations matters to a master shall be in accordance with Rule 9-208 and shall proceed only in accordance with that Rule.

(2) On motion of any party or on its own initiative, the court, by order, may refer to a master any other matter or issue not triable of right before a jury.

. . .

Rule 2-541 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 2-541 clarifies that any referral of a domestic

relations matter to a master must be in accordance with Rule 9-208 and may not be made under Rule 2-541.

Option 1 is the proposed change that is recommended by the Trial Subcommittee, in response to a letter dated September 19, 2001 from Chief Judge Robert M. Bell. "Options 2A and 2B" attached, are two alternative approaches for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE — CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-541 to allow referral of matters to a master under the Rule only on agreement of the parties, as follows:

Rule 2-541. MASTERS

(a) Appointment -- Compensation

(1) Standing Master

A majority of the judges of the circuit court of a county may appoint a full time or part time standing master and shall prescribe the compensation, fees, and costs of the master. No person may serve as a standing master upon reaching the age of 70 years.

(2) Special Master

The court may appoint a special master for a particular action and shall prescribe the compensation, fees, and costs of the special master and assess them among

the parties. The order of appointment may specify or limit the powers of a special master and may contain special directions.

(3) Officer of the Court

A master serves at the pleasure of the appointing court and is an officer of the court in which the referred matter is pending.

OPTION 2A

(b) Referral of Cases

(1) Referral of domestic relations matters to a master shall be in accordance with Rule 9-208 and shall proceed in accordance with that Rule.

(2) ~~On motion of any party or on its own initiative, the court, by order, may refer to a master~~ By agreement of the parties, any other matter or issue ~~not triable of right before a jury~~ may be referred to a master by order of the court.

OPTION 2B

(b) Referral of Cases

(1) Referral of domestic relations matters to a master shall be in accordance with Rule 9-208 and shall proceed in accordance with that Rule.

(2) ~~On motion of any party or on its own initiative, the court, by order, may refer to a master~~ By agreement of the parties, any other matter or issue not triable of right before a jury may be referred to a master by order of the court.

(c) Powers

Subject to the provisions of any order of reference, a master has the power to regulate all proceedings in the hearing,

including the powers to:

(1) Direct the issuance of a subpoena to compel the attendance of witnesses and the production of documents or other tangible things;

(2) Administer oaths to witnesses;

(3) Rule upon the admissibility of evidence;

(4) Examine witnesses;

(5) Convene, continue, and adjourn the hearing, as required;

(6) Recommend contempt proceedings or other sanctions to the court; and

(7) Recommend findings of fact and conclusions of law.

(d) Hearing

(1) Notice

The master shall fix the time and place for the hearing and shall send written notice to all parties.

(2) Attendance of Witnesses

A party may procure by subpoena the attendance of witnesses and the production of documents or other tangible things at the hearing.

(3) Record

All proceedings before a master shall be recorded either stenographically or by an electronic recording device, unless the making of a record is waived in writing by all parties. A waiver of the making of a record is also a waiver of the right to file any exceptions that would require review of the record for their determination.

(e) Report

(1) When Filed

The master shall notify each party of the proposed recommendation, either orally at the conclusion of the hearing or thereafter by written notice served pursuant to Rule 1-321. Within five days from an oral notice or from service of a written notice, a party intending to file exceptions shall file a notice of intent to do so and within that time shall deliver a copy to the master. If the court has directed the master to file a report or if a notice of intent to file exceptions is filed, the master shall file a written report with the recommendation. Otherwise, only the recommendation need be filed. The report shall be filed within 30 days after the notice of intent to file exceptions is filed or within such other time as the court directs. The failure to file and deliver a timely notice is a waiver of the right to file exceptions.

(2) Contents

Unless otherwise ordered, the report shall include findings of fact and conclusions of law and a recommendation in the form of a proposed order or judgment, and shall be accompanied by the original exhibits. A transcript of the proceedings before the master need not be prepared prior to the report unless the master directs, but, if prepared, shall be filed with the report.

(3) Service

The master shall serve a copy of the recommendation and any written report on each party pursuant to Rule 1-321.

(f) Entry of Order

(1) The court shall not direct the entry of an order or judgment based upon the master's recommendations until the expiration of the time for filing exceptions, and, if exceptions are timely filed, until the court rules on the exceptions.

(2) If exceptions are not timely filed, the court may direct the entry of the order

or judgment as recommended by the master.

(g) Exceptions

(1) How Taken

Within ten days after the filing of the master's written report, a party may file exceptions with the clerk. Within that period or within three days after service of the first exceptions, whichever is later, any other party may file exceptions. Exceptions shall be in writing and shall set forth the asserted error with particularity. Any matter not specifically set forth in the exceptions is waived unless the court finds that justice requires otherwise.

(2) Transcript

Unless a transcript has already been filed, a party who has filed exceptions shall cause to be prepared and transmitted to the court a transcript of so much of the testimony as is necessary to rule on the exceptions. The transcript shall be ordered at the time the exceptions are filed, and the transcript shall be filed within 30 days thereafter or within such longer time, not exceeding 60 days after the exceptions are filed, as the master may allow. The court may further extend the time for the filing of the transcript for good cause shown. The excepting party shall serve a copy of the transcript on the other party. Instead of a transcript, the parties may agree to a statement of facts or the court by order may accept an electronic recording of the proceedings as the transcript. The court may dismiss the exceptions of a party who has not complied with this section.

(h) Hearing on Exceptions

The court may decide exceptions without a hearing, unless a hearing is requested with the exceptions or by an opposing party within five days after service of the exceptions. The exceptions shall be decided on the evidence presented to the master unless: (1) the excepting party sets

forth with particularity the additional evidence to be offered and the reasons why the evidence was not offered before the master, and (2) the court determines that the additional evidence should be considered. If additional evidence is to be considered, the court may remand the matter to the master to hear the additional evidence and to make appropriate findings or conclusions, or the court may hear and consider the additional evidence or conduct a de novo hearing.

(i) Costs

Payment of the compensation, fees, and costs of a master may be compelled by order of court. The costs of any transcript may be included in the costs of the action and assessed among the parties as the court may direct.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 596 b.
Section (b) is derived in part from former Rule 596 c.
Section (c) is derived in part from former Rule 596 d.
Subsections (6) and (7) are new but are consistent with former Rule 596 f 1 and g 2.
Section (d) is in part new and in part derived from former Rule 596 e.
Section (e) is derived from former Rule 596 f.
Section (f) is new.
Section (g) is derived from former Rule 596 h 1, 2, 3, 4 and 7 except that subsection 3 (b) of section h of the former Rule is replaced.
Section (h) is derived from former Rule 596 h 5 and 6.
Section (i) is derived from former Rule 596 h 8 and i.

Rule 2-541 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 2-541 allows referrals to a master under the Rule only on agreement of the parties. In Option 2A, the phrase "not triable as of right

before a jury" is proposed to be deleted as unnecessary because if the parties have agreed to have a matter heard by a master, they implicitly have waived the right to have the matter heard by a jury. In Option 2B, that phrase is retained, so that no matter or issue triable of right before a jury may be heard by a master.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 200 - DIVORCE, ANNULMENT AND ALIMONY

AMEND Rule 9-208 (a) to delete a certain phrase as unnecessary, as follows:

Rule 9-208. REFERRAL OF MATTERS TO MASTERS

(a) Referral

(1) As of Course

If a court has a full-time or part-time standing master for domestic relations matters and a hearing has been requested or is required by law, the following matters arising under this Chapter shall be referred to the master as of course unless the court directs otherwise in a specific case:

(A) uncontested divorce, annulment, or alimony;

(B) alimony pendente lite;

(C) child support pendente lite;

(D) support of dependents;

(E) preliminary or pendente lite possession or use of the family home or

family-use personal property;

(F) subject to Rule 9-205, pendente lite custody of or visitation with children or modification of an existing order or judgment as to custody or visitation;

(G) subject to Rule 9-205 as to child access disputes, constructive civil contempt by reason of noncompliance with an order or judgment relating to custody of or visitation with a minor child, the payment of alimony or support, or the possession or use of the family home or family-use personal property, following service of a show cause order upon the person alleged to be in contempt;

(H) modification of an existing order or judgment as to the payment of alimony or support or as to the possession or use of the family home or family-use personal property;

(I) counsel fees and assessment of court costs in any matter referred to a master under this Rule;

(J) stay of an earnings withholding order; and

(K) such other matters arising under this Chapter and set forth in the court's case management plan filed pursuant to Rule 16-202 b.

Committee note: Examples of matters that a court may include in its case management plan for referral to a master under subsection (a)(1)(J) of this Rule include scheduling conferences, settlement conferences, uncontested matters in addition to the matters listed in subsection (a)(1)(A) of this Rule, and the application of methods of alternative dispute resolution.

(2) By Order on Agreement of the Parties

By agreement of the parties, any other matter or issue arising under this Chapter ~~that is not triable of right before a jury~~ may be referred to the master by order of the court.

. . .

Rule 9-208 was accompanied by the following Reporter's Note.

> Rule 9-208 (a) is proposed to be amended to delete the phrase "that is not triable of right before a jury" as unnecessary, because no matter or issue arising under Title 9, Chapter 200 is triable of right before a jury.

Mr. Johnson explained that the Trial Subcommittee is proposing changes to Rules 2-541 and 9-208 at the request of the Chief Judge of the Court of Appeals. One issue that has to be determined is whether the court can refer matters to masters on its own initiative or whether this can be done only by agreement of the parties. The Court is concerned as to how much authority masters should have. The Commission to Study the Masters System, chaired by the Honorable James C. Cawood, Jr., judge of the Circuit Court for Anne Arundel County, now retired, had issued a report which stated that masters should have more powers. The Court of Appeals was not in agreement with this conclusion. When the Honorable Robert M. Bell, Chief Judge of the Court of Appeals, asked for a review of Rules 2-541 and 9-208, the Subcommittee was not sure what changes Chief Judge Bell was interested in. With the concurrence of the Chair, Mr. Johnson had contacted Judge Bell, who said that he was in agreement with any of the proposed versions of the Rule that are in today's meeting materials.

Mr. Johnson said that the Subcommittee is presenting the various options to the Rules Committee. In Option 1, the amendment is purely a clarification –- making clear that Rule 2-541 may not be used to refer a domestic relations matter to a master. Initially, the Subcommittee thought that the language in subsection (b)(1), which states that referral to masters "shall be in accordance with Rule 9-208" was clear, but apparently, it is not clear enough. The suggestion is to add the first sentence and add the word "only" to the second sentence.

Options 2A and 2B require the agreement of the parties before any referral to a master can be made under Rule 2-541. Option 2A deletes the language "not triable of right by a jury." If a matter is heard by a master only after the parties agree, then the right to trial by jury is waived, and the language "not triable of right by a jury" is not necessary. Under Option 2B, actions that are triable of right before a jury may never be heard by a master, even if the parties agree. The Subcommittee takes no position as to which option is preferable. The Vice Chair commented that federal magistrate judges preside over jury trials with the consent of the parties, and she said that she is not sure that the right to a jury trial is waived if the case is heard by a master. She suggested that the language "not triable of right by a jury" should be left in the Rule for clarity.

Judge Heller questioned as to why the Rule is being changed. She asked why the court on its own initiative, should not be allowed to refer a case to a master, regardless of whether the

parties agree to the referral. Mr. Johnson responded that this issue has been debated previously. The Vice Chair remarked that certain kinds of matters, such as discovery motions, may be appropriate for referral to a master without the agreement of the parties, but the Rule as currently written permits the entire case to be transferred to a master without agreement of the parties. Judge Heller said that in Baltimore City, there are 13 masters actively assisting with the civil and juvenile dockets. A change to the Rule could result in disastrous consequences. For example, a civil master screens all temporary restraining orders (TRO's). The court refers the cases to the master on its own initiative. The master does not make a final decision, but screens the matter, which saves the judge from having to do this. Also, within the Family Division in domestice violence cases, the court sends requests for *ex parte* relief to one of the masters, who is very competent. What are the practical consequences of changing the Rule?

Mr. Johnson pointed out that the letter from Chief Judge Bell, dated September 19, 2001, a copy of which is in the meeting materials, generated the issue regarding a possible change to Rule 2-541. (See Appendix 1). Chief Judge Bell was concerned that the Rule was sufficiently broad as to create a loophole in the limitations imposed by Rule 9-208. Judge Heller inquired as to the nature of the loophole. Mr. Johnson replied that he was not sure what Chief Judge Bell's concern was. The October 31,

2002 memorandum from Frank Broccolina, Court Administrator, to Judge Bell, a copy of which is in the meeting materials, refers to the concern of the Cabinet over two loopholes in Rules 2-541 and 9-208. (See Appendix 2).

Mr. Bowen noted that in Option 1 of Rule 2-541, the proposed first sentence and the addition of the word "only" in the second sentence mean the same thing. The word "only" provides a shorter method to accomplish the intended purpose of the change. The same purpose can be accomplished in Options 2A or 2B by adding the word "only." Option 2A is the better version. The Vice Chair remarked that Judge Heller's comments have not been addressed.

Judge Heller expressed her concern that the proposed changes to the Rule will affect domestic violence and TRO screenings. Judge McAuliffe observed that masters could be called "administrative aides" if they do not make findings of fact and do not issue reports. Judge Kaplan clarified that the masters make a report as to their recommendations, and this report can then be excepted to by the parties. Judge McAuliffe responded that this means the masters are not simply screening the cases. Judge Kaplan remarked that generally, for the juvenile docket, the masters write a report and recommendation from which exceptions can be taken. The court rules on any exceptions. If there are no exceptions, the court adopts the recommendations of the master.

Judge Heller told the Committee that she had another concern about domestic violence hearings held before a Family Division

Master. Judge McAuliffe inquired as to whether the masters are participating in fact-finding. Judge Heller replied that the masters are resolving *ex parte* matters and then sending them to the judge. The memorandum from Mr. Broccolina is accurate in stating that the masters in Baltimore City heard 364 petitions for *ex parte* relief in domestic violence cases in Fiscal Year 2001. Judge McAuliffe questioned as to how these matters can be resolved *ex parte*. Judge Heller answered that the master hears the cases, enters the appropriate relief, and sets the cases on the docket before a judge.

The Vice Chair inquired as to whether domestic violence proceedings are assigned to the Family Division. What can or cannot be referred to a domestic relations master? The Reporter replied that this is stated in each county's case management plan, which is approved by the Chief Judge of the Court of Appeals. Judge Heller noted that subsection (a)(1)(K) of Rule 9-208 provides under the category of cases to be referred to a master "such other matters arising under this Chapter and set forth in the court's case management plan filed pursuant to Rule 16-202 b." She commented that her concern is not whether there is a right to trial by jury, but whether she can continue to refer cases to a master on the court's own initiative.

Mr. Bowen said that Options 2A and 2B are different than Option 1, because Options 2A and 2B limit the ability of the court to refer a case to a master on its own initiative. His

view is that the referral ought to be only by agreement of the parties. He commented that the real issue, which is in subsection (b)(2) of Rule 2-541, is whether the court can refer a case to a master on its own initiative or whether the referral requires the agreement of the parties. Judge Missouri expressed the opinion that the court should be able to refer cases to masters under Rule 2-541 on its own initiative. In some cases, if the court could not send issues to masters, the court might not have enough time to spend on its routine case assignments and might not be able to timely resolve esoteric issues that may arise in a particular case.

The Vice Chair remarked that this matter should be decided with an eye toward what the Rules Committee thinks that Chief Judge Bell is looking for. Another alternative is to structure Rule 2-541 like Rule 9-208, providing that the court can refer on its own initiative certain specified issues, other issues if listed in the court's case management plan, and anything by the agreement of the parties. The Reporter commented that the members of the Trial Subcommittee had tried to formulate a list of the appropriate issues the court can refer to masters, but they were unable to do so, because this is so difficult to predict. The Vice Chair said that she reads Option 1 as not in contrast to Options 2A and 2B. Mr. Johnson referred to Judge Missouri's opinion that judges should have the power to send cases to masters. The question arose as to Chief Judge Bell's views. Judge Missouri remarked that the circuit court judges in

Prince George's County are concerned about limitations on the master's role after Wiegmann v. State, 118 Md. App. 317 (1997), aff'd, 350 Md. 585 (1998).

Judge McAuliffe noted that the underlying concern is the court restricting referrals in domestic matters. Some courts are sending whole or large parts of cases to masters. The limitations as to domestic cases should be clarified. Mr. Bowen expressed the view that by adding the word "only" to subsection (b)(1) of Rule 2-541, the limitation is clear. The real conflict is whether the agreement of the parties is necessary.

Judge Kaplan suggested that the first sentence in Option 1 be deleted, and the word "only" be left in the second sentence of subsection (b)(1). Mr. Bowen said that the issue of whether the parties have to agree should be resolved. Mr. Lemmey pointed out that subsection (b)(2) of Rule 2-541 has the language "on motion of any party or on its own initiative." Mr. Johnson remarked that the current language allows the court to refer the cases on its own initiative.

Judge McAuliffe moved that Option 1 be adopted with the first sentence of subsection (b)(2) deleted, and the word "only" added to the second sentence. The motion was seconded. Mr. Titus asked if this motion addresses subsection (b)(2). Mr. Bowen replied affirmatively. The Vice Chair reiterated that the first sentence is taken out of subsection (b)(1). She said that the main question is whether the referral to a master is by agreement of the parties, or if the court can refer on its own

initiative.

Mr. Titus commented that there may be a constitutional right to have a case heard by a judge as opposed to a master. The Rule is couched in terms of all or nothing. He asked if compilation of a list of issues appropriate to be heard by a master is feasible. If referrals are made only by agreement of the parties, there could be chaos in the courts. Judge Heller again inquired if there is a problem that needs to be addressed.

Judge Missouri remarked that after the Wiegmann case, he had spoken with a Court of Appeals judge who said that the view of the Court is that circuit court judges had made masters into judicial officers by default, a result that was never intended. The Court feels that the circuit court judges have sent too much to masters and are shirking their duties. Judge Missouri inquired if there is a widespread problem. No one knew of any problems, but the change has to be made across the board because of a few violations. Judge Missouri said that it is his understanding that a majority of the Court of Appeals believes that nothing of a contested nature should be sent to a master. He expressed the view that it is difficult to draw the line as to issues of a contested nature, because most issues are contested in some way, and some masters have more expertise than judges. Judge Heller responded that masters only make recommendations to the court. Judge Missouri said that the Court of Appeals believes that many circuit court judges do not make a careful, independent determination as to the recommendations of the

master; rather, the circuit court judges simply adopt the recommendations verbatim.

Judge Heller commented that nothing in the Rule provides that a master cannot look at a contested issue. Most issues in court are contested. What is important is that masters do not make final decisions. Mr. Bowen commented that a person who pays a fee to file a case is entitled to a judge ruling on the admissibility of evidence in the case. Rule 2-541 gives this power to a master with a judge rubber-stamping the decision. Judge Heller inquired as to where that happens, and Ms. Ogletree replied that it happens in almost every visitation and establishment of child support case. The Vice Chair asked about non-domestic cases. Ms. Ogletree answered that this happens primarily in domestic cases, and she has not seen this happen in non-domestic cases.

Judge McAuliffe observed that the perceived abuses are in the domestic field. If the word "only" is added to subsection (b)(1) of Rule 2-541, this will take care of the problem. Mr. Brault had stated that there was a major domestic case with some hotly contested issues in Montgomery County. The court had referred the discovery disputes to a master, who was able to resolve them. This worked very well, and this type of referral to masters should be allowed to continue, even if the parties do not agree.

Mr. Johnson pointed out that there is a decided dislike of masters among certain segments of the legal profession. Many of

the recommendations of the Commission to Study the Master's System, such as the recommendation that masters should wear judicial robes, were not well received by the Court of Appeals. Judge Heller asked why the circuit court on its own initiative could not refer a complicated civil business case with complex discovery disputes to a special master. Options 2A and 2B take away this authority. Mr. Bowen inquired as to why a litigant should not have a voice in the matter. Judge Heller remarked that the master system is appropriate, but it is not perfect.

The Vice Chair pointed out that Mr. Titus had suggested a third alternative which is to create a list of issues appropriate for referral to a master by the court on its own initiative. Ms. Ogletree commented that it would be difficult to foresee every circumstance. Mr. Titus said that it is important to be careful to avoid opening up referral of more issues to non-judges. At the moment, around the State, practices concerning referrals to masters are widely divergent, and this does not serve the unification of the court system. Mr. Johnson remarked that Mr. Titus' suggestion is a good one. The Trial Subcommittee did try to come up with a list of issues appropriate for referral to masters, but it did not spend much time on this. Mr. Titus commented that whether or not Judge McAuliffe's motion is approved, he will move to address the subject of drawing up a list of issues for referral to masters. One method would be to send a questionnaire to the circuit court for each county in Maryland, asking for suggestions for appropriate issues for the

list. Ms. Ogletree noted that masters hear only domestic issues in Caroline County.

The Vice Chair called for a vote on the motion on the floor to approve Option 1 without the first sentence, and with the addition of the word "only." The motion passed on a vote of nine to eight. The Vice Chair suggested that because the vote was so close, the Court of Appeals could be presented with the various options. Mr. Titus expressed the opinion that the vote could be clearer if it did not address subsection (b)(2) at all. The Vice Chair asked whether the court on its own initiative can refer issues to masters, which is what subsection (b)(2) provides in the current Rule. The vote was in favor of the court referring on its own initiative by a margin of 11 in favor, six opposed. Rule 2-541, Option 1, was approved as amended.

Mr. Titus moved that the Trial Subcommittee develop a list of issues that are appropriate for referral to a master. The motion was seconded, and it carried on a vote of nine in favor, six opposed. Mr. Johnson commented that the Management of Litigation Subcommittee might be a more appropriate group to consider this. The Reporter said that she would send this to both subcommittees, to the Conference of Circuit Judges, and to the county administrative judge for each circuit court.

Mr. Johnson said that the Subcommittee is proposing to delete the language in Rule 9-208 which reads, "that is not triable of right before a jury." The Reporter commented that any matter in equity is not triable of right by a jury. The Vice

Chair asked if cases involving past due child support would be tried by a jury. Ms. Ogletree responded that civil contempt proceedings are tried in equity. The Vice Chair expressed the view that Rule 9-208 should not be changed. The Reporter countered that the language proposed to be stricken is superfluous, because anything tried under "this Chapter" is not triable of right by a jury. Judge Kaplan moved to eliminate the language crossed out in the Rule, and this was seconded. The Vice Chair asked about an action at law for past due child support. Ms. Ogletree answered that this would be a debt case and would not fall within "this Chapter." The Vice Chair called the question, and the vote was unanimous to delete the language in Rule 9-208.

Agenda Item 3. Consideration of the Report of the *Ad Hoc* Subcommittee to Review the Judicial Ethics Committee's Recommendations for the Code of Judicial Conduct (See Appendix 3)

Judge McAuliffe told the Committee that the Honorable Charlotte Cooksey, Chair of the Judicial Ethics Committee (the "Ethics Committee"), was unable to attend today's meeting because her mother is very ill. The Reporter said that other members of the Ethics Committee also had been invited to attend the meeting, but none were able to be present. Judge McAuliffe commented that the Ethics Committee is well represented by Elizabeth Veronis, Esq., from the Administrative Office of the Courts, who works with the Ethics Committee. Judge McAuliffe presented the Code of

Judicial Conduct for the Rules Committee's consideration. (See Appendix 3).

Judge McAuliffe explained that the Rules Committee's proposed revision of the Code of Judicial Conduct was transmitted to the Court of Appeals by letter dated April 9, 2001. The Court has indicated that it would like to receive for its consideration a joint recommendation from the Rules Committee and the Ethics Committee. The Ethics Committee reviewed the proposed revision and submitted a large compendium of additional changes, many of which are stylistic. To attempt to resolve the differences between the Rules Committee's version of the Code and the Ethics Committee's version, Chief Judge Murphy appointed an *ad hoc* subcommittee of the Rules Committee (the "*Ad Hoc* Subcommittee") to meet with members of the Ethics Committee. Judge McAuliffe said that the *Ad Hoc* Subcommittee comprises all of the judges on the Rules Committee, and he was appointed to serve as the *Ad Hoc* Subcommittee's chair.

Judge McAuliffe stated that in the package before the Rules Committee today, alternate language is submitted when the *Ad Hoc* Subcommittee and the Ethics Committee could not agree. There are proposed changes to the structure of the Code. The Ethics Committee had suggested a renumbering of the Rules comprising the Code. The *Ad Hoc* Subcommittee was opposed, because of all the internal renumbering that this would entail and the subsequent renumbering when the revision of all of Title 16 is completed.

In place of numbering Canon 7 as Rule 16-814, which had been proposed by the Ethics Committee, the *Ad Hoc* Subcommittee is proposing to number it Rule 16-813A, since that number is not already assigned to another rule.

In the third paragraph of the Preamble, there was a difference of opinion between the *Ad Hoc* Subcommittee and the Ethics Committee over the inclusion of the language printed on page 2 of the Code of Judicial Conduct as presented in the meeting materials. The language explains the meaning of the words "shall," "should," and "may." The Ethics Committee is requesting that the language be included, and the *Ad Hoc* Subcommittee took no stand as to whether the language should be included. Ms. Veronis added that the Ethics Committee would very much like to have this language in the Preamble. Mr. Sykes commented that Rule 1-201, Construction, Interpretation, and Definitions, already has language similar to the language in dispute. Ms. Ogletree pointed out that in that Rule, the word "should" is not defined. Judge McAuliffe moved to include the language in dispute as part of the Code of Judicial Conduct. The motion was seconded, and it passed with 14 in favor.

Judge McAuliffe said that the *Ad Hoc* Subcommittee was in favor of the language added to the sixth paragraph of the Preamble located at the top of page 3 which reads "nor discourages candidates from seeking judicial office." He pointed out that the eighth paragraph of the Preamble and the following

Committee note that follows the eighth paragraph were added by the Ethics Committee to directly reference the fact that the opinions are available. Initially, the Ethics Committee had requested that this material be placed in a comment, but the *Ad Hoc* Subcommittee was of the opinion that this should be in a Committee note. Instead of specific references to and excerpts from Ethics Committee opinions being placed throughout the Code, the Subcommittee suggested a Committee note.

Judge McAuliffe stated that the Ethics Committee had asked that the word "Reporter's" be changed to the plural, so that the Reporter's notes would be labeled "Reporters' notes." The *Ad Hoc* Subcommittee was not in favor of this. Ms. Veronis responded that the Ethics Committee is withdrawing its request.

Turning to the Terminology Section, Judge McAuliffe noted that several new definitions have been added at the request of the Ethics Committee. Mr. Hochberg commented that the words "administrator" and "executor" may not be necessary in the definition of the word "fiduciary", because there are no administrators or executors in Maryland. Mr. Sykes suggested that the words remain in the Code, because other jurisdictions may have these positions. Judge McAuliffe asked if the Rules Committee preferred Alternative A or B of section (d). Ms. Veronis explained that the reason the Ethics Committee preferred Alternative B is that there may other variations of the word "know" not covered by Alternative A, and the Ethics Committee's

version would cover everything. The Vice Chair pointed out that there are other verbs defined that do not refer to all of the variations of the defined term. Mr. Moser recommended that Alternative A be used, because it comes out of the 1990 ABA Code. Every time a deviation from the ABA Code is made, it takes the Maryland Code out of the standard version. Judge McAuliffe moved the approval of Alternative A. The motion was seconded, and it passed on a vote of 15 to one.

Judge McAuliffe pointed out that section (f) is different from section (g). Judge Heller questioned as to whether section (f) includes stepchildren. Judge McAuliffe noted that section (f) includes close family members. Judge Heller responded that a stepchild may or may not have a close relationship with the judge. Mr. Sykes remarked that if a stepchild does not have a close relationship with the judge, then the judge is not likely to be swayed by the stepchild's influence. Mr. Johnson asked if domestic partners are included in the definition of "family." He added that Mark Scurti, Esq., who represents the Gay and Lesbian Alliance, would argue that a domestic partner should be included in the definition of "family." Mr. Moser noted that section (g) is a slight deviation from the ABA version of the Rule which has the language "member of the judge's family residing in the judge's household." Mr. Johnson observed that this additional language might be sufficient to cover the situation of a domestic partner. Judge Kaplan expressed the view that the word "familial" might preclude the definition from applying to a

domestic partner.

Mr. Moser commented that Canon 4D (3) pertains to financial activities, referring to members of the judge's household. The definition in section (g) of the Terminology Section references Code, State Government Article §15-102. Judges are subject to some of the restrictions that executive branch employees are subject to under the Public Ethics Law. Judge McAuliffe pointed out that the problem of the domestic partner is cured in section (f) but not in section (g), where to cure the problem, the Rule would have to supersede the statute. Mr. Moser inquired as to whether a definition is needed. The text of the Code has been changed from the word "family" to the word "household," such as in Canon 4 D (3) and its accompanying Comment.

Judge McAuliffe said that the language "member of the judge's family" could include a judge's domestic partner. The definition includes the language "or individual with whom a judge maintains a close familial relationship." Mr. Moser pointed out that this language is intended to cover a domestic partner, and it also includes an in-law living in the judge's household. Judge McAuliffe said that this language should be retained even if it supersedes the statute. The Vice Chair added that a Reporter's note could be added to explain this. Judge McAuliffe remarked that it could go into a Committee note. Mr. Johnson expressed his agreement with handling this by a Reporter's note. The Vice Chair stated that the note could provide that a member of the judge's family does not have to be related by blood or

marriage.

Mr. Hochberg pointed out that the term “member of the judge’s household” is narrower and would not include a domestic partner. Judge McAuliffe said that the Rules Committee can look at this issue as it goes through the rest of the Code. A Reporter’s note will be added explaining about a judge’s domestic partner.

Judge McAuliffe told the Rules Committee that the Ethics Committee has proposed a broader definition of the word “lend.” Ms. Veronis commented that this word is not defined in the ABA Code. Judge McAuliffe pointed out that the word “lend” appears in Canon 2B. Ms. Veronis noted that the word “lend” is a broader term than the word “use.” The Ethics Committee requested that the word “lend” replace the word “use,” because the word “lend” is found in the ABA Code. Mr. Moser remarked that there is no need to define the term. Most people are familiar with the language in the Code which reads “lend the prestige of judicial office.” Mr. Sykes suggested that the language in Canon 2B be changed to “lend or use,” and the definition of the term “lend” be deleted. The Rules Committee agreed to these changes by consensus.

The Vice Chair pointed out that in section (f) of the Terminology Section, the word “denotes” should be changed to the word “means” to be consistent with other Rules of Procedure. The Committee agreed to this change by consensus. She asked if the Committee note to section (g) should refer to the defined term of

"member of the judge's household." Ms. Veronis explained that there had been a debate about incorporating the Public Ethics Law. The Ethics Committee felt strongly that the Public Ethics Law standard should be reflected, and the distinction between "family" and "household" should be highlighted by a Committee note. For consistency, similar language could be added after the definitions of "gift" and "honorarium." The Vice Chair suggested that when a definition is incorporated, there is no point in adding a Committee note after each term. Mr. Sykes noted that every time the legislature changes the statute, the Rule will have to be changed. Mr. Titus remarked that section (g) should be retained as originally drafted, without the proposed addition of the highlighted language or deletion of the language proposed to be stricken.

Judge McAuliffe said that judges are covered by the State Government Article. With the additional language in the Committee note, the judge knows what is provided in §15-102 (z) of the State Government Article. He commented that it is a matter of convenience to have all of the information available without someone having to refer to the State Government Article to be fully informed. This comes up more frequently than needing information about honoraria or gifts.

Judge Norton pointed out that in the Committee note to section (g), part (2) of the note does not require the judge's relative to be living in the judge's household. Mr. Moser said that the State Ethics Committee would be able to clear up any

confusion as to the Public Ethics Law. The Vice Chair inquired as to whether the Committee note is attempting to clarify this. Ms. Veronis stated that the note forewarns judges to check that law. Mr. Moser told the Rules Committee that the problem is not the issue of living in the judge's household, but rather it is accepting honoraria. The statute is more stringent on this than the Code of Judicial Conduct is.

Mr. Titus moved that no change be made to the original version of section (g), but there was no second to the motion. Judge McAuliffe explained that the changes to section (g) have been proposed by the Ethics Committee. The Vice Chair noted that the term "member of the judge's household" will be considered as the Rules Committee reviews the use of the term throughout the rest of the package. Mr. Sykes noted that Canon 3C (1)(c) provides that a judge has to recuse himself or herself if the judge knows that a member of the judge's family has a significant financial interest in the subject matter in controversy. Does this clearly include a separated spouse or a domestic partner, as it should? Mr. Moser suggested that since the definition of "member of the judge's family" is not in the Public Ethics Law, the definition could be taken out and simply referred to under the headings of "honoraria" and "gifts." Ms. Veronis pointed out that the proposed language of Canon 3C (2) refers to the "personal financial interests of each member of the judge's family residing in the judge's household," which is different than the language in Canon 3C (1)(c).

Mr. Moser expressed the opinion that this is confusing. For the purpose of accepting gifts and honoraria, the judge must follow the Public Ethics Law, which is not the same as the definitions in the Code of Judicial Conduct. Judge McAuliffe noted that the Ethics Committee no longer is requesting Alternative B to Canon 3C (2). He suggested that the definitions in sections (f) and (g) in the Terminology Section be discussed each time the specific language is reached throughout the Code of Judicial Conduct.

Judge McAuliffe referred to the two alternative versions of the definition of "significant financial interest." Ms. Veronis explained that the Ethics Committee had tracked the more recent language in the Public Ethics Law. The Vice Chair noted that the Rules Committee version of section (j) does not include ownership by a judge's spouse. Mr. Bowen expressed the view that Alternative A is preferable. The Assistant Reporter observed that the Court of Appeals has previously expressed a preference for the earlier version of the statute. Judge McAuliffe noted that the Ethics Committee felt very strongly that the current Public Ethics Law version should be used; however, he recommended the adoption of the Rules Committee version of section (j), which is not as broad as the current statute.

The Reporter pointed out that the Comment after Canon 3C (1) (c) of Rule 16-813, the current Code of Judicial Conduct, and the Comment after Canon 3C (1) (d) of Rule 16-814, the current Code of Conduct for Judicial Appointees, each contain a reference to

the Public Ethics Law. When the Rules Committee transmitted to the Court of Appeals proposed amendments to these two Rules that updated the references to the most current version of the statute, the Court directed that the references not be updated, because the revised version of the statute was too broad. Mr. Bowen moved to retain Alternative A of the definition of "significant financial interest," the motion was seconded, and it passed unanimously.

Turning to Canon 1, Judge McAuliffe pointed out that a new Committee note has been added after the first paragraph of Canon 1, as requested by the Ethics Committee. In Canon 2A, the language has been changed to "avoid impropriety" instead of "behave with impropriety." The Vice Chair expressed the opinion that the change in the Comment from the language "prohibition against behaving with impropriety" to "directive to avoid impropriety" could conflict with the use of the word "shall" in Canon 2A. Mr. Bowen remarked that he preferred the former language. Ms. Veronis explained that the revised language matches the language in the ABA Code and is broader than the current language. The Vice Chair noted that the language that has been added to the Preamble in the fourth paragraph provides that the word "shall" imposes a binding obligation. She suggested that the word "obligation" is preferable to the word "directive," and the Committee agreed by consensus. Judge McAuliffe noted that the Ethics Committee has withdrawn its request to have the language in Alternative B at the end of Canon

2A added.

Judge McAuliffe pointed out that in Canon 2B, the word "lend" has been changed to the phrase "lend or use." In the Comment to Canon 2B, the Ethics Committee has withdrawn its request for the language in the two sections marked "Alternative B." At the end of Canon 2B, the Ethics Committee has added a Committee note.

Mr. Brault commented that he had been involved in a disciplinary case against an attorney, based on a complaint made by a judge. The case revolved around the conduct of the attorney during the course of a trial. One of the attorneys representing the defendant attorney wanted to get opinions of judges in the county as to this particular attorney's demeanor, and this Canon was cited. All of the judges in the jurisdiction were subpoenaed to testify, which seemed to be proper according to the Canon. Bar Counsel did not allow live testimony, but allowed letters from judges as evidence of the attorney's character and demeanor. Judges also give opinions about other judges in Judicial Disabilities Commission proceedings.

Judge McAuliffe observed that judges will not give testimony unless they are subpoenaed. Generally, they give a letter in lieu of testimony. Mr. Brault asked that the minutes reflect that judges may testify. Mr. Hochberg remarked that judges have the option to testify, but they must testify if subpoenaed. The word "may" in the last sentence of the Comment to Canon 2B which reads, "A judge, may, however, testify when properly summoned"

means “shall.” Mr. Brault said that this sentence should not be changed to use the word “shall.” Mr. Sykes suggested that the word “summoned” should be changed to the word “subpoenaed”, and the Committee agreed by consensus to make this change.

Judge McAuliffe said that the changes to the Comment to Canon 2C are style changes. The Vice Chair asked about the change in the fourth paragraph of the Comment. Ms. Veronis responded that the change means that the date to be filled in is the effective date of the new Code of Judicial Conduct. The Vice Chair inquired as to what happens to a judge prior to this date. Ms. Veronis replied that the judge is covered by the Code that was in effect before the new Code. Mr. Moser remarked that the provision pertaining to the date to be filled in can be deleted, because its purpose was to allow a period of time for the Code of 1993 to become effective. There is no need for this now. The Vice Chair suggested that the language: “on or after ...” be deleted, so that the paragraph begins as follows: “When a judge learns that ...”. The Committee agreed by consensus to this change.

Turning to Canon 3, Judge McAuliffe pointed out that Canon 3A (1) is derived from the tagline of the parallel ABA Canon. Mr. Sykes commented that some of the responsibilities under the heading “Adjudicative Responsibilities” are administrative. The language of Canon 3A (1) is broader than the heading. Judge Heller expressed the opinion that Recusal, which is Canon 3C, should be listed under Canon 3A (1). Mr. Moser suggested that

Canon 3A (1) become Canon 3A, and Canon 3A would become Canon 3B. The tagline in the ABA version is "Judicial Duties." The Vice Chair remarked that the Style Subcommittee can work out the taglines.

Judge Heller suggested that Canon 3A could be a general statement. Mr. Johnson asked why the headings have to be "Adjudicative Responsibilities" and "Administrative Responsibilities." Mr. Moser replied the Code has always been arranged this way. Mr. Johnson inquired as to why Canon 3B (1) is listed under Administrative Responsibilities. Mr. Sykes noted that Canon 3B (1) and the new Canon 3A should be fused together. Mr. Moser recommended that the reference to "bias and prejudice" not be taken out of "Adjudicative Responsibilities." The words have been carefully crafted to be under that heading, and they should remain there.

Mr. Sykes commented that general items are strewn through the various sections. The administrative and adjudicative responsibilities can be put into a general provision. Mr. Moser pointed out that this is more than a stylistic change. The only word in Canon 3B (1) not needed in the "Adjudicative Responsibilities" section is "nepotism." It is important to spell out the details of any prejudice, and more important to spell out for the judges who judge, rather than for the judges who administer. Mr. Sykes stated that the Canon needs to be restructured. Mr. Johnson suggested that the laundry list in Canon 3A (11) be moved to the new section pertaining to the

general responsibilities of the judge. Judge Missouri expressed the concern that the language pertaining to administrative responsibilities should be retained, because judges do not receive schooling in how to administer the courts.

Judge McAuliffe stated that Canon 3 would be reconstructed from the beginning. All of the language pertaining to diligence, bias, and prejudice will go into Canon 3A. Judge Missouri suggested that the language pertaining to nepotism also be retained. Mr. Johnson questioned whether this would go under the heading of "Administrative Responsibilities." Judge McAuliffe commented that nepotism is prohibited under the existing Code. Judge Kaplan expressed the view that this would be under "Administrative Responsibilities." Mr. Moser remarked that this is similar to favoritism. Judge McAuliffe pointed out that the language in what will be the new Canon 3A which reads "perform ... impartially" is similar, and clearly, some redundancy has existed. Mr. Moser observed that changes have been made since 1993, but there has never been a general category. He cautioned that administrative and adjudicative responsibilities are slightly different.

Mr. Titus said that he sees no reason to separate the two categories and make a distinction between administrative and adjudicative responsibilities. The Vice Chair stated that the Style Subcommittee can redraft Canon 3. Judge McAuliffe added that this will be accomplished with caution. The Vice Chair referred to Canon 3A (7)(D), commenting that she had never

appeared before a judge in a settlement conference where the judge asks if the parties will consent to be in two different rooms. Judge McAuliffe said that unless someone objects, there is inferential consent.

Judge McAuliffe drew the Committee's attention to Canon 3A (7)(H), which has two alternatives. Alternative A was approved by the full Rules Committee, but the Ethics Committee has problems with it. Mr. Sykes asked with whom the discussion to which the provision refers is to take place. Judge Missouri remarked that he argued for this provision, because in a large jurisdiction which could have as many as 23 judges, many lawyers talk to a judge who is not presiding over a case. Why should a judge who is not involved in a case be prohibited from talking about it? Mr. Sykes responded that his concern was not the propriety of what Judge Missouri had described, but the breadth of the Rule which could permit other undesirable discussion. Mr. Johnson inquired if this provision would allow a District Court judge who is running for the circuit court to talk about a case. Judge McAuliffe answered that Canon 5 pertains to candidates for judicial office.

Mr. Moser noted that Canon 3A (9) is the general rule pertaining to public comment. Canon 5 covers political conduct and speech. Canon 5B (1)(f) is inconsistent with Canon 3A (7)(H). Mr. Johnson remarked that the phrase "likely to come before the judge" in Canon 5B (1)(f) was added to allow a candidate to comment on another judge's decision. Judge

McAuliffe inquired as to whether this should be prohibited. Mr. Johnson responded that some former judges felt that they were attacked unfairly.

Judge McAuliffe pointed out that the Rules Committee discussion had centered on whether Canon 3A (7)(H) would allow a judge teaching a class to discuss a case pending in another jurisdiction or on appeal. The proposed language would allow a judge to talk with anyone about a case in which the judge is not involved. This does not include a judge's getting advice. Mr. Sykes commented that a judge can get advice from a disinterested, non-expert. Mr. Titus suggested that subsection (7)(H) of Canon 3A be left in. The Vice Chair said that she does not disagree with the concept of the language, although it is very broad. Mr. Titus expressed the view that the language of subsection (7)(H) could be added to subsection (9) of Canon 3A. Mr. Moser disagreed, noting that if the language were moved to subsection (9), it would eliminate the limitation expressed in subsection (9). Ms. Veronis remarked that by combining the two sections, it seems to suggest that wide open discussion is permitted.

Mr. Sykes moved that subsection (7)(H) be deleted. The motion was seconded. Mr. Moser said that as long as a judge complies with subsection (9), the judge would be able to talk about a case in a classroom setting. Mr. Titus noted that there is no substantive change by moving the principles of subsection (7)(H) into subsection (9). The Style Subcommittee can clarify that teaching the class about a pending case is permitted as long

as it is consistent with subsection (9). Judge McAuliffe said that subsection (7)(H) would be deleted and moved into subsection (9). Mr. Moser pointed out that the two subsections are not consistent. Mr. Sykes suggested that language be added to subsection (9) referring to making public statements from private discussions. Mr. Moser disagreed, explaining that it is wrong for a judge to express the opinion that a case pending before an appellate court was decided erroneously. The problem is public comment -– it is difficult to stop private comment. Judge McAuliffe suggested that a reference to teaching could be added to the comment to subsection (9).

The Vice Chair called for a vote on the motion to delete subsection (7)(H) of Canon 3A. The vote was tied at eight to eight, and the Vice Chair broke the tie, voting that the subsection should be eliminated.

After the lunch break, Judge McAuliffe drew the Committee's attention to the cross reference added after subsection (13) of Canon 3A. Ms. Veronis pointed out that in subsection (12), the first words of the second sentence should be changed from "this Canon" to "this Canon 3A (12)." The Committee agreed to this change by consensus. Judge McAuliffe noted that due to the suggested changes to Canon 3A, Canon 3B will be renumbered as Canon 3C. Ms. Potter asked to which standards of fidelity and diligence Canon 3C (2) refers. Judge McAuliffe answered that this language appears in the current Canons, and Mr. Moser added that the ABA uses the same language. Mr. Titus inquired as to

whether the language “of fidelity and diligence” should be deleted. Mr. Brault commented that in earlier Canons there is a reference to a judge being faithful. Judge McAuliffe said that this language should remain in the Rule.

Judge McAuliffe noted that subsection (1)(c) of what is now Canon 3D, Recusal, reflects the change in the definition of the phrase “member of the judge’s family.” The Vice Chair questioned as to whether the wording should be “member of the judge’s household.” Ms. Ogletree responded that the phrase “member of the judge’s family” is broader than the language “member of the judge’s household.” Judge McAuliffe noted that the Ethics Committee broadened this language to “member of the judge’s family”, and the *Ad Hoc* Subcommittee agreed to the broader term. Mr. Moser said that Code, State Government Article, §15-502, Employment or Financial Interests -– General Restriction, applies to judges and their relatives. Canon 3D (1)(c) goes beyond the Code provision. Judge Kaplan remarked that judges cannot be expected to keep track of adult children who live elsewhere and are independent. Judge McAuliffe noted that if a judge’s sibling has a significant interest in a case before the judge, the judge should recuse himself or herself. The Canon is correct in using the language “member of the judge’s family.” Mr. Sykes cautioned that “knowledge” is a defined term and means actual knowledge, including actual knowledge that may be inferred from the circumstances.

Judge McAuliffe pointed out that Canon 3D (2) will be the Rules Committee's version, which is Alternative A. In subsection (3) of Canon 3F, Disciplinary Responsibilities, the new language parallels the beginning language of subsection (2) of Canon 3F. The Ethics Committee has withdrawn its query, which is located after subsection (3). Mr. Bowen commented that the Attorney Grievance Commission ("AGC") may not like subsection (3). Judges should be notifying the AGC about attorneys who are unfit. Judge McAuliffe responded that judges often meet and discuss such problems. It is not fair to exclude attorneys from the informal process of helping lawyers to be better lawyers. Mr. Bowen explained that his problem is the language referring to facts that raise a "substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer." Mr. Lemmey inquired as to whether Rule 8.3, of the Maryland Lawyers' Rules of Professional Conduct, Reporting Professional Misconduct, requires a judge to report the lawyer to the AGC. Judge McAuliffe answered that it does not. Mr. Moser pointed out that subsection (3) is a different rule than the ABA rule. It may be preferable to have the same standard as the ABA.

Judge McAuliffe noted that problems with fitness as an attorney involve a lack of being prepared and are not just a matter of a lack of honesty. The Vice Chair remarked that the standard for informing about a judge is a judge's fitness for office, and for a lawyer it is the lawyer's honesty, trustworthiness, or fitness as a lawyer. Mr. Bowen said that his

problem is whether the new language modifies a lawyer's honesty or trustworthiness. Judge Kaplan observed that there is more than one kind of honesty problem. A lawyer could be misappropriating funds or simply misquoting from cases. Judge McAuliffe stated that the language "if other corrective measures are not appropriate" is the saving language before the judge has to inform. Ms. Potter noted that the rule is stated as "shall," which creates a binding obligation. Mr. Brault remarked that Rule 8.3 refers to substantial violations and not minor ones.

Judge McAuliffe pointed out that in the Comment after Canon 3F (4) the language "has committed" has been changed to the language "is believed to have committed."

Turning to Canon 4, Judge McAuliffe said that the new Committee note located after the Comment to Canon 4A was added by the Ethics Committee. The Vice Chair asked the meaning of the language in the Committee note which reads "not to lecture to probationers who might be brought back before the court." Mr. Titus remarked that this may refer to a situation such as a judge who, while lecturing people at an Alcoholics Anonymous meeting, tells them to abstain from alcohol. The Vice Chair pointed out that the way the language is worded does not imply a reference to extra-judicial activity. Judge McAuliffe expressed the view that this is an obscure point and suggested that the language be deleted. The Committee agreed by consensus to this deletion.

Ms. Potter asked if the Committee note should be moved to Canon 4B. Judge McAuliffe suggested that the last sentence could

be moved. The Vice Chair expressed the opinion that the entire note should be moved. Mr. Sykes commented that whether writing an introduction for a book as referred to in the last sentence of the Committee note is allowed depends on the book and on the introduction. Mr. Moser cautioned that the note should be consistent with the ethics opinion pertaining to a judge writing an introduction for a book. Mr. Titus suggested that the Committee note be moved, but it should reference subjects mentioned in the Canon. A judge writing an introduction for a book is not mentioned in the Canon. Judge McAuliffe said that Mr. Moser has offered to redraft the Committee note. The Reporter added that the Committee note without the language pertaining to lecturing to probationers will be moved.

Judge McAuliffe pointed out that there are two alternative versions of subsection C (2) of Canon 4. The Ethics Committee is recommending Alternative B, which contains the adjective "advisory" modifying the words "committee or commission." Ms. Ogletree remarked that a charter commission is appointed by the county commissioners and may include retired judges. This would not be an advisory position because creating new charters involve questions of substance. Judge McAuliffe said that the Sentencing Commission votes on changes to the Sentencing Guidelines, and he does not like the word "advisory." Judge Kaplan moved to accept Alternative A of subsection (2), the motion was seconded, and it passed unanimously.

Judge McAuliffe said that the Ethics Committee has withdrawn

its request for a Committee note following Canon 4C (4)(b).

Judge McAuliffe noted that the Ethics Committee feels very strongly that Alternative B of subsection (4)(d) of Canon 4C should be adopted. Ms. Veronis explained that the language in Alternative A which reads "is devoted to the improvement of the law, the legal system, or the administration of justice" is a problem, because it is so subjective and subject to abuse. She asked if the language of this provision should follow the ABA language. Judge McAuliffe inquired as to whether the Legal Aid Bureau participates in fund-raising. Ms. Potter replied in the affirmative.

Judge McAuliffe questioned as to whether a judge should be permitted to be a speaker or a guest of honor at a fund-raising event. Ms. Veronis commented that some existing ethics opinions do not permit either. Mr. Moser noted that these opinions are pursuant to the former Maryland Code. Ms. Potter expressed the view that Alternative B is appropriate. Judge McAuliffe said that Alternative A permits a judge to participate as a speaker or as the guest of honor at a fund-raising event for an organization devoted to the improvement of the law, the legal system, or the administration of justice, while Alternative B states that a judge may not solicit funds for an organization for any purpose.

Judge Norton remarked that judges often attend fund-raisers for domestic violence shelters. Mr. Moser observed that the Chair of the Rules Committee is interested in this issue, because judges around the State often attend fund-raisers. They do not

personally solicit funds, nor participate in "arm-twisting," which is prohibited. Mr. Hochberg expressed his preference for Alternative A, but he suggested that it could be changed to prevent a judge from directly soliciting funds. Mr. Moser told the Committee that the ABA version of the Comment is that a judge must not be a speaker at a fund-raiser, but the judge's mere attendance is proper. The Vice Chair added that the ABA prohibits a judge from speaking, but Mr. Moser had pointed out that judges in Maryland often attend fund-raising events. Ms. Veronis commented that the Ethics Committee felt very strongly that Alternative B should be adopted. Mr. Sykes noted that Alternative B is more lenient. He suggested that the language in subsection (e)(i) pertaining to personal participation by a judge in soliciting funds could be added to Alternative B in place of what is there now. Mr. Brault observed that judges should not solicit funds using the power of their office.

Mr. Moser noted that if Alternative A is adopted, it would be inconsistent with the Comment after Canon 4C (4)(e). Mr. Sykes and the Vice Chair did not agree with Mr. Moser that the two are inconsistent. Ms. Potter remarked that the Anne Arundel Bar Association holds a black tie fund-raiser each year with a judge as the guest of honor. She suggested that neither alternative should be chosen, but the language in Alternative (B) could be placed in subsection (4)(e). The language in Alternative A could be placed in the Comment. Judge McAuliffe pointed out an inconsistency within subsection (4)(e)(i), which

states that a judge may assist in planning fund-raising, but cannot participate personally in the solicitation of funds. Mr. Bowen noted that Alternative B and the former language of subsection (4)(e) form a coherent pattern. An example would be a judge attending a Bar Foundation fund-raising event as the guest of honor. He suggested that Alternative B be adopted and subsection (4)(e) be rewritten.

The Vice Chair called for a vote on the adoption of Alternative A or Alternative B. Alternative A passed on a vote of 12 in favor, three opposed. The Vice Chair suggested that the content of Alternative A should be placed in the Comment. Mr. Moser responded that it would not be fair to include a prohibition in a comment. The fact that a judge may not participate in fund-raising is more like black letter law. The ABA language and the Ethics Committee version are more consistent with each other. The ABA states that a judge shall not use or permit the use of judicial office for fund-raising. As a guest of honor at a fund-raising event, a judge would be violating the ABA rule. This is similar to subsection (4)(e)(v).

The Vice Chair agreed that Alternative A is not consistent with subsection (4)(e)(v). The question is whether a judge should be allowed to be a guest of honor at a fund-raising event. Ms. Potter remarked that if a judge is the president of a bar association, he or she would not be allowed to ask anyone to join the association. The Vice Chair responded that this situation seems odd to her.

Judge McAuliffe suggested that Alternative A be retained, and subsection (C)(4)(e)(v) should be modified to add the language "except as otherwise provided herein." The Vice Chair questioned as to whether the Public Ethics Law addresses this. Mr. Moser answered that it does address it, and the Code of Judicial Conduct provision will be superseding the statute. Code, State Government Article, §15-506 provides that an official or employee may not intentionally use the prestige of office or public position for that official's or employee's private gain or the gain of another. Mr. Brault remarked that there is a difference between being a guest and being the guest of honor at an event. Judges often attend bar association events. The Montgomery County Bar Association does not allow judges to be officers. Mr. Moser said that under the current Code, Canon 4C (2) states that: "A judge should not solicit funds for any such organization [referring to educational, religious, charitable, fraternal, law-related or civic organizations], or use or permit the use of the prestige of the judge's office for that purpose, but a judge may be listed as an officer, director, or trustee of the organization."

Mr. Sykes moved to reconsider the vote on Canon 4C (4)(d). The motion was seconded, and it passed by a majority vote. Mr. Bowen suggested that Alternative (B) could be put into subsection (4)(e)(v), and there would be no need to choose from the two alternatives. Mr. Moser noted that the language at issue would replace the current Canon 4C (2). Ms. Veronis said that by

suggesting Alternative B, the Ethics Committee is not trying to delete the language that the judge shall not participate as a speaker, but they are mainly concerned with the clause that reads: “unless the organization is one that is devoted to the improvement of the law, the legal system, or the administration of justice and is not conducted for the economic or political advantage of its members.”

Mr. Bowen reiterated that Alternative B is not an alternative to Alternative A, it is an alternative to subsection (4)(e). If Alternative B is adopted, then subsection (4)(e) would have to be rewritten to be consistent. Judge McAuliffe stated that the policy question is whether a judge should be allowed to be a guest of honor or a speaker at a fund-raising event. Mr. Bowen suggested that Alternative A could be used, but the exception could be deleted by ending the sentence just before the word “unless.” The Vice Chair commented that this would mean that judges would not be allowed to speak at all at fund-raising events. Mr. Moser observed that once the policy question is resolved, both alternatives could be eliminated, and the matter would be covered by the language of subsection (4)(e). Or the prohibition could be retained in Alternative A, but without the exception.

Mr. Brault pointed out that this would not affect a judge speaking before a professional association. Mr. Moser added that this would only apply to fund-raising functions. Ms. Potter asked about a judge speaking to the YWCA. Mr. Brault remarked

that some of their events are for fund-raising, but some are not. The Vice Chair questioned whether a judge would have to ask an organization if the event is for the purpose of raising money, before the judge could speak at the event. Mr. Brault noted that the rule of reason would have to prevail. Mr. Lemmey added that sometimes when events are planned, the planners may not even know if the event will turn a profit. Ms. Knox said that it is more of a question of the intent of the organization to raise money, rather than whether the event was successful. Judge Missouri commented that judges often get invited to events to receive an award for support in a certain area. Would a judge be prohibited from accepting such an award? The judiciary needs a bright line rule on this. Judges may not know if the event at which they receive an award is a fund-raiser.

The Vice Chair suggested that Alternatives A and B should be eliminated, and subsection (e)(v) can take care of the issue being discussed. Judge McAuliffe expressed the opinion that the Rules Committee should choose one of the two options. Mr. Brault suggested that language could be put into Alternative A providing that judges are authorized to attend *pro bono* fund-raisers. The Vice Chair inquired as to whether judges across the country are prohibited from speaking at bar foundation events to raise money. Mr. Moser replied that he did not know of any states that prohibit this, but he could check. It is important to allow judges to speak at events which are not fund-raisers.

Judge McAuliffe reiterated that the Rules Committee has to determine the policy question of whether judges should be permitted to speak at or be a guest of honor at a fund-raising event of an organization. He asked which of the members were in favor of allowing judges to speak or be a guest of honor, and the vote was six to four against allowing judges to speak. The Vice Chair stated that the current rule already provides in Canon 4C (2) that a judge may not be a speaker or the guest of honor at an organization's fund-raising events. Judge McAuliffe said that the Style Subcommittee will redraft this provision.

The Reporter inquired as to whether it is necessary to list the various organizational positions in Canon 4C (e), when the phrase "or otherwise" also is used. Mr. Lemmey suggested that the introductory language to subsection (e) could be taken out. Mr. Moser explained that this language follows after the language of Alternative B. The Reporter asked if a judge can solicit funds if the judge is not a member of an organization. Judge Norton pointed out that subsection (e)(v) provides that a judge shall not use the prestige of the judicial office for fund-raising. The Vice Chair said that the language "or otherwise" in the introductory language of subsection (e) really expands the list of positions to anything. Mr. Moser agreed that this is construed as universal language.

Judge McAuliffe commented that the original language of subsection (e) which read: "[a] judge as an officer, director, trustee or non-legal adviser ..." was structured differently. He

expressed the view that this structure may be better than the new one and suggested that it be reinstated. It includes the word "otherwise."

Judge McAuliffe drew the Committee's attention to Canon 4D, and he pointed out that the first two sentences of the Comment after subsection (1) have been deleted. Ms. Veronis noted that the second sentence has been added back in. Judge McAuliffe said that the Rules Committee deleted subsections (3) and (4), which are labeled Alternative B, but the Ethics Committee has asked that this be included in the Code of Judicial Conduct. Mr. Bowen suggested that these provisions be added back in. Ms. Potter noted a typographical error –- in subsection (4), the first time the word "not" appears, it should be changed to the word "nor." Ms. Veronis explained that the *Ad Hoc* Subcommittee's view is that this provision should be limited to insider information. Under the current Code, Canon 4D states that a judge who receives confidential information within his or her judicial capacity may not disclose anything in financial dealings or for any other purpose not related to the judge's judicial duties. Mr. Bowen moved to add Alternative B back in to the Code, the motion was seconded, and it passed unanimously. Mr. Moser suggested that subsection (4) in Alternative B should be checked to make sure that it is consistent with Code, State Government Article, §15-507.

Judge McAuliffe pointed out that in subsection (3)(i) of

Canon 4 (which will be renumbered as subsection (5)(i) with the addition of the two provisions in Alternative B), after the word "reported," the following language is to be deleted, because it already appears in the same paragraph: "on the judge's financial disclosure statement." The Ethics Committee has withdrawn its request to include the cross reference, labeled "Alternative B," which appears after subsection (3)(i).

Ms. Veronis said that the Ethics Committee is withdrawing its request to include the last sentence of the Committee note after Canon 4E (3). Also, the Ethics Committee agrees with the Rules Committee that the cross reference after Canon 4F need not be added, so it can be deleted. Ms. Veronis stated that the Committee note, which appears after Canon 4G (2)(a), will be added in and will refer to Code, Estates and Trusts Article, §2-109, Restriction on Judge's Practice of Law. Judge McAuliffe asked if this should be a Committee note or a cross reference. This can be determined by the Style Subcommittee. Ms. Veronis pointed out that the Ethics Committee's opinion is that in the Comment after Canon 4G (2)(c), the language which reads "matters involving litigation" is unnecessary. Judge McAuliffe added that the Ethics Committee's version of this Comment is shorter. The Reporter remarked that there is not much difference between Alternative A and Alternative B. Judge Norton expressed his preference for Alternative A, the Rules Committee's version. He moved that Alternative A be adopted, the motion was seconded, and it passed unanimously.

Turning to Canon 5, Judge McAuliffe said that in Canon 5B (1)(f), the Ethics Committee added the language "likely to come before the judge." Mr. Moser pointed out that there is a case in the United States Supreme Court on this issue. The case is Republican Party of Minnesota v. Kelly, 122 S.Ct. 643; 151 L.Ed. 2d 561 (2001). Judge McAuliffe commented that the problem is that the restriction on speech has been challenged. Mr. Moser said that the ABA version of this provision, Canon 5B (3)(d)(ii), reads that a candidate for a judicial office shall not: "make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." He expressed the view that the language of the Maryland Canon is probably appropriate. He suggested that the first sentence of the Comment after subsection (1)(g) should be moved into the body of the Canon as a new subsection (2), and the Committee agreed to this change by consensus. What is now labeled subsection (2) is a new provision tracking the ABA language. The Committee note that follows is new and points out the *Ad Hoc* Subcommittee's and Ethics Committee's disagreement with the ABA provision, which states that family members of a judge should adhere to the same standards of political conduct as a judge who is a candidate for judicial office.

Judge McAuliffe called the Rules Committee's attention to the fourth paragraph of the Committee note after Canon 5B (2), which adds new language explaining that ABA (2000) Canon 5A

(1)(d) barring attendance of a candidate at political gatherings has been omitted, because it is inconsistent with Maryland Opinion No. 63. The next paragraph of the new language points out another departure from the ABA, which prohibits a judge from personally soliciting or accepting campaign funds or personally soliciting publicly stated support.

The Reporter observed that the language, "on the recommendation of the Rules Committee, the Court of Appeals permitted ..." in the Committee note after Canon 5C (4) should be moved to the Reporter's Note. The Committee agreed by consensus.

Mr. Moser commented that Rule 8.2 of the Maryland Lawyers' Rules of Professional Conduct should be changed to be parallel to Canon 5B (1)(e), (f), and (g). The Committee agreed by consensus.

Turning to Canon 6, the Vice Chair pointed out that in Canon 6D, a judge does not need to comply immediately with Canons 2C, 4D (2), and 4E. Mr. Moser said that the present Code has a time limit, also.

The Rules Committee approved Rule 16-813, as amended.

Judge McAuliffe drew the Rules Committee's attention to Rule 16-813A, Ethics - Committee; General Provisions, which has been renumbered as a rule, instead of a Canon. (See Appendix 4). The Rule creates the Ethics Committee and provides in detail how the Committee functions. Ms. Veronis added that to achieve staggered terms, one-third of the Committee's membership is changed each year. She said that one issue that arose in drafting this Rule

was the Ethics Committee sharing opinions with the Commission on Judicial Disabilities. The Ethics Committee is not in favor of sharing the opinions. The Vice Chair asked if the opinions are public. Ms. Veronis replied that some of the opinions are public, but they have been redacted. The Commission on Judicial Disabilities may be investigating a judge, and the sharing of the opinions would have a chilling effect on the investigation. The Reporter inquired as to where the opinions are published. Ms. Veronis answered that they are in the Judicial Handbook and may possibly be on the Internet. The Reporter questioned as to how the public can find the opinions. Ms. Veronis responded that currently, the opinions are bifurcated as unpublished and published. They are published if the opinion affects more than one judge, or the offense is repetitive. The judges get a copy of the opinions, so there is no need to publish all of them. Judge McAuliffe added that the published opinions are sent to law libraries. The Reporter asked if the judge's name is excised, and Ms. Veronis replied that all of the opinions are redacted before they are sent.

Mr. Lemmey commented that the Commission on Judicial Disabilities may need certain information at times. Ms. Veronis said that the Ethics Committee does not want to release the names of judges. Ms. Ogletree remarked that the opinions are published by topic, so there is access to those indexed that way.

The Reporter asked if Rule 16-814, Code of Conduct for Judicial Appointees, will be revised. Ms. Veronis answered that

once Rule 16-813 is finalized, Rule 16-814 can be changed to be consistent.

Ms. Veronis pointed out that in subsection (i)(4)(B) of Rule 16-813A, the *Ad Hoc* Subcommittee added the language that a panel of not less than three members appointed by the chairperson or the chairperson's designee may issue an unpublished, written letter of advice. The Ethics Committee agreed to this change.

The Rules Committee approved Rule 16-813A, as amended.

The Vice Chair adjourned the meeting.