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, Crownsville, Maryland on March 9, 2001.

Members present:

Hon. Joseph F. Murphy, Jr., Chair
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.
Hon. G. R. Hovey Johnson
Hon. Joseph H. H. Kaplan
Robert D. Klein, Esq.
Hon. John F. McAuliffe
Hon. William D. Missouri
Larry W. Shipley, Clerk
Melvin J. Sykes, Esq.
Roger W. Titus, Esq.
Del. Joseph F. Vallario, Jr.
Hon. James N. Vaughan

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Mike Lytle, Rules Committee Intern
Ramona Buck, ADR Commission
Nancy S. Forster, Esq., Office of the Public Defender
Kelley O'Connor, Administrative Office of the Courts
Albert "Buz" Winchester, Maryland State Bar Association
Frank Broccolina, State Court Administrator
Gary Bair, Esq., Attorney General's Office
Melony Joe Ellinger, Esq., House Judiciary Committee
Rachel Wohl, Esq., ADR Commission
Louise Phipps Senft, Esq., Baltimore Mediation Center
Brian Cox

The Chair convened the meeting. He made a special introduction of Brian Cox, a 9th grade student at Severna Park High School who is the son of Cathy Cox, Administrative Assistant to the Rules Committee. The Chair explained that Brian was "shadowing" the

Reporter today as part of a school project. The Chair also introduced Mike Lytle, who is a University of Baltimore law student and an intern for the Rules Committee.

Agenda Item 1. Consideration of proposed amendments to Rule 4-345 (Sentencing--Revisory Power of Court)

The Chair presented Rule 4-345, Sentencing--Revisory Power of Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-345 to add a notice to victims provision, to add a provision prohibiting the judge from hearing a motion to modify or reduce a sentence unless victims have been notified, and to add a provision requiring the judge to prepare a statement or dictate into the record the reasons for granting the motion, as follows:

Rule 4-345. SENTENCING -- REVISORY POWER OF COURT

(a) Illegal Sentence

The court may correct an illegal sentence at any time.

(b) Modification or Reduction - Time For

The court has revisory power and control over a sentence upon a motion filed within 90

days after its imposition (1) in the District Court, if an appeal has not been perfected, and (2) in a circuit court, whether or not an appeal has been filed. Thereafter, the court has revisory power and control over the sentence in case of fraud, mistake, or irregularity, or as provided in section ~~(d)~~ (e) of this Rule. The court may not increase a sentence after the sentence has been imposed, except that it may correct an evident mistake in the announcement of a sentence if the correction is made on the record before the defendant leaves the courtroom following the sentencing proceeding.

(c) Notice to Victims

The State's Attorney shall give notice to each victim who has filed a Crime Victim Notification Request form pursuant to Code, Article 27, §770 or who has submitted a written request to the State's Attorney to be notified of subsequent proceedings as provided under Code, Article 27, §784 that states (1) that a motion to modify or reduce a sentence has been filed and (2) either that the motion has been denied without a hearing or the date, time, and location of the hearing.

~~(c)~~ (d) Open Court Hearing

The court may modify, reduce, correct, or vacate a sentence only on the record ~~after notice to the parties and~~ in open court, after hearing from the State and from any victim who has requested an opportunity to be heard. The court shall not proceed to hear a motion to modify or reduce the sentence until the court determines that the notice requirements in section (c) have been satisfied or that all reasonable means to satisfy those requirements have not succeeded. If the court grants the motion, the court shall prepare or dictate into the record a statement setting forth the reasons upon which the ruling is based.

~~(d)~~ (e) Desertion and Non-support Cases

At any time before expiration of the sentence in a case involving desertion and non-support of spouse, children or destitute parents, the court may modify, reduce, or vacate the sentence or place the defendant on probation under the terms and conditions the court imposes.

> Source: This Rule is derived from former Rule 774 and M.D.R. 774.

Rule 4-345 was accompanied by the following Reporter's Note.

> To conform this Rule with victims' rights' legislation, the Criminal Subcommittee is recommending that the notice to victims be expanded to ensure that they are aware of a defendant's request to reduce a sentence and that the judge be required to state on the record the reasons for granting the motion.

The Chair said that the Criminal Subcommittee had proposed some changes to Rule 4-345. The Honorable Robert M. Bell, Chief Judge of the Court of Appeals, had requested that the Rules Committee study the Rule in light of proposed legislation to place a time limit on the judge's revisory power over a criminal sentence. The Criminal Subcommittee met and considered whether section (b) should be amended to add a time limit within which the judge must decide a motion for modification or reduction of sentence. Delegate Anthony Brown addressed the Subcommittee, a majority of which, for reasons to be discussed, rejected the addition of language to place a time limit on a judge's revisory power. There is proposed legislation, HB62 and SB632, to add a one-year time limit, while maintaining the judge's revisory power for fraud, mistake, or irregularity. The Subcommittee suggested changes to reflect victims' rights' legislation. In addition, Ms. Roberta Roper of the Stephanie Roper Committee, an organization devoted to the rights of victims, has requested an additional amendment which is that the language "and victim's

representative" be added in after the word "victim" throughout the Rule. Ms. Roper otherwise endorses the Subcommittee's proposed changes.

The Chair said that the Subcommittee members who attended the Subcommittee meeting at which the limit on a judge's revisory power was discussed are present today and will have the opportunity to speak. As proposed, the Rule would prohibit a judge from deciding the merits of a motion to revise a sentence unless and until the judge is satisfied that the requirements of notice to victims have been complied with or that all reasonable means have been taken to satisfy the requirements.

Judge Missouri remarked that he thought that notice to a victim also included notice to a victim's representative, but he had no problem with making Ms. Roper's suggested changes. He expressed the concern that at the time of the Subcommittee discussion, Mr. Dean had asked what the court would do if the prosecutor declines to notify the victim or the victim's representative. A contempt order creates more problems than it solves. He suggested that some language could be added to the Rule dealing with the recalcitrant prosecutor. Judge Missouri stated that the bench in Prince George's County is opposed to time limits. He personally is not opposed to a reasonable time limit of five to seven years.

Mr. Maloney expressed his agreement with adding a provision for victim notification, which is required by statute. He also agreed

with Ms. Roper's amendments. In the cases that had been cited in recent newspaper articles, the State's Attorney had failed to timely notify the victim that a hearing to reduce a defendant's sentence had been scheduled, and the victim did not find out until later that the sentence was reduced. A time limit on revising a sentence is counterproductive to what most judges are trying to accomplish. Sentence revision can be a powerful incentive, allowing the defendant to work toward something besides parole. Twelve months is not enough time for a judge to be able to determine if a defendant has been rehabilitated. The tool of sentence revision is especially useful in cases involving addictions, where there is no identifiable victim except for the public. It is not as useful in violent crime cases. To refute the assertion that a sentence revision is interfering with the executive branch of the government, which is the Parole Commission, Mr. Maloney pointed out that the Parole Commission reviews 22,000 cases annually. The nine Commissioners have a heavy workload, and often the hearings are held by video conferencing from the penal institution. The Commissioners may have never met the defendant. They may only have seen the defendant on a television screen. A victim would usually not be interested in attending a hearing at the prison. In contrast, the sentencing judge is the person who sat through the trial, heard from the victims, listened to the defendant's allocution, and read the Presentence Investigation report. He or she has had the opportunity to follow up on the

defendant. The sentencing judge may have the most meaningful exposure to make a decision about reduction of sentence. Revisory power of judges should be preserved.

Mr. Dean, another member of the Criminal Subcommittee, said that previously he had asked the Rules Committee, the legislature, and the Sentencing Guidelines Commission to consider amending the policy in Maryland of indefinite control by judges over sentences. The vast majority of other states do not allow this practice. The retention of control by a judge over the sentence blends the judicial function into the executive function, and it is not healthy. If the Parole Commission is not working properly, it should be fixed, so that the executive branch operates as it should. Judges vary remarkably -- some rule immediately, some hold the case for a long time. This scattered approach is chaotic. Some cases go on for years with the sentence in legal limbo. There are instances where sentences should be adjusted, but this should be handled by the executive branch of government. Executive power includes parole, clemency, and pardons. Victims of crime are upset when the sentence of the defendant is reduced. The Roper Committee supports House Bill 62, which has the one-year time limit. Mr. Dean said that he was in the minority in the Subcommittee on the issue of whether or not there should be a time limit on revising sentences. He expressed the opinion that the proposed changes to the Rule do not address House Bill 62 and Senate Bill 632. A reasonable time limit would put

Maryland in conformity with other jurisdictions.

Delegate Vallario commented that he was in agreement with Ms. Roper's amendment. He said Mr. Dean's request for a time limit was considered in 1995 and 1996 and was rejected. The Sentencing Commission also considered and rejected a time limit proposal. The proposed changes to the Rule answer all the necessary questions. It will be matched to the law on the issue of victim notification. In four of the five "horror stories" involving a later reduction of a criminal's sentence cited by the press, the State's Attorney was part of the plea arrangement to reduce the sentence. The legislature believes in truth in sentencing. It rejected a time limit in last year's session. A hearing on the issue of the time limits will be held on Tuesday, March 13, 2001. There has been some negative publicity on the report prepared by a legislative aide, concerning time limits in other states. The aide, Melony Joe Ellinger, Esq., is present today and can answer any questions. Delegate Vallario expressed the opinion that the Rule as drafted meets the appropriate requirements.

Mr. Hochberg asked about the problem of the prosecutor not cooperating with victim notification requirements. Mr. Dean replied that this is not usually a problem. The Chair noted that it is not possible to put in sanctions for every violation of every Rule. He is not aware of any problems with the prosecutors not cooperating, and the trial judge has a great amount of discretion to fashion an

appropriate remedy if a prosecutor does not cooperateJudge Vaughan said that the issue of time limits impacts on the District Court. He would not like to see a time limit. The function of the court is not just to sentence, punish, and forget, but it is a broader function. The judge attempts to structure the sentence to have the greatest impact on reducing recidivism. The idea is give the defendant something for which to work. Judge Vaughan expressed his agreement with the Roper amendments, and he stated that if a time limit is to be imposed, a three-year limit would not adversely impact the operation of the District Court.

The Chair noted that there are some statutes on the books dealing with the shortening of sentences which are not often considered. Code, Article 27, §654N, Diminution of Sentence for Good Behavior, has been recodified as Code, Correctional Article §3-704, Diminution Credits--Good Conduct, which pertains to a deduction from an inmate's term of confinement and as Code, Correctional Article, §11-504, Diminution Credits--Postsentence Confinement--Good Conduct, which allows an initial deduction from an inmate's term of confinement if the judge approves. Also, Code, Article 27, §641A, Suspension of Sentence or Imposition of Probation following Judgment, provides that the court may suspend the imposition or execution of sentence and place the defendant on probation upon such terms and conditions as the court deems proper.

Judge McAuliffe said that he was in favor of the Subcommittee

changes. However, he has debated for years with many people, including his brother, the Honorable James McAuliffe, over the issue of a time limit on a judge's revisory power, and he expressed the view that some limit should be set. He was the chair of the Sentencing Guidelines Commission when Mr. Dean brought this issue before the Commission, and he was in agreement with Mr. Dean, although the limit did not pass the Commission. His feeling is that one year is enough time to modify a sentence. He said that in his 13 years on the trial court, most motions to modify were disposed of in less than a year. He remarked that he could not remember needing to hold a case for more than one year, even if it involved addiction rehabilitation. The behavior modification tool is important, but so is public confidence, which is waning. Although the limit should be reasonable, Judge McAuliffe suggests that it not be couched in terms of a "reasonable" time, because there are too many interpretations of the word "reasonable." It is important to assure public confidence. He moved to add to the proposed changes to Rule 4-345 that the court retain revisory power over the sentence for one year after the motion to modify is filed. Mr. Titus seconded the motion. Mr. Sykes asked if this amendment would apply to fraud, mistake, or irregularity, and Judge McAuliffe answered that the one-year limit would not apply to these.

Mr. Brault commented that no one had mentioned whether or not an appeal filed would affect a time limit. He inquired as to whether

all appeals are completed within one year. Mr. Maloney noted that the Rule's predecessor, former Rule 774, provided that the time for revision was after the appeals were exhausted. The Chair said that it was 90 days after the imposition of a sentence or within 90 days after the Court of Special Appeals had affirmed the conviction or after the Court of Appeals or the U.S. Supreme Court had denied the writ of certiorari.

Judge Heller stated that she was opposed to amending the Rule to put in a one-year time limit. It is important that there be public confidence in what judges do, and it is important to have safeguards to the extent possible to protect against a judge abusing his or her discretion. This should not be the basis for a one-year restriction. Certain restrictions already exist. For example, there is case law that if a guilty plea agreement is reached, the judge cannot subsequently modify the original sentence without the consent of the State's Attorney. The addition of notice to victims and their representatives is a good amendment. It is important to allow victims notice and an opportunity to be heard before a sentence is modified. The modification should be stated in the courtroom and on the record. Putting in a one-year limitation would have an adverse impact in a great number of cases, and not just theoretically. For example, in drug addiction cases, many people are sent to the Department of Correction awaiting entry into drug treatment programs. It may take six to eight months before the defendant can get into the

program, and a one-year time limit to modify a sentence could give the judge only a few months after the defendant gains entry into the program to see if the defendant is successful, and this is not long enough. Even if a defendant is not incarcerated, a 28-day program requires months of aftercare. In treating drug addition, one year is very short-term.

Judge Heller said that there have been big drug sweeps in Baltimore City causing young people who were not directly involved in selling drugs to plead guilty to drug felony charges, which may impact their later ability to get jobs. If there is a two- or three-year period for these individuals to satisfy their probation and get out of the system, they may be able to stay off drugs and became productive citizens.

Judge Heller cited two examples that do not involve drugs. If a defendant with no prior criminal record is convicted of felony theft and has to pay restitution, the restitution may take time. After restitution has been completed, a sentence modification may be appropriate. Another example is a defendant who is elderly, has no prior record, and is found guilty of maintaining a common nuisance. It may take a while to correct the nuisance, after which a sentence modification may be appropriate.

Judge Heller expressed her opposition to using a “reasonable time” as the standard for modifying a sentence. If there has to be a time limit, it should be a minimum of five years, which is the time

period allowed by statute for probation; however, she said that she was not in favor of any time limit.

Judge Kaplan expressed his agreement with Judge Heller. He said that many cases in Baltimore City involve drugs. Where drug treatment is a reasonable alternative to incarceration, the program may last 18 to 24 months. It is important that the judge have the ability to modify the sentence, if the defendant completes the program successfully. In Baltimore City, a number of people have successfully completed the program, and the case against them is expunged two or three years down the line. If there were a one-year limit on modifying sentences, a number of people would be ruined for life, with the judiciary having no ability to correct the situation. The one-year time limit would be detrimental to justice. Mr. Dean remarked that the legislature has dealt with this issue by providing for probation before judgment and a five-year period of probation. There are two categories of cases, those involving victims and those with no victims. Crimes of violence are in the first category, and crimes involving substance addiction often are in the second category. The State's Attorneys' Association is concerned with the crimes of violence. The Chair commented that the State's Attorneys support the concept of drug court where the judge maintains control over the defendant in an ongoing process. Mr. Dean said that the concern of the State's Attorneys is identifiable victims of crimes of violence.

Judge Vaughan commented that there is a contradiction between five years of probation and a one-year limit on the judge's revisory power. Mr. Dean expressed the opinion that this is consistent. The Chair pointed out that someone not sentenced to a prison term should not necessarily get a probation before judgment at the time of sentencing when the person has not earned it. If the judge can impose a sentence and hold out earning probation before judgment as a reward, the process of earning that reward may take longer than one year. Judge Missouri remarked that the problem with there being no limit on the judge's revisory power is if the victims are not notified. In responding to Judge McAuliffe's comment that he never had to change a sentence after one year, Judge Missouri said that Baltimore City and Prince George's County do not have the resources of Montgomery County and are not necessarily able to handle cases within one year. It may take six months to get into a drug treatment program and then the defendant may spend 18 months in the program. A defendant may be a college student, and the judge may want to see if the defendant graduates before the judge decides the sentence modification. A one-year time limit to modify a sentence is not appropriate. Judges are gatekeepers to ensure that justice and equality prevail. Judge Missouri reiterated that he is not opposed to a time limit of five to ten years. If the concern is that people do not know which cases are under consideration for a reduction in sentence, the judge could report these cases in the monthly reports

that judges are required to submit. A one-year time limit to revise a sentence is unacceptable for trial judges.

Judge McAuliffe pointed out that problems with drugs and alcohol can be addressed in other ways. There are techniques such as suspending the imposition of sentence, and, based upon how well the person does in a diversion program, then imposing a sentence the judge thinks is appropriate. Alternative sentencing provisions could be built into the grid for drug and alcohol cases. Substance abuse cases are special, but in general he still favors a one-year limitation. Without the limitation, public confidence is eroded. Mr. Sykes asked if drug and alcohol violations would be excluded from the one-year limitation. Judge McAuliffe replied that they would not be excluded, but they would have a different disposition. The Chair commented that another way to handle this issue is for the Rule to provide that in violent crimes (a term which is already defined by statute), the judge cannot reconsider the sentence. Judge McAuliffe stated that he was not in favor of the Chair's suggestion. The judge should be able to reconsider the sentence. The defense attorney may not have brought in enough evidence, and it would be important for the judge to be able to reconsider the sentence. There should be a one-year limitation on crimes of violence.

The Chair stated that if a limit on crimes of violence were imposed, the limit could be five years to be consistent with the five-year limit on probation. There have been anecdotal situations

where the prosecutor and defense attorney agreed to a reduction of sentence, but the victim was not notified, and the judge was criticized for modifying the sentence in accordance with the agreement. There are also anecdotal situations in which having a motion for modification pending has been beneficial to society. In the case of Ware v. Maryland, 348 Md. 19 (1997), a key witness in a murder case, Eddie Anderson, who was himself incarcerated for committing a separate felony murder, had telephoned the victims' house at the time the murders were being carried out and heard screaming and gunshots in the background. He indicated his willingness to testify as a state's witness. Mr. Anderson had filed a timely motion for reconsideration with the trial judge in Anderson's case. The Chair stated that he was that trial judge. Mr. Anderson's attorney filed a supplement to the motion for reconsideration that detailed Mr. Anderson's cooperation with the State in the Ware case. Ware was convicted as a result of Anderson's testimony. However, the State's Attorney had not told the defense about the pending motion for reconsideration, and Ware was granted a new trial. In the second trial, Ware again was convicted, and the case was recently affirmed on appeal. The question is whether Anderson would have come forward if the Chair had denied the motion or if Anderson did not have a motion for reconsideration pending. However, he did come forward, and a killer is now behind bars. The Chair said that he thinks that it is important that his colleagues

have this tool if they want to use it. The Chair expressed the view that without the possibility of a reduction in sentence, Anderson may not have cooperated with the State.

Mr. Titus commented that he agreed with Judge McAuliffe that there should be a time limit on a judge's power to revise a sentence. He suggested that if a year is not suitable, another number could be chosen. He said that he is troubled by the public's lack of confidence in the courts, and this is not only the victims' lack of confidence. The judicial system should have some finality, and he expressed his concern about the endless process. The issue is not simply notice to victims, but the need for victims to have to come to court so many times, which may be traumatic for them. He is also troubled by a lengthy sentence being turned into a probation before judgment. There should be some time limit beyond which a judge can make no further changes. If the Parole Commission is overburdened, then its staff should be increased.

Mr. Hochberg asked Judge McAuliffe if he would consider changing his proposed one-year time limit to three years. Judge McAuliffe responded that he thought that the limit should be one year. Mr. Brault told the Committee that he did not practice criminal law, but he was concerned because the Committee handles procedural matters only and has no authority as to substantive law. It is appropriate for the Court of Appeals to impose a time limit on a procedure, but this procedure is substantive and has a large

legislative component to it. The legislature has bills on this issue pending before it, and Mr. Brault expressed the view that this is where the matter should be handled.

Delegate Vallario said that a legislative public hearing will be held next week. The Rules Committee has not had the benefit of the pros and cons which will be expressed at the hearing and should not take any action yet. The hope for a reduction in sentence is foremost in a prisoner's mind and has a substantial effect on a prisoner's performance in prison. There was a case on the Eastern Shore where an inmate rescued a prison guard after a minor riot in the prison. The inmate's reward was a reconsideration of his sentence. The court should have the right to look at an inmate's conduct in prison. When a motion for reconsideration is pending, the one person the inmate wants to impress the most is the sentencing judge. If the prisoner does the right thing, such as rescuing the prison guard, the prisoner hopes that the judge will "take back some time." Time limits would not be beneficial for the courts or for prison guards.

The Chair polled the Committee as to whether they were in favor of any time limit on a judge's ability to revise a sentence. The Committee voted four to eleven against any time limit. The Chair stated that in light of the Committee's decision, there was no need to vote on the motion to have a one-year time limit.

The Chair inquired about the Subcommittee's proposed changes to

the Rule. The Vice Chair noted that in section (d), the language which reads "after hearing from the State and from any victim who has requested an opportunity to be heard" implies that the defendant has no opportunity to be heard. The Chair stated that the defendant always has the opportunity to be heard. Judge Missouri added that case law holds that the judge cannot modify the sentence unless the defendant is present. The Vice Chair commented that the language in the sentence should be changed. The Chair suggested that the sentence read as follows: "The court may modify, reduce, correct, or vacate a sentence only on the record in open court, after hearing from the defendant and State and from any victim and any victim's representative who has requested an opportunity to be heard." The Committee agreed by consensus to this change.

The Vice Chair referred to the Crime Victim Notification Request form which is provided for by statute. She said that she assumed that pursuant to the statute, the State's Attorney provides notice by mailing to the address listed on the form. She asked about the language in section (d) which reads: "or that all reasonable means to satisfy those requirements have not succeeded." This language is taken from Rule 2-122, Process--Service--In Rem or Quasi in Rem. Judge Heller responded that what happens is that the State's Attorney may tell the court that the notice sent to the victim comes back marked "moved." It is not infrequent that the State's Attorney puts on the record the efforts expended to try to notify the victim.

The Vice Chair questioned the meaning of the third sentence of section (d) of Rule 4-345 which provides that the court may dictate into the record a statement setting forth the reasons upon which the ruling is based. Judge Vaughan said that the District Court always dockets the entry in writing. The Vice Chair asked if the circuit court grants the motion in writing. Judge Kaplan remarked that this requirement is satisfied by a docket entry. The Reporter added that if the statement is dictated into the record, a transcript of the statement can be obtained.

Mr. Sykes said that section (c) refers to the notice requirements in Code, Article 27, §784, which does not provide that notice means one has to reach the party. There is a contradiction in the language in section (d). The notice requirement is satisfied when the notice is sent, not when it is received. The language of section (d) seems to mean that the court is satisfied that all reasonable means to ensure receipt of the notice have not succeeded. The Vice Chair pointed out that requiring the court to determine whether all reasonable means to give notice have been completed is more than section (c) requires. The Chair noted that the statute uses the language "shall notify" and "shall send." He suggested that the second sentence of section (d) could read as follows: "The court shall not proceed to hear a motion to modify or reduce the sentence until the court determines that the victim or the victim's representative has been notified or that all reasonable efforts to

provide notice have not succeeded." The Vice Chair questioned as to how one would know that the victim has been notified. The Chair responded that usually the prosecutor would know. Sometimes it happens that the victim has been notified but does not wish to attend the court hearing. Mr. Dean remarked that usually the judge asks if the victim has been notified, and the State's Attorney either cannot find the victim, or the victim does not want to attend the court hearing.

Delegate Vallario said that the Crime Victim Notification Form instructs the victim to keep his or her address current. The person is entitled to notice at whatever address is in the file. The prosecutor should make reasonable efforts to find the victim. The Chair added that reasonable efforts such as those designated in Rule 2-122 should be made. Sometimes it is impossible to find a person. Mr. Dean suggested adding the words "when practicable" to section (d). Judge McAuliffe observed that this would be changing the requirements. Code, Article 27, §770 puts the responsibility on the victims to keep their addresses up to date. It does not require more than attempts to notify someone at the address in the record. Mr. Sykes commented that the way the Rule is worded, the State's Attorney is required to be more diligent than the victim. If the victim changes his or her address, it is fair that the victim have the responsibilities for notifying the State's Attorney.

Judge McAuliffe suggested that the second sentence of section

(d) end with the word “satisfied,” and the remainder of the sentence should be deleted. The Committee agreed by consensus with this change. The Committee approved the Rule as amended.

Agenda Item 2. Consideration of a proposed amendment to Rule 4-347 (Proceedings for Revocation of Probation)

Judge Johnson presented Rule 4-347, Proceedings for Revocation of Probation, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-347 (e)(1) to permit a judge, other than the sentencing judge, to hear a violation of probation proceeding, as follows:

Rule 4-347. PROCEEDINGS FOR REVOCATION OF PROBATION

(a) How Initiated

Proceedings for revocation of probation shall be initiated by an order directing the issuance of a summons or warrant. The order may be issued by the court on its own initiative or on a verified petition of the State's Attorney or the Division of Parole and Probation. The petition, or order if issued on the court's initiative, shall state each condition of probation that the defendant is charged with having violated and the nature of the violation.

(b) Notice

A copy of the petition, if any, and the order shall be served on the defendant with the summons or warrant.

(c) Release Pending Revocation Hearing

Unless the judge who issues the warrant sets conditions of release or expressly denies bail, a defendant arrested upon a warrant shall be taken before a judicial officer of the District Court without unnecessary delay or, if the warrant so specifies, before a judge of the District Court or circuit court for the purpose of determining the defendant's eligibility for release.

(d) Waiver of Counsel

The provisions of Rule 4-215 apply to proceedings for revocation of probation.

(e) Hearing

(1) Generally

The court shall hold a hearing to determine whether a violation has occurred and, if so, whether the probation should be revoked. The hearing shall be scheduled so as to afford the defendant a reasonable opportunity to prepare a defense to the charges. Whenever practicable, the hearing shall be held before the sentencing judge or, if the sentence was imposed by a Review Panel pursuant to Rule 4-344, before one of the judges who was on the panel. With the consent of the defendant and the original sentencing judge or his or her successor, the hearing may be held before any other judge. The provisions of Rule 4-242 do not apply to an admission of violation of conditions of probation.

Cross reference: See *State v. Peterson*, 315 Md. 73 (1989), construing the third sentence of this subsection.

(2) Conduct of Hearing

> The court may conduct the revocation hearing in an informal manner and, in the interest of justice, may decline to require strict application of the rules in Title 5, except those relating to the competency of witnesses. The defendant shall be given the opportunity to admit or deny the alleged violations, to testify, to present witnesses, and to cross-examine the witnesses testifying against the defendant. If the defendant is found to be in violation of any condition of probation, the court shall (A) specify the condition violated and (B) afford the defendant the opportunity, personally and through counsel, to make a statement and to present information in mitigation of punishment.
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> Cross reference: See *Hersch and Cleary v. State*, 317 Md. 200 (1989), setting forth certain requirements with respect to admissions of probation violations, and *State v. Fuller*, 308 Md. 547 (1987), regarding the application of the right to confrontation in probation revocation proceedings.
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> Source: This Rule is new.

Rule 4-347 was accompanied by the following Reporter's Note.

> For purposes of managing criminal dockets more efficiently, the Honorable David B. Mitchell of the Circuit Court of Baltimore City has requested that Rule 4-347 (e)(1) be amended to allow any judge, and not just the original sentencing judge, to hear violations of probation. The Subcommittee is suggesting that this change be made conditioned upon the consent of the defendant and the original sentencing judge or his or her successor.

Judge Johnson explained that the Honorable David B. Mitchell, Circuit Court Judge for Baltimore City, had requested this change to subsection (e)(1) to allow a judge, other than the original

sentencing judge, to hear a violation of probation. Judge Johnson remarked that he thought that this was already authorized. Prince George's County is doing this, so that probation officers need only come to court for one specific time period. The Vice Chair asked about the language "his or her successor," and Judge Heller replied that if a judge retires, the successor judge is the one who takes the place of the retiring judge. In Baltimore City, the court is divided into units entitled "parts," and when the judge for Part III, for example, retires, the new judge for Part III is the successor judge. The Vice Chair asked why the defendant has to go before the successor judge. Judge Missouri said that otherwise the administrative judge would have to handle the case. Judge Johnson commented that if a defendant on probation allegedly commits another offense, the judge handling the new case should be able to handle the revocation of probation.

The Vice Chair again questioned about the successor judge. Judge Heller replied that administratively all of the former judge's cases are inherited by the successor judge. The Vice Chair inquired if Baltimore City approves of the successor judge refusing to allow the judge handling the new case to hear the probation violation. Judge Heller responded affirmatively, noting that Baltimore City prefers that the Rule not require the defendant's consent for the judge to whom the new case is assigned to hear the probation violation. The judges of Baltimore City strongly believe that if the

sentencing judge or the successor judge wants to retain the case, the judge should be able to do so. The Chair remarked that if the State wants to work out the case, it can do so and *nol pros* the violation of probation. He noted that this is not a very common problem.

The Vice Chair stated that for the benefit of the Style Subcommittee, she wished to clarify the changes that the Criminal Subcommittee had suggested. She said that her understanding was that the violation of probation would be heard by the original sentencing judge unless this is impracticable or unless the original or successor judge agrees that some other judge will hear the violation case. Judge Johnson commented that the Style Subcommittee can rewrite the Rule to express the substance of the Committee's changes.

Judge Heller reiterated that Judge Mitchell does not believe that the defendant needs to consent to a judge other than the original sentencing judge hearing the probation violation. Judge McAuliffe expressed the view that the defendant should have the right to consent or prevent the transfer. It may be unfair to transfer the case to another judge. If the transfer is part of a plea arraignment that resolves both the violation and the new case, defendants will consent to the transfer. Judge Vaughan commented that the process should be streamlined to get the matter resolved. The District Court judges had been concerned that they would not be able to hear their violations of probation, but they are in agreement with the proposed language. Judge Dryden pointed out that in terms of the successor

judge, there may not always be a straight succession from one judge to another. Judge Missouri said that the clerk's office can be instructed to give any case to the administrative judge where there is a problem determining the successor judge.

The Vice Chair suggested that the word "original" could be taken out. Without this word, the new language could be construed to include the person in the shoes of the sentencing judge. Judge Missouri expressed his disagreement with this suggestion. The Chair said that the shift to another judge can be made with the consent of the defendant and the sentencing judge, unless the sentencing judge has retired. Judge Kaplan suggested that the following language could be added: "unless the sentencing judge is unavailable." The Chair noted that the judge may be retired but available. Mr. Sykes observed that the successor judge has no proprietary interest in the case. Judge Heller responded that the Rule uses the language "whenever practicable." The Chair pointed out that under the Rule, the transfer to a different judge cannot be made without the consent of the sentencing judge, even if the defendant and the prosecutor are willing. Judge Vaughan commented that as a practical matter, most judges would have no problem with this, unless it is a special case. The amended Rule is proper as written. Mr. Sykes suggested that any further changes be left to the Style Subcommittee.

The Vice Chair questioned as to why the reference to the "successor judge" has to stay in the Rule. Judge Missouri answered

that it could be deleted. Judge McAuliffe remarked that there needs to be an exception for retired judges. Judge Kaplan commented that the exception could be for unavailable judges, but Judge McAuliffe expressed the opinion that the word "unavailable" could cause problems. Judge Heller noted that the phrase "whenever practicable," which is already in the Rule, covers this situation. The Reporter suggested that the language "or his or her successor" and "original" be deleted from the proposed language. The Committee agreed by consensus to these changes. The Chair stated that the Style Subcommittee will take care of this. Mr. Sykes summarized that (1) the sentencing judge and the defendant may agree that the hearing on a violation of probation will be before another judge and (2) the hearing will not be before the sentencing judge if it is not practicable. The Committee approved the Rule as amended.

Agenda Item 3. Reconsideration of certain proposed rules changes concerning court-referred alternative dispute resolution proceedings: Amendments to: Rule 17-102 (Definitions), Rule 17-103 (General Procedures and Requirements), Rule 17-104 (Qualifications and Selection of Mediators), Rule 17-105 (Qualifications and Selections of Persons Other than Mediators), New Rule 17-109 (Mediation Confidentiality), and Amendments to Rule 1-101 (Applicability)

The Vice Chair presented Rules 17-102, Definitions; 17-103, General Procedures and Requirements; 17-104, Qualifications and Selection of Mediators; 17-105, Qualifications and Selection of Persons Other than Mediators; 17-109, Mediation Confidentiality; and

1-101, Applicability, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

AMEND Rule 17-102 to add Committee notes to sections (a) and (b); to modify the definitions of "arbitration," "mediation," and "neutral case evaluation"; and to add a definition of "mediation communication," as follows:

Rule 17-102. DEFINITIONS

In this Chapter, the following definitions apply except as expressly otherwise provided or as necessary implication requires:

(a) Alternative Dispute Resolution

"Alternative dispute resolution" means the process of resolving matters in pending litigation through a settlement conference, neutral case evaluation, neutral fact-finding, arbitration, mediation, other non-judicial dispute resolution process, or combination of those processes.

Committee note: Nothing in these Rules is intended to restrict the use of consensus-building to assist in the resolution of disputes. Consensus-building means a process generally used to prevent or resolve disputes or to facilitate decision making, often within a multi-party dispute, group process, or public policy-making process. In consensus-building processes, one or more neutral facilitators may identify and convene all stakeholders or their representatives and use techniques to open communication, build trust, and enable all parties to develop options and determine

mutually acceptable solutions.

(b) Arbitration

"Arbitration" means a process in which (1) the parties appear before one or more impartial arbitrators and present evidence and argument supporting their respective positions, and (2) the arbitrators render a decision in the form of an award that~~,~~ is not binding, unless the parties ~~otherwise~~ agree otherwise in writing~~, is not binding~~.

Committee note: Under the Federal Arbitration Act, the Maryland Uniform Arbitration Act, at common law, and in common usage outside the context of court-referred cases, arbitration awards are binding unless the parties agree otherwise.

(c) Fee-for-service

"Fee-for-service" means that a party will be charged a fee by the person or persons conducting the alternative dispute resolution proceeding.

(d) Mediation

"Mediation" means a process in which the parties ~~appear before an impartial~~ work with one or more impartial mediators who, ~~through the application of standard mediation techniques generally accepted within the professional mediation community and~~ without providing legal advice, assist~~s~~ the parties in reaching their own voluntary agreement for the resolution of ~~all or part of their~~ the dispute or issues in the dispute. A mediator may identify issues and options, assist the parties or their attorneys in~~, explore~~ exploring the needs underlying ~~settlement alternatives, and discuss candidly with the parties or their attorneys the basis and practicality of~~ their respective positions~~, but, unless the parties agree otherwise,~~ and, upon request, assist the parties in reducing to writing a memorandum of their points of agreement. Unless the parties

agree otherwise, the mediator does not engage in arbitration, neutral case evaluation, ~~or~~ neutral fact-finding, or other alternative dispute resolution processes and does not recommend the terms of an agreement.

(e) Mediation Communication

"Mediation communication" means speech, writing, or conduct made as part of a mediation, including communications made for the purpose of considering, initiating, continuing, or reconvening a mediation or retaining a mediator.

~~(e)~~ (f) Neutral Case Evaluation

"Neutral case evaluation" means a process in which (1) the parties, their attorneys, or both appear before an impartial person and present in summary fashion the evidence and arguments supporting their respective positions, and (2) the impartial person renders an evaluation of their positions and an opinion as to the likely outcome of the dispute or issues in the dispute if the action is tried.

~~(f)~~ (g) Neutral Fact-finding

"Neutral fact-finding" means a process in which (1) the parties, their attorneys, or both appear before an impartial person and present evidence and arguments supporting their respective positions as to particular disputed factual issues, and (2) the impartial person makes findings of fact as to those issues. Unless the parties otherwise agree in writing, those findings are not binding.

~~(g)~~ (h) Settlement Conference

"Settlement conference" means a conference at which the parties, their attorneys, or both appear before an impartial person to discuss the issues and positions of the parties in the action in an attempt to resolve the dispute or issues in the dispute by

agreement or by means other than trial. A settlement conference may include neutral case evaluation and neutral fact-finding, and the impartial person may recommend the terms of an agreement.

Source: This Rule is new.

Rule 17-102 was accompanied by the following Reporter's Note.

As requested by the Alternative Dispute Resolution (ADR) Commission, the Rules Committee is proposing the addition of a Committee note to section (a) which refers to consensus-building as a means of dispute resolution. The note also contains a definition of the term. The Commission would like the Rule to make clear that consensus-building is a method of ADR because it is a useful procedure in certain situations such as disputes involving government agencies.

The ADR Commission also has asked for clarifying amendments to section (b). The proposed amendments make clear that arbitrators are impartial and explain that outside of the court arena, arbitration is binding unless the parties agree otherwise.

The ADR Commission has asked for changes to section (d), the definition of "mediation," to make the distinction between mediation and other ADR processes clearer.

At the request of the Commission, the Committee also proposes to add a definition of the term "mediation communication," which will relate to proposed new Rule 17-109, Mediation Confidentiality.

At its open meeting on the One Hundred Forty-Eighth Report of the Rules Committee, the Court of Appeals remanded to the Committee the proposed changes to Title 17 set out in that Report. One area of concern was the second

sentence of Rule 17-102 (d) which, as proposed in the 148th Report, would have ended as follows: "and, upon request, assist the parties in reducing to writing any agreement that they may reach." The Court was concerned that this language could be construed as authorizing the unauthorized practice of law by a nonlawyer mediator or, if the mediator is a lawyer, authorizing the lawyer to violate the ethical prohibition against representing two parties who have conflicting interests. To address this concern, the Alternative Dispute Resolution Subcommittee recommends that the following language be used in lieu of the language that was originally proposed: "and, upon request, assist the parties in reducing to writing a memorandum of their points of agreement." The proposed language is based on similar language in revised Rule 9-205 (d) (adopted by the Court, effective July 1, 2001), which reads as follows:

> (d) If Agreement
>
> If the parties agree on some or all of the disputed issues, the mediator shall prepare a written memorandum of the points of agreement and send copies of it to the parties and their attorneys for review and signature. If the memorandum is signed by the parties as submitted or as modified by the parties, the mediator shall submit it to the court for whatever action the court deems appropriate.

MARYLAND RULES OF PROCEDURE

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

AMEND Rule 17-103 to add language to subsection (c)(3) providing that the court may require parties in a dispute to attend a non-fee-for-service mediation session explaining the mediation process, as follows:

Rule 17-103. GENERAL PROCEDURES AND REQUIREMENTS

(a) In General

A court may not require a party or the party's attorney to participate in an alternative dispute resolution proceeding except in accordance with this Rule.

(b) Minimum Qualifications Required for Court Designees

A court may not require a party or the party's attorney to participate in an alternative dispute resolution proceeding conducted by a person designated by the court unless (1) that person possesses the minimum qualifications prescribed in the applicable rules in this Chapter, or (2) the parties agree to participate in the process conducted by that person.

(c) Procedure

(1) Inapplicable to Child Access Disputes

This section does not apply to proceedings under Rule 9-205.

(2) Objection

If the court enters an order or

determines to enter an order referring a matter to an alternative dispute resolution process, the court shall give the parties a reasonable opportunity (A) to object to the referral, (B) to offer an alternative proposal, and (C) to agree on a person to conduct the proceeding. The court may provide that opportunity before the order is entered or upon request of a party filed within 30 days after the order is entered.

(3) Ruling on Objection

The court shall give fair consideration to an objection to a referral and to any alternative proposed by a party. The court may not require an objecting party or the attorney of an objecting party to participate in an alternative dispute resolution proceeding other than a non-fee-for-service settlement conference or a non-fee-for-service mediation session in which the parties will be given an explanation of the mediation process and an opportunity to determine whether to participate in mediation.

(4) Designation of Person to Conduct Procedure

In an order referring an action to an alternative dispute resolution proceeding, the court may tentatively designate any person qualified under these rules to conduct the proceeding. The order shall set a reasonable time within which the parties may inform the court that (A) they have agreed on another person to conduct the proceeding, and (B) that person is willing and able to conduct the proceeding. If, within the time allowed by the court, the parties inform the court of their agreement on another person willing and able to conduct the proceeding, the court shall designate that person. Otherwise, the referral shall be to the person designated in the order. In making a designation when there is no agreement by the parties, the court is not required to choose at random or in any particular order from among the qualified

persons. Although the court should endeavor to use the services of as many qualified persons as possible, the court may consider whether, in light of the issues and circumstances presented by the action or the parties, special training, background, experience, expertise, or

temperament may be helpful and may designate a person possessing those special qualifications.

Source: This Rule is new.

Rule 17-103 was accompanied by the following Reporter's Note.

The ADR Commission is requesting that subsection (b)(3) of Rule 17-103 be modified to include language providing that the court may require an objecting party to participate in a non-fee-for-service mediation session where the parties will be given an explanation of the mediation process before they decide whether to participate. The idea is that often when the process is explained to reluctant parties, they will change their mind about opposing the mediation process.

When it remanded to the Rules Committee the proposed changes to Title 17 set out in the 148th Report, the Court of Appeals requested that the Committee consider a comment letter from the Hon. Paul H. Weinstein suggesting that the word "shall" in the second sentence of Rule 17-103 (c)(4) be changed to "may." The Alternative Dispute Resolution Subcommittee recommends that the current Rule be retained without amendment so that the parties always will have the opportunity to agree to substitute a person of their choice for the person tentatively designated by the court to conduct an alternative dispute resolution proceeding.

AMEND Rule 17-104 to combine subsections (a)(1) and (a)(2) and add a waiver provision, to add to a certain education requirement for mediators, to refer to standards for mediators, and to add a new section (c) pertaining to additional qualifications for mediators in divorce cases with marital property issues, as follows:

Rule 17-104. QUALIFICATIONS AND SELECTION OF MEDIATORS

(a) Qualifications in General

To be designated by the court as a mediator, other than by agreement of the parties, a person must:

(1) unless waived by the court, be at least 21 years old~~;~~

~~(2) unless waived by the court for good cause in connection with a particular action,~~ and have at least a bachelor's degree from an accredited college or university;

Committee note: This subsection permits a waiver because the quality of a mediator's skill is not necessarily measured by age or formal education.

~~(3)~~ (2) have completed at least 40 hours of mediation training in a program meeting the requirements of Rule 17-106;

(3) complete every two years eight hours of continuing mediation-related education in a program meeting the requirements of Rule 17-106;

(4) ~~agree to~~ abide by ~~a code of ethics approved~~ any standards adopted by the Court of Appeals;

(5) ~~agree to~~ submit to periodic monitoring of court-ordered mediations by a qualified mediator designated by the county administrative judge; and

(6) ~~agree to~~ comply with ~~reasonable~~ procedures and requirements prescribed in the court's case management plan filed under Rule 16-203 b. relating to diligence, quality assurance, and a willingness to accept a reasonable number of referrals on a reduced-fee or pro bono basis upon request by the court.

(b) Additional Qualifications ~~for Mediators of~~ -- Child Access Disputes

To be designated by the court as a mediator with respect to issues concerning child ~~custody or visitation~~ access, the person must:

(1) have the qualifications prescribed in section (a) of this Rule;

(2) have completed at least 20 hours of training in a family mediation training program meeting the requirements of Rule 17-106; and

(3) have observed or co-mediated at least ~~two custody or visitation~~ eight hours of child access mediation~~s~~ sessions conducted by ~~a~~ persons approved by the county administrative judge, in addition to any observations during the training program.

(c) Additional Qualifications -- Marital Property Issues

To be designated by the court as a mediator in divorce cases with marital property issues, the person must:

(1) have the qualifications prescribed in section (a) of this Rule;

(2) have completed at least 20 hours of skill-based training in mediation of marital property issues; and

(3) have observed or co-mediated at least eight hours of divorce mediation sessions involving marital property issues conducted by persons approved by the county administrative judge, in addition to any observations during the training program.

Source: This Rule is new.

Rule 17-104 was accompanied by the following Reporter's Note.

The Rules Committee is proposing to combine subsections (a)(1) and (a)(2) into one provision. The ADR Commission has requested that a waiver provision be added to the requirement that a mediator be at least 21 years old and have a bachelor's degree. Although some mediators had suggested the elimination of these two requirements altogether, the Committee recommends their retention, coupled with the proposed waiver provision.

The ADR Commission also has suggested that mediators be required to take eight hours of continuing mediation-related education every two years to keep current with developments in the field. A change is proposed for subsection (a)(4) because it is anticipated that a specific set of standards for mediators will be adopted by the Court of Appeals in the near future.

The ADR Commission also is proposing more stringent qualifications for mediators in divorce cases with marital property issues, which qualifications are set out in proposed new section (c), because these cases are often very complicated.

As a matter of style, the phrase "agree to" is deleted throughout the Rule, because what is important is compliance with a particular requirement, rather than an agreement to do so.

On review of the proposed changes to Title 17 set out in the 148th Report and remanded to the Committee, the Alternative Dispute Resolution Subcommittee recommends the following stylistic and clarifying changes to Rule 17-106:

(1) The Subcommittee recommends that the language of proposed new subsection (a)(3) be changed from:

> have completed within the preceding two years eight hours of continuing mediation-related education in a program meeting the requirements of Rule 17-106

to:

> complete every two years eight hours of continuing mediation-related education in a program meeting the requirements of Rule 17-106.

This change makes clear that the continuing mediation-related education requirement is on-going.

(2) Additional changes make parallel the language of subsections (b)(3) and (c)(3), so that each subsection uses the language "... conducted by persons approved by the county administrative judge, in addition to any observations during the training program."

MARYLAND RULES OF PROCEDURE

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

AMEND Rule 17-105 to refer to standards adopted by the Court of Appeals, to add a certain waiver provision, and to add a requirement of an eight-hour training program approved by the county administrative judge, as follows:

Rule 17-105. QUALIFICATIONS AND SELECTIONS OF PERSONS OTHER THAN MEDIATORS

(a) Generally

Except as provided in section (b) of this Rule, to be designated by the Court to

conduct an alternative dispute resolution proceeding other than mediation, a person, unless the parties agree otherwise, must:

(1) ~~agree to~~ abide by ~~a code of ethics approved~~ any standards adopted by the Court of Appeals;

(2) ~~agree to~~ submit to periodic monitoring of court-ordered alternative dispute resolution proceedings by a qualified person designated by the county administrative judge;

(3) ~~agree to~~ comply with ~~reasonable~~ procedures and requirements prescribed in the court's case management plan filed under Rule 16-203 b. relating to diligence, quality assurance, and a willingness to accept a reasonable number of referrals on a reduced-fee or pro bono basis upon request by the court;

(4) either (A) be a member in good standing of the Maryland bar and have at least five years experience in the active practice of law as (i) a judge, (ii) a practitioner, (iii) a full-time teacher of law at a law school accredited by the American Bar Association, or (iv) a Federal or Maryland administrative law judge, or (B) have equivalent or specialized knowledge and experience in dealing with the issues in dispute; and

(5) unless waived by the court, have ~~either~~ completed a training program ~~specified by the circuit administrative judge or conducted at least two alternative dispute resolution proceedings with respect to actions pending in a circuit court~~ that consists of at least eight hours and has been approved by the county administrative judge.

(b) Judges and Masters

A judge or master of the court may conduct a non-fee-for-service settlement conference.

Cross reference: See Rules 16-813, Canon 4H

and 16-814, Canon 4H.

Source: This Rule is new.

Rule 17-105 was accompanied by the following Reporter's Note.

The proposed change to subsection (a)(1) is parallel to the change in subsection (a)(4) of Rule 17-104.

At the suggestion of the ADR Commission, the Committee recommends changes to subsection (a)(5) to add an eight-hour minimum for training programs to be approved by the county administrative judge and a waiver provision.

MARYLAND RULES OF PROCEDURE

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

ADD new Rule 17-109, as follows:

Rule 17-109. MEDIATION CONFIDENTIALITY

(a) Mediator

Except as provided in sections (c) and (d) of this Rule, a mediator and any person present at the request of the mediator shall maintain the confidentiality of all mediation communications and may not disclose or be compelled to disclose mediation communications in any judicial, administrative, or other proceeding.

(b) Parties

Subject to the provisions of sections (c) and (d) of this Rule, (1) the parties may

enter into a written agreement to maintain the confidentiality of all mediation communications and to require any person present at the request of a party to maintain the confidentiality of mediation communications and (2) the parties and any person present at the request of a party may not disclose or be compelled to disclose mediation communications in any judicial, administrative, or other proceeding.

(c) Signed Document

A document signed by the parties that reduces to writing an agreement reached by the parties as a result of mediation is not confidential, unless the parties agree in writing otherwise.

Cross reference: See Rule 9-205 (d) concerning the submission of a memorandum of the points of agreement to the court in a child access case.

(d) Permitted Disclosures

In addition to any disclosures required by law, a mediator and a party may disclose or report mediation communications to a potential victim or to the appropriate authorities to the extent that they believe it necessary to help:

(1) prevent serious bodily harm or death, or

(2) assert or defend against allegations of mediator misconduct or negligence.

Cross reference: For the legal requirement to report suspected acts of child abuse, see Code, Family Law Article, §5-705.

(e) Discovery; Admissibility of Information

Mediation communications that are confidential under this Rule are privileged and not subject to discovery, but information otherwise admissible or subject to discovery does not become inadmissible or protected from

disclosure solely by reason of its use in mediation.

Source: This Rule is new.

Rule 17-109 was accompanied by the following Reporter's Note.

> New Rule 17-109 is proposed in response to a recommendation of the Maryland Alternative Dispute Resolution Commission set out in the Commission's Practical Action Plan (December, 1999).
>
> Section (a) imposes a duty of confidentiality upon the mediator and all persons who, at the request of the mediator, are present at the mediation. The Committee did not specifically include the mediator's employees in section (a) because it believes that requiring the mediator to maintain confidentiality includes the obligation on the part of the mediator to require the mediator's staff to maintain confidentiality. Section (a) also includes a prohibition of voluntary disclosure and a broad protection against compelled disclosure in "any judicial, administrative, or other proceeding." When applicable, the exceptions set out in sections (c) and (d) of this Rule override the provisions of section (a).
>
> Subject to the provisions of sections (c) and (d), section (b) allows the parties to determine whether they and any persons they bring to the mediation will maintain confidentiality. In the absence of a written agreement to the contrary, the parties may disclose mediation communications. The Committee believes that allowing this disclosure enables the parties to obtain opinions, advice, and information that may help them reach an informed agreement in the mediation. Regardless of whether the parties agree to maintain confidentiality, subsection (b)(2) provides to parties the same protection against compelled disclosure and prohibition of voluntary disclosure in "any judicial, administrative, or other proceeding" that is set out in section (a) as to mediators.
>
> Under section (c), any document signed by

the parties that reduces to writing an agreement reached by the parties as a result of mediation is not confidential, unless the parties agree in writing otherwise. The Alternative Dispute Resolution Subcommittee of the Rules Committee debated limiting this section to "final" agreements, but concluded that it is not always clear when an agreement is "final." Following the section is a cross reference to Rule 9-205 d, concerning the submission of agreements to the court in child access cases.

Section (d) exempts from the confidentiality requirements of the Rule disclosures that are required by law and disclosures that the mediator or a party believes necessary to help (1) prevent serious bodily harm or death or (2) assert or defend against allegations of mediator misconduct or negligence. Following section (d) is a cross reference to Code, Family Law Article, §5-705, concerning reporting requirements if acts of child abuse are suspected.

Section (e) provides that mediation communications that are confidential under the Rule are privileged and not subject to discovery. Section (e) also makes clear that by using otherwise admissible or discoverable information in mediation, a person does not render that information inadmissible or not subject to discovery.

If proposed new Rule 17-109 is adopted, the Committee recommends that section (f) of revised Rule 9-205 (Mediation of Child Custody and Visitation Disputes) be amended to read as follows:

(f) Confidentiality

Confidentiality of mediation communications under this Rule is governed by Rule 17-109.

Cross reference: For the definition of "mediation communication," see

Rule 17-102 (e).

The Vice Chair told the Committee that when the Alternative Dispute Resolution (ADR) Rules were presented to the Court of Appeals, the Court was concerned with the issue of what constitutes the practice of law by mediators. This stems from the definition of "mediation" in section (d), which provides that "upon request, [the mediator may] assist the parties in reducing to writing any agreement that they may reach." To address this problem the Subcommittee revised the provision to read, "upon request, [the mediator may] assist the parties in reducing to writing a memorandum of their points of agreement." The original language arguably appeared to permit the practice of law by non-lawyers. The Vice Chair said that Rachel Wohl, Esq., Executive Director of the ADR Commission, had pointed out some additional problems with the Title 17 Rules set out in the 148th Report, such as that the word "resolution" is missing from the phrase "alternative dispute resolution" and that Rule 17-104 (a)(3) was written as if the eight-hour education requirement must be completed before a mediator can get on the court list. The eight hours must be completed every two years, but completion of the 40-hour mediation training requirement allows a mediator to get on the list. The Vice Chair said that Rule 17-104 (a)(3) has been revised. She also stated that subsection (c)(3) of Rule 17-104 has been revised to conform with the language of subsection (b)(3) which is: "conducted by persons approved by the county administrative judge."

The Vice Chair said that the 148th Report did not contain the proposed changes to Rule 1-101. The Subcommittee has added a new section (q) pertaining to Title 17. With respect to Rule 17-109 (e) the Honorable Alan M. Wilner, Judge of the Court of Appeals, had recently raised the issue of whether a privilege should be established by rule or whether this should be in a statute. The Vice Chair expressed the view that it is appropriate for a rule to establish a privilege. Mr. Sykes observed that there is one in the Attorney Disciplinary Rules, and the Vice Chair noted that there is one in the Judicial Disabilities Commission Rules. Inclusion of Rule 17-109 is not the same as creating a statutory privilege. Similar to provisions in the Attorney Disciplinary Rules and the Judicial Disabilities Commission Rules, the Court of Appeals is regulating procedure. The Vice Chair stated that she is in favor of retaining the language of Rule 17-109 (e) as originally drafted. Ms. Wohl remarked that there has been a shifting away from the idea of privilege. The Chair said that this language is from the Attorney Disciplinary Rules. What is inadmissible cannot be referred to or discovered. The word "privilege" need not be used. The Vice Chair said that confidential communications are unavailable and inadmissible. She commented that the words "privileged and" could be taken out and replaced by the words "not admissible." The Committee agreed to leave the terminology to the Style Subcommittee.

Mr. Sykes asked about the training requirements in Rule 17-104.

He noted that a mediator must have completed 40 hours of mediation training, and then every two years must complete eight hours of mediation education. This would require 48 hours of training in the first two years. Ms. Wohl responded that the intention of the language of the Rule is that one must complete the 40 hours of training to be eligible to be on the list of mediators, and then the person will take eight hours of continuing mediation-related education every two years. Mr. Sykes inquired as to the difference between education and training. Ms. Wohl replied that one must take the initial training in alternative dispute resolution and then keep up in the field by taking courses. The Committee approved the Alternative Dispute Resolution Rules as amended.

Agenda Item 4. Consideration of proposed amendments to: Rule 2-124 (Process – Persons to be Served) and Rule 3-124 (Process – Persons to be Served)

Mr. Brault, Chair of the Process, Parties, and Pleading Subcommittee said that Mr. Titus, who is the expert on this matter, would present this item. Mr. Titus presented Rules 2-124 and 3-124 for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE--CIRCUIT COURT

CHAPTER 100 - COMMENCEMENT OF ACTION AND PROCESS

AMEND Rule 2-124 to add certain provisions

concerning service on governmental entities, as follows:

Rule 2-124. PROCESS — PERSONS TO BE SERVED

(a) Individual

Service is made upon an individual by serving the individual or an agent authorized by appointment or by law to receive service of process for the individual.

(b) Individual Under Disability

Service is made upon an individual under disability by serving the individual and, in addition, by serving the parent, guardian, or other person having care or custody of the person or estate of the individual under disability.

(c) Corporation

Service is made upon a corporation, incorporated association, or joint stock company by serving its resident agent, president, secretary, or treasurer. If the corporation, incorporated association, or joint stock company has no resident agent or if a good faith attempt to serve the resident agent, president, secretary, or treasurer has failed, service may be made by serving the manager, any director, vice president, assistant secretary, assistant treasurer, or other person expressly or impliedly authorized to receive service of process.

(d) General Partnership

Service made upon a general partnership sued in its group name in an action pursuant to Code, Courts Article, §6-406 by serving any general partner.

(e) Limited Partnership

Service is made upon a limited partnership by serving its resident agent. If the limited partnership has no resident agent or if a good faith attempt to serve the resident agent has failed, service may be made upon any general partner or other person expressly or impliedly authorized to receive service of process.

(f) Limited Liability Partnership

Service is made upon a limited liability partnership by serving its resident agent. If the limited liability partnership has no resident agent or if a good faith attempt to serve the resident agent has failed, service may be made upon any other person expressly or impliedly authorized to receive service of process.

(g) Limited Liability Company

Service is made upon a limited liability company by serving its resident agent. If the limited liability company has no resident agent or if a good faith attempt to serve the resident agent has failed, service may be made upon any member or other person expressly or impliedly authorized to receive service of process.

(h) Unincorporated Association

Service is made upon an unincorporated association sued in its group name pursuant to Code, Courts Article, §6-406 by serving any officer or member of its governing board. If there are no officers or if the association has no governing board, service may be made upon any member of the association.

(i) State of Maryland

Service is made upon the State of Maryland by serving the Attorney General or an individual designated by the Attorney General in a writing filed with the Chief Clerk of the court and by serving the Secretary of State.

In any action attacking the validity of an order of an officer or agency of this State not made a party, the officer or agency shall also be served.

(j) Officer or Agency of the State of Maryland

Service is made upon an officer or agency of the State of Maryland, including a government corporation, ~~by serving the officer or agency.~~ in the following manner:

(1) Officer of Agency Represented by Attorney General

Service is made on an officer or agency of the State of Maryland represented by the Attorney General by serving the Attorney General or an individual designated by the Attorney General in a writing filed with the Chief Clerk of the Court and by serving the Secretary of State.

(2) Officer or Agency Not Represented by Attorney General

Service is made on an officer or agency of the State of Maryland not represented by the Attorney General by serving the resident agent, if any, designated by the officer or agency. If no resident agent has been designed by the officer or agency, service is made by serving the officer or the chief executive officer of the agency.

Cross reference: The Maryland Tort Claims Act, in Code, State Government Article, §12-108 (a), provides that service of a complaint under that statute is sufficient only when made upon the Treasurer of the State.

(k) Local Entity

Service is made on a county, municipal corporation, bicounty or multicounty agency, public authority, special taxing district or other political subdivision or unit of a

political subdivision of the State by serving the resident agent, if any, designated by the local entity. If no resident agent has been designated, service is made by serving the chief executive officer, or if there is no chief executive officer, by serving the presiding officer of the governing body of the local entity.

~~(k)~~ (l) United States

Service is made upon the United States by serving the United States Attorney for the District of Maryland or an individual designated by the United States Attorney in a writing filed with the Chief Clerk of the court and by serving the Attorney General of the United States at Washington, District of Columbia. In any action attacking the validity of an order of an officer or agency of the United States not made a party, the officer or agency shall also be served.

~~(l)~~ (m) Officer or Agency of the United States

Service is made upon an officer or agency of the United States, including a government corporation, by serving the United States and by serving the officer or agency.

~~(m)~~ (n) Substituted Service upon State Department of Assessments and Taxation

Service may be made upon a corporation, limited partnership, limited liability partnership, limited liability company, or other entity required by statute of this State to have a resident agent by serving two copies of the summons, complaint, and all other papers filed with it, together with the requisite fee, upon the State Department of Assessments and Taxation if (i) the entity has no resident agent; (ii) the resident agent is dead or is no longer at the address for service of process maintained with the State Department of Assessments and Taxation; or (iii) two good faith attempts on separate days to serve the

resident agent have failed.

~~(n)~~ (o) Statutes Not Abrogated

The provisions of this Rule do not abrogate any statute permitting or requiring service on a person.

Committee note: Although this Rule does not preclude service upon a person who is also the plaintiff where the plaintiff enjoys a dual status, the validity of such service in giving notice to the defendant entity is subject to appropriate due process constraints.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 104 b 1 (i) and (ii).
Section (b) is derived from former Rule 119.
Section (c) is derived from former Rule 106 b.
Section (d) is new.
Section (e) is new.
Section (f) is new.
Section (g) is new.
Section (h) is new.
Section (i) is new.
Section (j) is new.
Section (k) is new.
Section ~~(k)~~ (l) is derived from former Rule 108 a.
Section ~~(l)~~ (m) derived from former Rule 108 b.
Section ~~(m)~~ (n) is new, but is derived in part from former section (c) and former Rule 106 e 1 and 2.
Section ~~(n)~~ (o) is new and replaces former Rules 105 c and 106 f.

Rule 2-124 was accompanied by the following Reporter's Note.

Proposed amendments to Rules 2-124 and 3-124 add provisions concerning service on governmental entities, in light of Chapter 608, Acts of 2000 (HB 481), effective July 1, 2001.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE--DISTRICT COURT

CHAPTER 100 - COMMENCEMENT OF ACTION AND PROCESS

AMEND Rule 3-124 to add certain provisions concerning service on governmental entities, as follows:

Rule 3-124. PROCESS — PERSONS TO BE SERVED

(a) Individual

Service is made upon an individual by serving the individual or an agent authorized by appointment or by law to receive service of process for the individual.

(b) Individual Under Disability

Service is made upon an individual under disability by serving the individual and, in addition, by serving the parent, guardian, or other person having care or custody of the person or estate of the individual under disability.

(c) Corporation

Service is made upon a corporation, incorporated association, or joint stock company by serving its resident agent, president, secretary, or treasurer. If the corporation, incorporated association, or joint stock company has no resident agent or if a good faith attempt to serve the resident agent, president, secretary, or treasurer has failed, service may be made by serving the manager, any director, vice president, assistant secretary, assistant treasurer, or other person expressly or impliedly authorized to receive service of process.

(d) General Partnership

Service made upon a general partnership sued in its group name in an action pursuant to Code, Courts Article, §6-406 by serving any general partner.

(e) Limited Partnership

Service is made upon a limited partnership by serving its resident agent. If the limited partnership has no resident agent or if a good faith attempt to serve the resident agent has failed, service may be made upon any general partner or other person expressly or impliedly authorized to receive service of process.

(f) Limited Liability Partnership

Service is made upon a limited liability partnership by serving its resident agent. If the limited liability partnership has no resident agent or if a good faith attempt to serve the resident agent has failed, service may be made upon any other person expressly or impliedly authorized to receive service of process.

(g) Limited Liability Company

Service is made upon a limited liability company by serving its resident agent. If the limited liability company has no resident agent or if a good faith attempt to serve the resident agent has failed, service may be made upon any member or other person expressly or impliedly authorized to receive service of process.

(h) Unincorporated Association

Service is made upon an unincorporated association sued in its group name pursuant to Code, Courts Article, §6-406 by serving any officer or member of its governing board. If there are no officers or if the association has no governing board, service may be made upon

any member of the association.

(i) State of Maryland

Service is made upon the State of Maryland by serving the Attorney General or an individual designated by the Attorney General in a writing filed with the Chief Clerk of the court and by serving the Secretary of State. In any action attacking the validity of an order of an officer or agency of this State not made a party, the officer or agency shall also be served.

(j) Officer or Agency of the State of Maryland

Service is made upon an officer or agency of the State of Maryland, including a government corporation, ~~by serving the officer or agency.~~ in the following manner:

(1) Officer of Agency Represented by Attorney General

Service is made on an officer or agency of the State of Maryland represented by the Attorney General by serving the Attorney General or an individual designated by the Attorney General in a writing filed with the Chief Clerk of the Court and by serving the Secretary of State.

(2) Officer or Agency Not Represented by Attorney General

Service is made on an officer or agency of the State of Maryland not represented by the Attorney General by serving the resident agent, if any, designated by the officer or agency. If no resident agent has been designed by the officer or agency, service is made by serving the officer or the chief executive officer of the agency.

Cross reference: The Maryland Tort Claims Act, in Code, State Government Article, §12-108 (a), provides that service of a complaint under that

statute is sufficient only when made upon the Treasurer of the State.

(k) Local Entity

Service is made on a county, municipal corporation, bicounty or multicounty agency, public authority, special taxing district or other political subdivision or unit of a political subdivision of the State by serving the resident agent, if any, designated by the local entity. If no resident agent has been designated, service is made by serving the chief executive officer, or if there is no chief executive officer, by serving the presiding officer of the governing body of the local entity.

~~(k)~~ (l) United States

Service is made upon the United States by serving the United States Attorney for the District of Maryland or an individual designated by the United States Attorney in a writing filed with the Chief Clerk of the court and by serving the Attorney General of the United States at Washington, District of Columbia. In any action attacking the validity of an order of an officer or agency of the United States not made a party, the officer or agency shall also be served.

~~(l)~~ (m) Officer or Agency of the United States

Service is made upon an officer or agency of the United States, including a government corporation, by serving the United States and by serving the officer or agency.

~~(m)~~ (n) Substituted Service upon State Department of Assessments and Taxation

Service may be made upon a corporation, limited partnership, limited liability partnership, limited liability company, or other entity required by statute of this State to have a resident agent by serving two copies

of the summons, complaint, and all other papers filed with it, together with the requisite fee, upon the State Department of Assessments and Taxation if (i) the entity has no resident agent; (ii) the resident agent is dead or is no longer at the address for service of process maintained with the State Department of Assessments and Taxation; or (iii) two good faith attempts on separate days to serve the resident agent have failed.

~~(n)~~ (o) Statutes Not Abrogated

The provisions of this Rule do not abrogate any statute permitting or requiring service on a person.

Committee note: Although this Rule does not preclude service upon a person who is also the plaintiff where the plaintiff enjoys a dual status, the validity of such service in giving notice to the defendant entity is subject to appropriate due process constraints.

Source: This Rule is derived as follows:

Section (a) is derived from former M.D.R. 104 b 1 (i) and (ii). Section (b) is derived from former M.D.R. 119.
Section (c) is derived from former M.D.R. 106 b.
Section (d) is new.
Section (e) is new.
Section (f) is new.
Section (g) is new.
Section (h) is new.
Section (i) is new.
Section (j) is new.
Section (k) is new.
Section ~~(k)~~ (l) is derived from former Rule 108 a.
Section ~~(l)~~ (m) is derived from former Rule 108 b.
Section ~~(m)~~ (n) is new, but is derived in part from former section (c) and former M.D.R. 106 e 1 and 2.
Section ~~(n)~~ (o) is new and replaces former M.D.R. 106 f.

Rule 3-124 was accompanied by the following Reporter's Note.

> See the Reporter's Note to the proposed amendment to Rule 2-124.

Mr. Titus explained that the new statute, Chapter 608, Acts of 2000 (HB 481) addresses the problem of how to serve municipalities. Mr. Titus had been counsel in a case where a garnishment was served on a low-level clerk in a government agency who had no idea what to do with it. The legislation provides for the option of designating a resident agent and authorizes a method of service. The new language provides for a backup method of service. It clarifies procedures for service and is intended to complement and implement the statute which goes into effect on July 1, 2001. There may be further legislation to change these procedures, so that designating a resident agent by filing with the State Department of Assessments and Taxation ("SDAT") will be mandatory instead of optional. If the statute changes, the Rules can be changed.

Judge Heller noted that in some instances, two different persons are served. Mr. Titus said that this is statutory. Under the Maryland Tort Claims Act in Code, State Government Article, §12-108 (a), service of a complaint is sufficient only when made upon the Treasurer of the State. The Vice Chair pointed out that the Rules currently provide for service upon an officer or an agency of the State. Mr. Brault added that the Rule now provides for service by serving an individual designated by the Attorney General in a writing

filed with the Chief Clerk of the court and by serving the Secretary of State. The Vice Chair said that she thought that all of the shaded language was new. Mr. Titus responded that section (i) pertains to service on the State of Maryland as a defendant. Proposed new language in section (j) involves service on an officer or agency of the State. Subsection (j)(1) applies if the officer or agency is represented by the Attorney General, and subsection (j)(2) applies if the officer or agency is not represented by the Attorney General.

Mr. Bowen asked to whom the language "Chief Clerk of the court" refers. The Chair suggested that it is the Clerk of the Court of Appeals. Mr. Brault inquired if it could be the Chief Clerk of each trial court. Mr. Titus answered in the negative, explaining that the Attorney General writes to Alexander Cummings, the Clerk of the Court of Appeals. He suggested that the language "Chief Clerk of the court" should be changed to the language "Clerk of the Court of Appeals," and the Committee agreed by consensus to this change.

Referring to section (k), the Vice Chair asked if the enabling statute allows the designation of a resident agent to be filed with the SDAT. Mr. Titus replied in the affirmative. Mr. Hochberg inquired if one could sue a county Board of Education pursuant to section (k). Mr. Titus responded that for almost all purposes, subsection (j)(2) is the appropriate provision for suing a county Board of Education. The Vice Chair commented that this provision may

result in people telephoning the Office of the Attorney General, because many attorneys do not know the intricacies of the process. Anne Arundel County is represented by the Attorney General and the County Law Office. Mr. Brault added that often no one is sure whom to serve. The Vice Chair said that she attended a hearing on a bill to mandate service on a resident agent. This would also apply to service of subpoenas.

Referring to section (j), Mr. Maloney expressed some doubt about the Clerk of the Court of Appeals being the person with whom the designation should be filed. Usually, the entity that maintains this information is the SDAT. Mr. Titus said that he had suggested the SDAT, but until the legislature passes a bill designating the SDAT as the repository for names of resident agents of the entities described in section (j), this is the best arrangement, and it clears up any confusion. Without enabling legislation, the judiciary does not have the authority to impose this obligation on the SDAT. The Vice Chair remarked that the average attorney does not know who is represented by the Attorney General. Judge Dryden noted that the attorneys can figure it out.

Judge McAuliffe referred to the requirement in subsection (j)(1) of serving the Secretary of State, and he asked if there is any statutory requirement for this. Mr. Titus said that he used the existing language of the Rule. Judge McAuliffe suggested that some research may need to be carried out on this. Mr. Titus suggested

that if there is not a good reason for this requirement, such as being required by statute, the language "Secretary of State" should be deleted where it appears in both Rules. The Committee agreed by consensus with this suggestion.

The Vice Chair inquired about the term "chief executive officer" in section (k). Mr. Titus responded that it was the best term that the Subcommittee could find because it covers mayors, chairpersons, county executives, etc. The Vice Chair remarked that in Anne Arundel County, there is no Chief Executive Officer, but there is a Chief Administrative Officer. Mr. Titus responded that there does not have to be a chief executive officer. It could be the presiding officer of the county council. The Vice Chair agreed that the presiding officer of the county council is the equivalent of the county executive.

The Reporter noted that in the tagline to subsection (j)(1), the word "of" should be the word "or," and in subsection (j)(2), the word "designed" should be "designated." The Committee agreed by consensus with these housekeeping changes.

Mr. Bowen said that the cross reference after section (j) is an exception to the Rule and should be part of the Rule. The Vice Chair suggested that after research is completed to see if the law requires this, the new provision should begin as follows: "When a claim is made under the Tort Claims Act...". The Committee agreed by consensus to this suggestion, subject to changes by the Style

Subcommittee.

The Committee approved the Rules as amended.

The Chair adjourned the meeting.