MINUTES OF THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100A of the People's Resource Center, 100 Community Place, Crownsville, Maryland, on April 7, 2000.

Members present:

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

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Robert L. Dean, Esq.
Hon. James W. Dryden
Bayard Z. Hochberg, Esq.
H. Thomas Howell, Esq.
Hon. Joseph H. H. Kaplan
Robert D. Klein, Esq.
Anne C. Ogletree, Esq.
Melvin J. Sykes, Esq.
Roger W. Titus, Esq.
Hon. James N. Vaughan

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Louise Phipps Senft, Baltimore Mediation Center
L. Toyo Obayashi, Baltimore Mediation Center
Roger Wolf, Esq., University of Maryland School of Law
Lou Gieszl, Maryland ADR Commission
Lorig Charkoudian, Community Mediation Program
Gaye Tearnan, Community Mediation Program
Fay Mauro, Anne Arundel County Conflict Resolution Center
Nick Beschen, Maryland Association of Community Mediation Center
Jay Huntington, Prince George's County Community Mediation Board
Julie Vallario, Prince George's County Community Mediation Board

The Chair convened the meeting. He said that the minutes of the January and February 2000 Rules Committee meetings had been sent to the Committee by mail. Mr. Klein moved that the minutes of the January meeting be approved as read. The motion was seconded, and it passed unanimously. Mr. Klein commented that he had one change to suggest to the minutes of the February meeting.

On page 46, in the discussion of why the language originally in the form interrogatories, which had been “injuries or damages,” was changed to the word “harm.” Mr. Klein pointed out that he stated at the meeting that the term “harm” is used in the Restatement of Torts 2nd and 3rd, and this information should be part of the record. Mr. Klein moved to approve the February minutes as amended, the motion was seconded, and it passed unanimously. The Chair stated that the minutes of the March meeting were available at today’s meeting, and these would be voted on at a later time.

Agenda Item 1. Consideration of proposed rules changes to Title 17, Alternative Dispute Resolution: Proposed amendments to Rule 17-102 (Definitions), Rule 17-103 (General procedure and Requirements), Rule 17-104 (Qualifications and Selection of Mediators), and Rule 17-105 (Qualifications and Selection of Persons Other Than Mediators), and proposed new Rule 17-108 (Mediation Confidentiality)

The Chair said that there were several guests and consultants present for the discussion of the Alternative Dispute Resolution (ADR) Rules. They included: Roger Wolf, Esq, Professor at the University of Maryland School of Law; Louise Phipps Senft, Baltimore Mediation Center; L. Toyo Obayashi, Baltimore Mediation Center; Faye Mauro, Anne Arundel Conflict Resolution Center; Gaye Tearnan, Community Mediation Program; Nick Beschen, Maryland Association of Community Mediation Centers; Lorig Charkoudian, Community Mediation Program: Jay Huntington, Prince George’s County Community Mediation Board;

Julie Vallario, Human Relations Commission, Prince George's County Community Mediation Board; Lou Gieszl, Alternative Dispute Resolution Commission staff.

The Chair presented Rule 17-102, Definitions, 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 a Committee note to sections (a) and (b); modify the definitions of "arbitration," "mediation," and neutral case evaluation"; and 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 as a way to resolve disputes. Consensus-building means a process generally used to prevent or resolve disputes and/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 build trust, open communication, 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 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 disputes. 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 the agreement to writing. Unless that parties agree otherwise, the mediator does not engage in arbitration, neutral case evaluation, ~~or~~ neutral fact-finding, or other alternative dispute 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 those communications made for the purpose of considering, initiating, continuing, or reconvening a mediation or retaining a mediator and includes a document drawn up as a result of a mediation if the participants agree to make it confidential.

~~(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 ADR Subcommittee 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.
>
> To avoid any confusion, the ADR Commission has asked for amendments to section (b) to clarify that arbitrators are impartial, to include language that arbitration is not binding, and to add a Committee note which explains that outside of the court arena, arbitration is binding unless the parties agree otherwise.
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> 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.
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> At the request of the Commission, the Subcommittee is proposing to add a definition of the term "mediation communication" which will relate to the new proposed rule on confidentiality.

The ADR Subcommittee suggested that the definition of the term "consensus-building" be moved into a Committee note instead of being placed in the list of defined terms. The idea of consensus-building is that it is carried out when there is the potential for litigation, but before the Rules of Procedure are applicable. The Chair said that he and Mr. Hochberg had worked

with the ADR Subcommittee on the changes proposed by the ADR Commission. Mr. Hochberg noted that in section (b) the word "impartial" was added before the word "arbitrators", but in section (d) it was not added before the word "mediators." He questioned as to why this discrepancy exists. The Chair responded that this is reflective of the difference between arbitrators and mediators. The latter assists the parties in reaching a voluntary agreement. Mr. Hochberg remarked that by definition, a mediator is impartial. The Reporter observed that the Style Subcommittee had discussed this issue when Title 17 originally was styled.

Mr. Klein suggested that the word "impartial" should be used throughout the Rules. The Chair asked the consultants for their opinion on this suggestion. Professor Wolf pointed out that a mediator is by definition impartial. Mr. Hochberg remarked that there is no harm in adding the word "impartial." Ms. Senft commented that mediation, by its nature, is impartial. When arbitrators for panels are selected, people select those who tend to rule in the party's favor. Mr. Klein inquired as to why the definitions of "neutral fact-finding" and "settlement conference" use the word "impartial." From a rules construction and a legislative history standpoint, this needs to be clarified. Mr. Bowen asked if the word "impartial" should be taken out of section (b). Ms. Senft remarked that leaving the word in creates a higher degree of confidence in the procedure. Mr. Sykes questioned as to whether the word "impartial" is correct if

someone is able to choose his or her own arbitrator. He suggested that the word "impartial" be left out altogether.

The Chair stated that he prefers that the word "impartial" remain in section (b). The Vice Chair commented that she does not read section (b) as meaning that there is one impartial arbitrator and two biased ones. Mr. Titus noted that usually the way the system works is that one party picks one arbitrator, and the other party picks the second arbitrator. Unless the parties agree expressly in writing, the arbitrators are impartial. The Vice Chair asked if under the definition of "arbitration" in Rule 17-102, when the parties agree contractually they are bound. If the arbitration is a court-ordered one, then there is no choosing the arbitrator, since he or she is picked by the court. The parties do not participate in the choice unless the court allows. Professor Wolf said that the Rules allow the parties to choose the arbitrators. The Vice Chair suggested that the word "impartial" be added to section (d), and the Committee agreed by consensus to this suggestion.

The Reporter told the Committee that the Assistant Reporter had sent out a draft of the ADR Rules to the Subcommittee and consultants. Rachel Wohl, Esq., Executive Director of the ADR Commission, could not attend today's meeting, and she had asked the Reporter to express her comments to the Committee. In the definition of the term "mediation," Ms. Wohl suggested that in the second sentence the language "reducing their agreement to writing" should replace the language "reducing the agreement to

writing." The Chair pointed out that Ms. Senft had sent in a comment suggesting a change to the same provision. Copies of Ms. Senft's letter are available at the meeting. The Vice Chair said that she preferred the language "reducing their agreement to writing." Mr. Howell expressed the view that the suggested change would be helpful. Using the language "their agreement" may encourage the parties to agree to the extent that they can. The parties may not agree on global issues, but they may be able to reach some partial or interim agreement. Mr. Howell also stated that he agreed with Ms. Senft's suggested language of adding in the language "which may include a memorandum of understanding or a settlement agreement" at the end of the second sentence of section (d). Mr. Bowen suggested that the word "any" should replace the word "their" in the second sentence of section (d), because no agreement may have been reached. He moved that the sentence read as follows: "A mediator may identify issues and options, assist the parties or their attorneys in exploring the needs underlying their respective positions, and upon request, assist the parties in reducing to writing any agreement that they may reach." The motion was seconded, and it passed unanimously.

Ms. Senft remarked that she preferred the language "their own agreement." The Reporter pointed out that in the first sentence, the language is "their own voluntary agreement." Ms. Senft observed that when Rule 9-205, Mediation of Child Custody and Visitation Disputes, was discussed, the sentiment was that a

memorandum of understanding should be drawn up. This is not the practice across the country. She asked for clarification on Rule 17-102 as to what a "writing" means. The Chair suggested that a Committee note could be added to clarify this.

The Chair drew the Committee's attention to section (e), the definition of "mediation communication." Mr. Sykes expressed the opinion that the language "conduct made" is not appropriate. He added that the Style Subcommittee can look at this. Mr. Bowen suggested that the word "made" could be deleted. Mr. Titus noted that the parties have to agree to the confidentiality of a document drawn up as a result of the mediation. The Chair responded that the parties may be willing to reach an agreement, but they may not want certain portions of the agreement filed with the court. Mr. Titus remarked that this is a drafting issue. If, during the mediation, one side writes something down, it is a document. The document to which the definition refers is intended to evidence the resolution of the matter. It could be argued that any piece of paper associated with the mediation is not a document that is confidential. The Chair said that the language "as a result of" takes care of this problem.

Mr. Sykes commented that there are two parts to this issue. The first is that anything done in connection with a mediation is confidential. The second is that a document drawn up as a result of a mediation is confidential only if the parties agree. Mr. Bowen suggested that a period be added after the word "mediator," and the remainder of section (e) be a separate sentence beginning

with the language “It includes a document ...”. Mr. Sykes noted that clearly the agreement as to confidentiality applies only to a document drawn up as a result of the mediation and not to other writings made during the mediation. Mr. Titus suggested that the last sentence could read as follows: “A document drawn up as a result of a mediation is not confidential unless the parties agree otherwise.” Professor Wolf expressed the view that the presumption should be that the document is confidential unless the parties agree otherwise. The Chair remarked that either version would work. However, since there is a concern about First Amendment access to judicial proceedings, it might be preferable to word the sentence so that the document is not confidential, unless the parties agree to make it confidential.

Mr. Brault observed that the media may dislike confidentiality clauses in the settlement conference context, but the media probably does not have the right to attack the parties’ agreement to keep the matter confidential. The media may have the right to attack a decision to seal a case by a court. The Chair remarked that it is easier to point to a rule to cover the situation than to litigate every case.

Mr. Bowen expressed the opinion that the proposed second sentence of section (e) should not be in the definitions rule because it is substantive. The Style Subcommittee could move it elsewhere in the ADR Rules. The Vice Chair pointed out that if the definition of “mediation communication” is read without the sentence, it means that all writings are confidential. The Chair

suggested that these matters should be included in Rule 17-108, Mediation Confidentiality.

Ms. Senft referred to the proposed changes to Rule 9-205 made at an earlier Rules Committee meeting. The Committee had decided that the mediator is to draw up a memorandum of understanding rather than the agreement itself. Ms. Senft questioned whether there should be a Committee note in Rule 17-102 explaining the change to Rule 9-205. The Vice Chair expressed the view that this was a good question, since the two rules should not necessarily use different language. Mr. Sykes inquired whether the family law area uses a different term. Ms. Senft answered that the term "memorandum of understanding" is not always used, but it is an option. The Chair commented that the terminology does not necessarily have to agree between the two rules. The Vice Chair pointed out that the issue is whether or not mediators should be practicing law by drawing up contracts. The language should not indicate different approaches to this issue depending on the area of law that applies to the dispute that is being mediated. Ms. Senft said that she and Professor Wolf agreed. The parenting plans in Baltimore City are entitled "agreements." The Chair said that the two Rules will be checked for consistency.

The Chair drew the Committee's attention to section (f). There was no discussion. The Committee approved the Rule as amended.

The Chair presented Rule 17-103, General Procedures and

Requirements, for the Committee’s consideration.

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 session explaining the mediation process in a non-fee-for-service mediation, 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 where the parties will be given an explanation of the mediation process and then determine whether to participate in the 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 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.

The Chair explained that subsection (c)(3) was proposed for change because when there is some reluctance on the part of parties to ADR proceedings, if the judge can order that an explanation be given to the parties, the parties may become more comfortable with the idea. This is a good tool for administrative and scheduling judges. The Vice Chair noted that the comma in the shaded language should be deleted, and the Committee agreed. The Vice Chair suggested that the Style Subcommittee restate the term "non-fee-for-service." The Committee approved the Rule as amended.

The Chair presented Rule 17-104, Qualifications and Selection of Mediators, for the Committee's consideration.

Revised Rule 17-104

MARYLAND RULES OF PROCEDURE

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

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

Note to Committee: The Subcommittee is proposing to combine subsections (a)(1) and (a)(2) and add a waiver provision. Some mediators have requested that subsections (a)(1) and (a)(2) be deleted entirely. The Subcommittee is asking the Committee for a policy decision on this.

(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;

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

(3) agree to take eight hours of continuing mediation-related education every two years;

(4) agree to abide by ~~a code of ethics approved~~ the 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 person approved by the county administrative judge, in addition to any observations during the training program.

(c) Additional Qualifications for Mediators in Divorce Cases With **[Financial] [Marital Property]** Issues

To be designated by the court as a mediator in divorce cases with **[financial] [martial property]** issues, the person must:

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

(2) unless there is no child access dispute involved, have the qualifications prescribed in section (b) of this Rule;

(3) have completed at least 20 hours of skill-based training in mediation of **[financial] [martial property]** issues; and

(4) have observed or co-mediated eight hours of divorce mediation sessions involving **[financial] [martial property]** issues conducted by persons approved by the county administrative judge.

Source: This Rule is new.

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

The ADR Subcommittee is proposing to combine subsections (a)(1) and (a)(2) into one provision, because 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. Members of a community mediation organization in Baltimore are requesting that the requirements of being 21 years of age and having a bachelor's degree from an accredited college or university be deleted as unnecessary, and the Subcommittee is asking the Rules Committee for a policy determination on this.

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

The Commission is also proposing more stringent qualifications for mediators in divorce cases with financial issues, which

qualifications are set out in proposed new section (c), because these cases are often very complicated.

The Chair explained that the Subcommittee is asking the full Committee for a policy decision as to whether to retain the qualifications of being at least 21 years of age and having a bachelor's degree to be eligible to be designated by the court as a mediator. The Subcommittee's position is that as long as the qualifications can be waived by the court, they should be retained. Some of the consultants have expressed the view that these qualifications should be eliminated. The Vice Chair pointed out that these qualifications are much less stringent than the original proposals, which required that the mediator be a lawyer.

Ms. Charkoudian said that mediation is a skill-based process. A good mediator has the necessary skills and empathy. There need not be degree requirements. Both the State and the court lose by setting standards that do not correlate with the skills required of a mediator. The Vice Chair remarked that she fully supported Ms. Charkoudian's position, but she noted that the court has the authority to decide whether a mediator is qualified. Ms. Charkoudian commented that an appropriate mediator without these qualifications could be a teenager who is mediating a case in which other teens are involved. The Vice Chair questioned whether there is a pool of trained mediators who are under the age of 21. Ms. Charkoudian answered that she has a

few available. She and the other mediators at the Community Mediation Center suggest that the minimum age be 18, although younger mediators could participate as co-mediators. Professor Wolf pointed out that although the ADR Rules apply to the circuit court, they could also be made to apply to the District Court or the juvenile court. In juvenile matters, it would be appropriate for a mediator to be less than 21 years of age. The Chair said that if the waiver provision is added in, then the court can waive the requirements if the court deems it is appropriate.

Ms. Charkoudian noted that there are two separate issues being discussed. One is the requirement of a bachelor's degree. The other is the requirement of being 21 years old. They should be considered separately, not as a package. Judge Kaplan noted that there is a connection. He observed that it is very unusual for an 18-year-old to not have a bachelor's degree, but that it is not so unusual for a 21-year-old to have one. The key to this is that the court can waive the requirements.

Ms. Vallario expressed her concern that the requirement of having the college degree would preclude some good people from being able to mediate. She said that she has trained over 300 people, 25% of whom have no bachelor's degree, but are qualified and intelligent. Many of the mediators are over the age of 55. Some are working on their bachelor's degree. Even without the requisite degree, many people have years of experience which serves them well as mediators. The Chair reiterated that rather than reducing the requirements, the possibility of the waiver

should be discussed. Mr. Brault suggested placing the language "unless waived by the court" in the preamble to the Rule, but Ms. Charkoudian pointed out that it is important not to waive the training requirements. It is also important not to require qualifications which are unrelated to being a mediator. Even with the waiver, keeping the requirements listed in the Rule would send a wrong message, implying that if one does not have those qualifications, one is inferior. The Chair expressed the view that the language "unless waived by the court" should be retained.

Mr. Klein asked if a 15-year-old who has completed 40 hours of mediation training is considered a person qualified as a mediator. Ms. Vallario responded that the person could be a co-mediator. Mr. Klein explained that he was questioning whether the person could be a mediator. Ms. Charkoudian answered in the affirmative, explaining that some 15-year-olds are more effective as mediators than people with master's degrees. Mr. Howell pointed out that the Rules set out general standards which the court can waive. He expressed the opinion that there is a need to inform individuals about the waiver situation. The Rule should contain important qualifications with a waiver provision. Ms. Charkoudian reiterated that this would discredit otherwise qualified mediators. Mr. Klein commented that a mediator needs some level of maturity and life experience. He agreed with the requirement to have a bachelor's degree. The Vice Chair noted that sometimes the fact that one is a juvenile and has no life

experience makes the person a good mediator. Mr. Beschen added that the younger people who mediate take it very seriously and learn very quickly.

The Chair said that another aspect of this is that the court is ordering people to a process. There has to be a comfort level of those who are ordered to go to mediation. The minimum requirements in the Rule establish this comfort level. Judge Vaughan remarked that our society gets tripped up with the bachelor's degree requirement. Compared to 20 years in the military, a college degree may not be special. The Chair pointed out that the same comment could be made about having a law degree. There has to be some floor. Mr. Howell suggested that the requirement be 21 years of age unless waived. Ms. Charkoudian expressed her disagreement, and Mr. Howell suggested that the two requirements in subsection (a)(1) could be in the alternative. The Vice Chair commented that she would agree about reducing the requirements for mediators, except that the Rules require that the mediator draw up a contract. The Court of Appeals would never approve of an 18-year-old drawing up a contract. The Court of Appeals may not even approve of the requirements as they exist in the current version of the Rule because they are not stringent enough.

Judge Kaplan observed that great strides have been made in the loosening of the requirements to be a mediator. One no longer has to have a law degree, and be a member of the bar for five or ten years. If the Court of Appeals accepts the waiver

provision, this will be an accomplishment. If the minimum requirements are reduced, it may be a step backwards.

Mr. Brault asked if a mediation order is used in juvenile proceedings. Mr. Hochberg responded that it could be used where the court has ordered the mediation. Ms. Charkoudian remarked that there are some juvenile-related cases in juvenile or family court. The Chair added that these are by agreement. Mr. Hochberg commented that he is in favor of the standards in the Rule which could be waived by the court or by the agreement of the parties. Ms. Charkoudian cautioned that this will result in a loss of high-quality mediators. Mr. Titus said that the Court of Appeals will not abolish minimum standards, and the Vice Chair agreed. Judge Dryden suggested that the Court could be offered the extreme position with a backup of the current position. The Vice Chair acknowledged that a bachelor's degree has no relationship to being a good mediator. She reiterated her concern as to a non-lawyer drawing up a contract and suggested that a bachelor's degree may be useful in that aspect of the process.

Mr. Klein suggested that a Committee note could be added which would state that there are good mediators who do not have a bachelor's degree. The Chair noted that the language "unless waived by the court" indicates the Committee's acknowledgment that the qualifications are not always necessary. Ms. Charkoudian again warned that the waiver provision means that persons without the qualifications are the exception, not the

rule. Mr. Sykes inquired as to how this works in practice -- is there a roster of court-approved mediators? The Vice Chair answered in the affirmative. Professor Wolf added that it depends on the county. Mr. Sykes noted that this is case-specific. The court may waive for one case, but not for another. Professor Wolf noted that under the proposed Rule, the administrative judge could waive the requirements.

Mr. Brault pointed out that in Montgomery County, a record of the results of mediations is kept, and the results are analyzed. The Vice Chair remarked that a good result might be the recognition that there is an inability to reach a resolution. There is a tension between the interest of the court system and what mediation is. The Chair said that the administrative judge of each county places the mediators on the list. Ms. Senft noted that the mediators are chosen in alphabetical order in Baltimore City, and this has caused complaints by litigants. Mr. Titus observed that if the mediators are chosen in alphabetical order, this could mean that an 18-year-old could handle a complicated antitrust case. Professor Wolf suggested that this be left up to the administrative judge in each county.

The Vice Chair suggested that the Committee note proposed by Mr. Klein pertaining to the fact that a college degree is not always a necessary requirement be added to section (a) of Rule 17-104. The Committee agreed by consensus to this addition.

Mr. Titus inquired as to why subsection (a)(3) is necessary. Ms. Charkoudian answered that mediation is a skill-based process.

Mr. Titus remarked that this is not a requirement for attorneys. Ms. Charkoudian said that the concern is that a mediator's skills may become rusty, and the education requirement is important to maintain high standards. Professor Wolf added that after the initial 40-hour training, once someone is on the list of mediators, there needs to be some assurance that the mediator will have continuing experience. No objections to this requirement have been expressed by people in the field. Judge Dryden pointed out that the Rule provides for waiver of the age and education requirements, but not the other requirements. Mr. Sykes questioned as to who decides whether education is "mediation-related." Professor Wolf said that he had no objection to dropping the word "related." Ms. Charkoudian remarked that the mediator would have to submit a certificate that the education was completed. Professor Wolf added that it could be submitted to the administrative judge.

The Chair commented that another way to handle this is to provide in the Rule that the mediator certifies that he or she has taken eight hours of continuing education in the past two years. Ms. Senft noted that sometimes people are lax in fulfilling these types of requirements, especially when there is no follow-up administratively. An affidavit could be sent out every two years for the mediator to sign that he or she completed the education requirements.

The Vice Chair pointed out that the language "mediation-related education" could mean that the mediator is not taking

classes in something related to his or her skills. Mr. Titus again questioned as to who determines what is related to mediation. Mr. Hochberg questioned as to who gives the courses. Professor Wolf replied that the Maryland Institute for the Continuing Professional Education of Lawyers (MICPEL) provides the education. The 40-hour training is given in a program approved by the Administrative Office of the Courts (AOC). The AOC needs to state which courses are appropriate. Mr. Sykes cautioned that the Rule should not try to define which courses are relevant. Professor Wolf noted that Rule 17-106, Mediation Training Programs, contains a list of the requirements for a mediation training program.

Judge Kaplan suggested that the language "agree to" should be deleted from subsection (a)(3) and that subsection (a)(2) should read as follows: "take eight hours of continuing mediation-related education every two years in a program meeting the requirements of Rule 17-106." The Committee agreed by consensus to this suggestion. The Vice Chair suggested that the language "agree to" also should be deleted from subsections (a)(4), (a)(5), and (a)(6). The Committee agreed by consensus to this suggestion.

The Chair drew the Committee's attention to section (c). The Reporter asked whether the language "financial issues" should be changed to "marital property." The Honorable Paul H. Weinstein, Administrative Judge of the Circuit Court for Montgomery County, had pointed out that marital property issues

would include the use of a family home and family use person property. The Subcommittee's intention was that this section of the Rule should cover money and related items, not the children. Ms. Senft observed that a number of people involved in disputes are not married. The Vice Chair commented that the word "financial" can be everything, in a sense. Child issues often relate to money issues. What does the word "financial" mean? Ms. Senft remarked that it is correct to include child issues with financial issues. The Chair added that in almost every case, both are required.

Ms. Charkoudian observed that the section requires eight hours of training observation or co-mediation and 20 hours of other training on marital property issues. The Chair commented that if someone is involved in a case with marital property issues, financial issues must be involved. In considering marital property, one has to adjust the numbers for alimony, child support, and use and possession. Mr. Brault remarked that the term "marital property" is difficult to figure out. The Reporter suggested that the phrase used in the Rule could be "financial or property issues;" however, this is very broad.

The Vice Chair inquired as to what the intent of the provision is. The Rule should use the term "marital property" because the term "financial" is unclear. Ms. Senft pointed out that if the term "marital property" is used, this would limit the section to cases involving married people. Many of the cases involve the same issues with people who are not married, and

these should be able to go to mediation. The Chair agreed that in those cases, there are many arguments over money and property.

Mr. Sykes asked how a mediator can avoid giving advice. Mr. Brault noted that a common claim in a legal malpractice case is the failure of attorneys to determine the amount of marital property. The Chair questioned whether in these kinds of cases, the mediator should have a law degree. The Vice Chair answered that she did not think the mediator has to have a law degree. Ms. Senft commented that many mediators are not attorneys, but they have excellent skills in family matters. Mr. Hochberg disagreed. He said that even attorneys fail to pursue areas of marital property, and this failure is the subject of numerous grievances filed with Bar Counsel.

The Chair pointed out another troubling aspect of this. A husband and wife may sit down with a mediator. One or both may be pro se. The mediator cannot give legal advice by rule. This may be a prescription for disaster. Ms. Senft said that the mediator needs to have training. Ms. Ogletree responded that even if the mediator has training and even if the mediator is an attorney, there are complicated issues, such as those involving real property, which may be disastrous for a mediator to sort out. She remarked that she has a problem with the concept that the mediator cannot give advice, but the question is how to build it into the Rule. Ms. Charkoudian noted that if advice has to be given, mediation is not appropriate.

Ms. Ogletree said that if mediators prepare a marital

property agreement, the agreement has to be reviewed. The Vice Chair added that there has to be a reality check on the agreement. The parties ought to know what the agreement accomplishes and the consequences. Mr. Sykes pointed out that someone has to tell the party what he or she is giving up. Without this, there is no informed consent. Ms. Senft observed that, anecdotally, this may be an example of a poor mediation. In a good mediation, for the reality check, the parties go to someone else. Ms. Ogletree questioned as to who provides the reality check if the parties cannot afford counsel. Ms. Senft responded that this is a "chicken and egg" type of discussion. When people cannot afford lawyers, the quality of the mediation may be affected. Ms. Ogletree said that in Caroline County, many people do not qualify for Legal Aid. They do not have the money to pay a private attorney, and they think that mediation is the panacea for this.

The Chair inquired as to why a mediator needs additional skills if a mediator does not give legal advice. Ms. Charkoudian answered that the mediators need to learn how to ask the proper questions and how to bring people through the collaborative process. The Chair commented that a danger exists here. The mediator may have completed the additional 20 hours of skill-based training and may have observed eight hours of divorce mediation sessions, but may know nothing about marital property law. One alternative is that the court not appoint a mediator in divorce cases with marital property unless the court is persuaded

that the mediator has experience in that area.

The Vice Chair commented that when she was trained in mediation, there was some disagreement among the teachers. One believed that a definition, which is taken from the law, should be given out as to what marital property means. Ms. Ogletree responded that the problem is in the application of the law. In complicated real property situations, an unrepresented person will not raise certain issues. The Vice Chair remarked that a trained mediator will ask appropriate questions. Mr. Beschen said that at the follow-up at the end of a family mediation, if the issues are beyond the capabilities of the mediator, the parties can come back or consult an attorney. The idea is that mediation creates a collaborative process. Mr. Hochberg expressed the view that this is a rocky road. For example, the subject of pensions in Maryland is very complicated and it could take 40 hours to properly train mediators on this one issue. It takes many hours to read and understand the six or eight appellate decisions on this issue.

The Vice Chair asked Mr. Hochberg about a hypothetical case. If a couple has a diamond ring and they agree that the ring should be given to one of them in the settlement, what difference would it make whether the ring is marital or non-marital property? Mr. Hochberg replied that that example is not a problem. However, if the diamond ring had been sold and General Motors stock purchased with the proceeds, which was then sold to buy a car, there could be a tracing problem. Who advises people

of their rights? The Vice Chair responded that mediation is not rights-based. The parties decide how to share or parcel their property. Mr. Hochberg remarked that there must be a starting point to know who is giving up something to which that person is otherwise entitled.

The Chair suggested that the following language could be added to Rule 17-104 at an appropriate place: "In divorce cases involving marital property, the court shall not require the parties to submit to mediation." If the parties agree to the mediation, then it would be appropriate. This provision would reduce the danger that mistakes would be made in the mediation. Another approach is that the mediator must be an attorney unless the court is persuaded that the mediator has the necessary training and background.

The Vice Chair pointed out that a different approach is the one provided for in the Rule. The qualifications for mediators in cases involving marital property issues are strengthened. Mr. Sykes expressed a concern that the process is aimed at agreement – a successful mediation is one in which the parties agree, rather than one in which an equitable result is obtained. The Vice Chair commented that mediators would prefer no agreement to one that is coerced. Mr. Sykes suggested that protections to ensure that the agreement is not improvident should be built into the Rule. His view is that the proposed alternative does not go far enough. The Vice Chair noted that an important provision is periodic monitoring of the mediators. The court has to have

confidence in the mediators on the court's list.

Mr. Beschen expressed his concern that the rules are being written to accommodate a small portion of divorce cases, eliminating the availability of mediation to a greater number of cases. Mr. Hochberg commented that next to the home, the pension is the most common and valuable asset that the parties have. Pension issues are very difficult, even for experienced attorneys. Mr. Beschen observed that those people who do not have a pension should not be eliminated from the mediation process. Professor Wolf remarked that anyone who mediates marital property needs to know how to handle pensions. One can talk about pensions without giving legal advice.

Mr. Gieszl suggested that a Committee note could be added which would state that the purpose of the training of mediators is not a substitute for counsel to review the agreement. Ms. Ogletree commented that a Committee note would not give people the ability to obtain counsel. The training has to be given, so that people learn to ask the correct questions. This provides a reality check.

Mr. Hochberg moved to delete section (c), the motion was seconded, but it failed on a vote of one in favor, the remainder opposed.

The Chair inquired about the issue of whether to use the language "financial issues" or "marital property" in section (c) of Rule 17-104. The Vice Chair suggested that the preferable language is "marital property," and the Committee agreed by

consensus to this change.

The Chair said that the second issue for the Committee to consider is details of the additional qualifications.

Mr. Bowen asked why subsection (c)(2) is necessary and moved to delete it. The motion was seconded, and it passed unanimously.

Mr. Bowen questioned as to why the language "skill-based" modifies the word "training" in former subsection (c)(3) which has now become subsection (c)(2) with the deletion of the previous provision. He pointed out that the word "training" is not modified this way in any other part of the Rule. The Reporter suggested that the language "skill-based" be deleted from subsection (c)(2), and the Committee agreed by consensus to this suggestion.

The Reporter said that Michael McWilliams, Esq., had telephoned her regarding the proposed changes to this Rule and the other rules in Title 17. He observed that the question of how to deal with a poor mediator was not answered by the proposed revisions. The Reporter stated that she would send this question to the ADR Commission.

The Chair presented Rule 17-105, Qualifications and Selections of Persons other than Mediators, for the Committee's consideration.

AMEND Rule 17-105 to refer to standards adopted by the Court of Appeals, add a waiver provision for persons with substantial experience, and 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~~ the 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 this requirement is waived by the court for those persons who have substantial experience, 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~~ consisting of at least eight hours 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.

The Commission is asking for a change in subsection (a)(5) to add an eight-hour minimum for training programs to be approved by the county administrative judge. The Commission also suggests that a waiver provision be added for persons who have substantial experience.

The Vice Chair pointed out that for consistency with the change made to Rule 17-104, the words "agree to" should come out of subsections (a)(1), (a)(2), and (a)(3). The Committee agreed by consensus to this change. Mr. Sykes asked why the training

program of eight hours in subsection (a)(5) is able to be waived. This is such a minimal amount of training. The Chair noted that the waiver is by the court. The Vice Chair added that the Rule provides that the waiver is if the person has substantial experience, and she asked if the experience has to be related to the type of ADR process that the person will be conducting. Mr. Brault noted that this would eliminate attorneys who have not been involved in ADR. The Vice Chair observed that most attorneys have been involved in ADR. Judge Dryden remarked that it is not necessary to retain the requirement that one must have substantial experience to qualify for a waiver because the county administrative judge will be able to make that decision. The Chair suggested that the "substantial experience" language be deleted, and subsection (a)(5) read as follows: "unless waived by the court, have completed a training program consisting of at least eight hours approved by the county administrative judge." The Committee agreed by consensus to this change.

The Reporter pointed out that although Rule 17-107, Procedure for Approval, had not been recommended for change, at the Subcommittee meeting there had been a discussion as to whether documentation is necessary, and the Subcommittee agreed that documentation is mandatory.

The Chair presented Rule 17-108, Mediation Confidentiality, for the Committee's attention.

Revised Rule 17-108

MARYLAND RULES OF PROCEDURE

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

ADD new Rule 17-108, as follows:

Rule 17-108. MEDIATION CONFIDENTIALITY

Except for an agreement submitted to the court or as otherwise required by law, no mediation communication is subject to discovery or admissible in evidence in any judicial, administrative, or other adversarial proceeding unless the parties and their counsel agree otherwise in writing. Neither the mediator nor an attorney may be called as a witness in such a proceeding to give evidence regarding the mediation.

Committee note: See Code, Family Law Article, §5-701 et seq. For provisions that require the reporting of suspected child abuse.

Source: This Rule is new.

Rule 17-108 was accompanied by the following Reporter's Note.

The Commission has asked for a rule on confidentiality for mediations. The Subcommittee is proposing that new Rule 17-108, which is derived from Rule 9-205 f, the confidentiality rule pertaining to mediation of child custody and visitation disputes, be added for this purpose.

The Reporter told the Committee that an updated version of Rule 17-108 was available. Ms. Ogletree commented that she had a problem conceptually with not being able to call a mediator as a witness in a court proceeding to set aside a mediated agreement.

The mediator should be available to provide information as to the state of mind of a party during the mediation. Professor Wolf explained that the mediator does not want to be "caught in the middle." Ms. Ogletree pointed out that the mediator already is caught in the middle if the mediator has relevant information as to whether someone has been abused. How can a valid agreement that is reached in a mediation be enforced if one of the parties later reneges? Professor Wolf responded that the agreement survives if the parties want it to. The concern is that the mediator is put in the middle in favor of one side. If the mediator allowed certain things to happen, this may constitute malpractice. The Chair commented that this is a policy question.

Mr. Brault asked if there is absolute immunity for the mediator's actions. Professor Wolf noted that the idea to base Rule 17-108 on Rule 9-205 f. came up at the Subcommittee meeting. There should be a Committee note stating that a mediator is liable for malpractice. In those situations, confidentiality is opened up. Mr. Hochberg suggested that the language "between the parties" be added in the fourth line of Rule 17-108 after the word "proceeding" and before the word "unless." The Reporter pointed out that Rule 17-108 is broader than Rule 9-205 f. because the latter applies to admissibility in evidence in any proceeding "under this Chapter" and the former applies to admissibility in evidence in "any judicial, administrative, or other adversarial proceeding." Mr. Sykes commented that if there were absolute immunity for mediators, someone would be precluded

from claiming that the mediation was unfair, or there was collusion, or the agreement was not voluntary. The Vice Chair inquired as to whether someone could show the mediation agreement to the court. Mr. Titus remarked that an 18-year-old mediator could write a memorandum of agreement that was ambiguous, leading to a good faith dispute. Mr. Beschen observed that the mediator uses the language of the parties. Mr. Brault said that the law is that the conversations are privileged, and settlement conferences are privileged. Mr. Titus observed that Rule 5-408 precludes the use of conduct or statements made in mediation to prove the validity, invalidity, or amount of a civil claim in dispute.

The Vice Chair asked how to resolve these issues. The Chair suggested that Rule 17-108 could begin as follows: "Except for documents drawn up as a result of mediation, no statement or writing made in the course of the mediation, including all mediation communications as defined in Rule 17-102 (d), is subject to discovery or admissible in evidence in the proceeding between the parties to the mediation...". The Vice Chair expressed the view that this may be too narrow. Mr. Sykes pointed out a redundancy. The Rule refers to "no statement or writing made in the course of mediation," and includes all "mediation communications." These two items should be combined into the term "mediation communications" as defined in Rule 17-102 (d).

The Vice Chair stated that the version of the Rule drafted

by the ADR Commission is better than the current version. Under the ADR Commission version, generally speaking, all is not disclosable. This is true even if a new action is filed. Ms. Ogletree remarked that in that case, a mediator is not accountable for his or her actions. The Vice Chair noted that some items are not confidential. For example, the mediator must report evidence of child abuse. Mr. Howell observed that Rule 5-408 is already in effect. This was produced after much study, and it came from the federal rules. Mr. Howell said that he was troubled by Ms. Ogletree's point. Rule 17-108 should be more closely aligned with Rule 5-408. There is a need for confidentiality, but the confidentiality rule should not sweep in too much. Professor Wolf remarked that there were exceptions to the original proposal. The Uniform Mediation Act is in the process of being drafted. The ADR Commission version of the confidentiality rule tracks proposals in the Uniform Act.

The Chair commented that the answer to this may be that parties in mediation enjoy the protections of Rule 5-408. That may be enough protection. Professor Wolf reiterated that the concern from the mediator's point of view is that the mediator does not want to be in the middle of every contest. The effort is to keep the mediator separate. The Chair said that everything stated during the mediation stays in the room except for evidence of child abuse. This should be left to Rule 5-408. Mr. Titus pointed out that there are two public policy issues. One is effectuating confidentiality by precluding bringing the mediator

in later; the other is to protect mediators. He said that his concern was more about the first issue. He referred to Ms. Ogletree's problem about the need for a mediator to testify as to how a party behaved in a mediation. Ms. Ogletree expressed her agreement with leaving this up to the evidence rules.

Mr. Brault inquired if the language "except as otherwise required by law" includes a court order. The Chair answered that it includes a court order. Mr. Brault commented that the Attorneys Subcommittee has been discussing Rule 4.2, Communication with Person Represented by Counsel, pertaining to the interviewing of employees. The Rule uses the language "except as otherwise authorized by law," but the American Bar Association recommends the addition of the language "or by order of court." It is somewhat ambiguous as to whether the language of Rule 4.2 includes court orders. The Vice Chair cautioned that there may be many rules which would need to make a parallel change. The Chair said that it is better to key this to Rule 5-408. Judge Kaplan suggested that the Committee note be expanded to include a reference to Rule 5-408. The Chair noted that one of the reasons to adapt Rule 17-108 to Rule 9-205 is that the latter is working well. Ms. Ogletree expressed the opinion that Rule 17-108 is overly broad. The Chair commented that the concern is that the way the Rule is worded, a party cannot establish duress. The Vice Chair said that she believed that mediation should be confidential. She stated that the current version of Rule 17-108, based on Rule 9-205, works well. Ms.

Ogletree reiterated her concern that it is overly broad. Mr. Brault expressed the view that the mediation should be totally confidential. Ms. Ogletree observed that the evidence rules can handle the confidentiality aspect. Mr. Howell agreed. He suggested that the Rule also should have language which provides that ordinarily a mediator is not subject to being called as a witness. The judge would have to determine in advance that a certain case is not covered by the protections given by Rule 5-408.

The Chair reiterated that Rule 9-205 works well. Mr. Howell suggested that the wording of the new Uniform Rule should be considered. Professor Wolf added that the Uniform Rule was hotly debated, and it took years to develop. The Chair suggested that the mediation confidentiality rule be parallel to Rule 9-205. The Committee note can refer to Rule 5-408. Mr. Beschen told the Committee that he is not an attorney, and he inquired whether documents and notes from the mediation could be used. The Vice Chair responded that these could not be considered later. Mr. Brault remarked that the term "mediation communication" is broader than the scope of Rule 9-205 because "mediation communication" includes conduct. Rule 9-205 permits the case set forth by Ms. Ogletree. The Reporter suggested that the two need to be reconciled, and then section f. of Rule 9-205 could be deleted.

The Vice Chair commented that Mr. Bowen had suggested that the last part of Rule 17-102 (e) should be included in Rule 17-

108. The Chair suggested that the following sentence could be added: "A document drawn up as a result of a mediation is not confidential, unless the parties have agreed." Mr. Brault noted that unless the language "between the parties" is added, civil immunity for the mediator is created by the Rule. The Vice Chair commented that the issue of the use of evidence in a malpractice case when a mediator is sued for malpractice needs to be addressed. Mr. Brault observed that a State's Attorney could bring an action against a husband for parental kidnaping and an issue in the case could be how custody was obtained. Judge Dryden remarked that a mediator may have observed an assault during the mediation. The Chair reiterated that the addition of language which reads "proceedings between the parties" affords some protection.

Mr. Howell asked if one of the parties hands a letter to the mediator, is the letter forever barred from being used as evidence? Professor Wolf said that anything otherwise discoverable that is not generated within the mediation, even if brought into the mediation, is not confidential.

Mr. Brault commented that there are a variety of privileges and immunities. For example, at a hospital quality assurance committee meeting that is hearing allegations of malpractice against a physician, everything the committee hears is not privileged. Witnesses relating the events are not immunized. What is immunized are the committee's discussions and negotiations with the physician and his or her attorney.

Mr. Howell expressed his preference for Rule 5-408 (a)(3), instead of the Rule being presented today, because the version of the Rule which was distributed at the meeting is too broad. The Vice Chair said that the Committee should consider the rule drafted by the ADR Commission. Mr. Brault suggested that the Rule be limited to the proceeding between the parties related to the subject matter of the mediation. The Chair observed that the language in the Rule which reads "or as otherwise required by law" would mean that if an assault occurred, the law would require the mediator to testify. The Vice Chair remarked that what happened during the mediation might not rise to the level of an assault.

Mr. Gieszl observed that there could be two agreements, one which goes to the court, and the other which includes sensitive material, such as pertaining to drug use. The parties can specify that one is confidential, and the other is not. The Vice Chair inquired if, in a subsequent drug case, the State's Attorney can call the mediator to testify that a party had a drug problem. Mr. Gieszl commented that this should be confidential.

Judge Dryden expressed the view that conduct should be included as confidential. Mr. Bowen said that the more loopholes in the Rule, the more confusing it is. The Rule should be airtight. Mr. Sykes remarked that confidentiality between the parties takes care of the assault situation. In other cases, conduct is involved where the mediator is the only witness. Judge Vaughan observed that it is inconceivable that the State's

Attorney could later refer to the information that a person used drugs after he or she admitted to this in a mediation. The Chair commented that the defendant could take the stand and be impeached by the evidence from the mediation. Professor Wolf asked why the Rule should be protecting that; a mediator should not be placed in the middle by being a witness. The Chair pointed out that taking the mediator out as a witness downstream could deny the opportunity to sue for malpractice and deny the State the ability to obtain evidence of abuse. Professor Wolf agreed that the mediator is liable for malpractice. There is existing law that a mediator has to testify about abuse of children or the elderly.

Mr. Bowen said that commonly a mediator talks with one party to find out that person's stand, and then the mediator talks with the other party. The mediator may ask the first party if the mediator can tell the other side what the party's view is. How is the disclosure of the first party protected? The Chair responded that the evidence rule will take care of this.

The Vice Chair suggested that the Rules Committee consider the ADR version of Rule 17-108. The Chair said that the Subcommittee can review the ADR version. It may also be applicable to domestic mediation. After the Subcommittee considers it, the Rules Committee can look at it again.

Agenda Item 2. Consideration of proposed rules changes recommended by the Appellate Subcommittee: Proposed amendments to: Rule 7-102 (Modes of Appeal), Rule 7-112 (Appeals Heard De Novo), Rule 7-202 (Method of Securing Review), Rule 7-206

(Record), Rule 8-122 (Appeals from Proceedings for Adoption or Guardianship - Confidentiality), Rule 8-501 (Record Extract), Rule 8-504 (Contents of Brief), Rule 8-502 (Filing of Briefs), and Rule 8-602 (Dismissal by Court); Proposed new Rule 8-605.1 (Reporting of Court of Special Appeals Opinion); Proposed amendments to Rule 8-606 (Mandate) and Rule 8-113 (Court Papers--Duty of Clerk)

After the lunch break, Mr. Titus presented Rule 7-102, Modes of Appeal, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 100 - APPEALS FROM THE DISTRICT COURT TO THE CIRCUIT COURT

AMEND Rule 7-102 (b) to move part of the Rule into a Committee note and to include a reference to peace orders, as follows:

Rule 7-102. MODES OF APPEAL

(a) On the Record

An appeal shall be heard on the record made in the District Court in the following cases:

(1) a civil action in which the amount in controversy exceeds $2,500 exclusive of interest, costs, and attorney's fees if attorney's fees are recoverable by law or contract;

(2) any matter arising under §4-401 (7)(ii) of the Courts Article;

(3) any civil or criminal action in which the parties so agree;

(4) an appeal from an order or judgment of direct criminal contempt if the sentence

imposed by the District Court was less than 90 days' imprisonment; and

(5) an appeal by the State from a judgment quashing or dismissing a charging document or granting a motion to dismiss in a criminal case.

(b) De Novo

An appeal shall be tried de novo in all other civil and criminal actions~~, including a criminal action in which sentence has been imposed or suspended following a plea of guilty or nolo contendere, an appeal in a municipal infraction or Code violation case, and an appeal under Code, Family Law Article §4-507 from the granting or denying of a petition seeking relief from abuse~~.

Committee note: Appeals to the circuit court that are tried de novo include a criminal action in which sentence has been imposed or suspended following a plea of guilty or nolo contendere, an appeal in a municipal infraction or Code violation case, an appeal from a peace order issued pursuant to Code, Courts and Judicial Proceedings Article, §§3-1501 - 3-1509, and an appeal under Code, Family Law Article §4-507 from the granting or denying of a petition seeking relief from abuse.

Source: This Rule is new but is derived in part from Code, Courts Article, §12-401 (b), (c), and (f).

Rule 7-102 was accompanied by the following Reporter's Note.

In light of the passage of the law permitting the issuance of peace orders, Chapter 404, Laws of 1999, effective October 1, 1999, the Appellate Subcommittee is proposing to amend Rule 7-102 (b) to clarify that peace orders are included as actions tried de novo on appeal. The Subcommittee is suggesting that the list of actions tried de novo be moved from the body of the Rule into a Committee note because of the length of the list.

Mr. Titus explained that the Subcommittee is proposing the addition of a Committee note to include a reference to Code, Courts Article §§3-1501 - 1509, the new peace order statute. The other actions that are tried de novo, which were listed in the body of the Rule, have been put into the new Committee note. Mr. Sykes questioned as to why the Subcommittee did not put the list of actions tried de novo in a cross reference instead of in a Committee note. The Reporter answered that this would be too wordy for a cross reference. Mr. Sykes suggested that the Committee note could begin as follows: "[f]or appeals to cases in circuit court tried de novo, see....". The Reporter responded that that format may create a trap for practitioners in the situation where types of cases tried de novo are omitted from the Committee note. Mr. Sykes commented that the problem is that the way the note is worded is a trap. If an action tried de novo is not listed, people will not be alerted. Mr. Sykes suggested that the language of the proposed Committee note should be placed in a cross reference instead. The cross reference would begin as follows: [f]or examples of appeals to the circuit court that are tried de novo, see:...". The Committee agreed by consensus to this change. The Committee approved the changes to Rule 7-102 as amended.

Mr. Titus presented Rule 7-112, Appeals Heard De Novo, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 100 - APPEALS FROM THE DISTRICT COURT TO THE CIRCUIT COURT

AMEND Rule 7-112 to add a new section and cross reference pertaining to peace orders, as follows:

Rule 7-112. APPEALS HEARD DE NOVO

(a) Scope

This Rule applies only to appeals heard de novo in the circuit court.

(b) District Court Judgment

The District Court judgment shall remain in effect pending the appeal unless and until superseded by a judgment of the circuit court or, in a criminal action, a disposition by nolle prosequi or stet entered in the circuit court.

(c) Modification of Peace Orders Pending Appeal

In an appeal from the granting or denial of a peace order, the circuit court may, on its own motion or on motion of any party, modify, stay, or issue a peace order for good cause shown pending the determination of the appeal.

Cross reference: Grounds for the issuance of a peace order are set forth in Title 3, Subtitle 15 of Code, Courts and Judicial Proceedings Article.

~~(c)~~ (d) Procedure in Circuit Court

(1) The form and sufficiency of pleadings in an appeal to be heard de novo are governed by the rules applicable in the District Court. A charging document may be

amended pursuant to Rule 4-204.

(2) If the action in the District Court was tried under Rule 3-701, there shall be no pretrial discovery under Chapter 400 of Title 2, the circuit court shall conduct the trial de novo in an informal manner, and Title 5 of these rules does not apply to the proceedings.

(3) Except as otherwise provided in this section, the appeal shall proceed in accordance with the rules governing cases instituted in the circuit court.

Cross reference: See Rule 2-327 concerning the waiver of a jury trial on appeal from certain judgments entered in the District Court in civil actions.

~~(d)~~ (e) Withdrawal of Appeal; Entry of Judgment

(1) An appeal shall be considered withdrawn if the appellant files a notice withdrawing the appeal or fails to appear as required for trial or any other proceeding on the appeal.

(2) Upon a withdrawal of the appeal, the circuit court shall dismiss the appeal, and the clerk shall promptly return the file to the District Court. Any statement of satisfaction shall be docketed in the District Court.

(3) On motion filed in the circuit court within 30 days after entry of a judgment dismissing an appeal, the circuit court, for good cause shown, may reinstate the appeal upon the terms it finds proper. On motion of any party filed more than 30 days after entry of a judgment dismissing an appeal, the court may reinstate the appeal only upon a finding of fraud, mistake, or irregularity. If the appeal is reinstated, the circuit court shall notify the District Court of the reinstatement and request the District Court to return the file.

Source: This Rule is derived in part from

former Rule 1314.

Rule 7-112 was accompanied by the following Reporter's Note.

> In light of the new peace order law, the Subcommittee is proposing to amend Rule 7-112 by adding a new section and cross reference. The new section provides that the circuit court may modify, stay, or issue a peace order pending determination of the appeal. The Subcommittee was of the opinion that this authority is permitted because the peace order statute, Code, Courts and Judicial Proceedings Article in section 3-1506 states that "unless the circuit court orders otherwise, modification or enforcement of the District Court shall be by the District Court."

Mr. Titus explained that because of the new peace order law, the Subcommittee is proposing to add to Rule 7-112 a new section (c) and a cross reference. The new section provides that the circuit court may modify, stay, or issue a peace order pending determination of the appeal. The Vice Chair noted that the language "granting a peace order" is worded unusually. Mr. Bowen remarked that the Style Subcommittee can look at this. The Vice Chair said that it is clear from the law that the granting of the peace order is simply provisional. Mr. Sykes pointed out that the order stays in effect until the appeal. The Chair suggested the language at the end of section (c) could be moved to the beginning. Section (c) would begin as follows: "[p]ending the determination of an appeal from the granting or denial...". The Vice Chair stated that she agreed with the concept of the change to the Rule, but she had a conceptual problem with a stay

pending an appeal. Once the appeal is decided de novo by the circuit court, does the District Court peace order go away? Mr. Titus answered that it is no longer in effect. The Vice Chair noted that modification of the order may moot the case. The Committee approved the change to Rule 7-112 as presented.

Mr. Titus presented Rule 7-202, Method of Securing Review, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 200 - JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY DECISIONS

AMEND Rule 7-202 by adding a Committee note after section (b) and be adding language to subsection (d)(3), as follows:

Rule 7-202. METHOD OF SECURING REVIEW

(a) By Petition

A person seeking judicial review under this chapter shall file a petition for judicial review in a circuit court authorized to provide the review.

(b) Caption

The Petition shall be captioned as follows:

IN THE CIRCUIT COURT FOR _____

PETITION OF _____ *
[name and address] *
*

FOR JUDICIAL REVIEW OF THE DECISION OF THE	*	CIVIL
	*	ACTION
_____	*	No. _____
[name and address of administrative agency that made the decision]	*	
	*	
	*	
IN THE CASE OF _____	*	
[caption of agency proceeding, including agency case number]	*	

Committee note: When the final decision is issued by the Office of Administrative Hearings, it is the agency making the decision for purposes of the petition and should be named in the caption as well as receive notice. See Beeman v. Department of Health and Mental Hygiene, 107 Md.App. 122 (1995).

(c) Contents of Petition

The petition shall request judicial review, identify the order or action of which review is sought, and state whether the petitioner was a party to the agency proceeding. If the petitioner was not a party, the petition shall state the basis of the petitioner's standing to seek judicial review. No other allegations are necessary. If judicial review of a decision of the Workers' Compensation Commission is sought, the petitioner shall attach to the petition a certificate that copies of the petition were served pursuant to subsection (d)(2) of this Rule.

Committee note: The petition is in the nature of a notice of appeal. The grounds for judicial review, required by former Rule B2 e to be stated in the petition, are now to be set forth in the memorandum filed pursuant to Rule 7-207.

(d) Copies; Filing; Mailing

(1) Notice to Agency

Upon filing the petition, the petitioner shall deliver to the clerk a copy

of the petition for the agency whose decision is sought to be reviewed. The clerk shall promptly mail a copy of the petition to the agency, informing the agency of the date the petition was filed and the civil action number assigned to the action for judicial review.

(2) Service by Petitioner in Workers' Compensation Cases

Upon filing a petition for judicial review of a decision of the Workers' Compensation Commission, the petitioner shall serve a copy of the petition by first class mail on the Commission and each other party of record in the proceeding before the Commission.

Committee note: This subsection is required by Code, Labor and Employment Article, §9-737. It does not relieve the clerk from the obligation under subsection (d)(1) of this Rule to mail a copy of the petition to the agency or the agency from the obligation under subsection (d)(3) of this Rule to give written notice to all parties to the agency proceeding.

(3) By Agency to Parties

Unless otherwise ordered by the court, the agency, upon receiving the copy of the petition from the clerk, shall give written notice promptly by ordinary mail to all parties to the agency proceeding, including any other agency that appeared in the proceeding, that:

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

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

(e) Certificate of Compliance

> Within five days after mailing, the agency shall file with the clerk a certificate of compliance with section (d) of this Rule, showing the date the agency's notice was mailed and the names and addresses of the persons to whom it was mailed. Failure to file the certificate of compliance does not affect the validity of the agency's notice.
>
> Source: This Rule is derived from former Rule B2.

Rule 7-202 was accompanied by the following Reporter's Note.

> Although the Office of Administrative Hearings (OAH) is of the opinion that the agency which delegated decision-making authority to the OAH is the agency that made the decision for purposes of judicial review, the Appellate Subcommittee agrees with the holding of Beeman v. Department of Health and Mental Hygiene, 105 Md.App. 147 (1995). In that case, the court held that OAH is the agency that made the decision under review. The Subcommittee is proposing to add a Committee note at the end of section (b) to clarify this.
>
> The Subcommittee is also proposing additional language in subsection (d)(3) to answer a query from the Court of Appeals as to who the "parties of record" are.

Mr. Titus explained that the Office of Administrative Hearings (OAH) does not want to be considered as the agency making the decision for purposes of the Rule. The position of the OAH is that when the power to hear cases has been delegated to the OAH by other agencies, the OAH should not be considered as the agency making the decision for purposes of the petition. The Subcommittee disagrees, and recommends the opposite position.

The Chair said that this is a beneficial change.

Mr. Sykes inquired as to what the obligations of OAH are as the agency identified as making the decision. Mr. Titus answered that OAH assembles the record, files it with the court, and notifies the parties. Mr. Sykes questioned the meaning of the language in the Committee note which reads: "for purposes of the petition." Mr. Titus suggested that this language be removed. The Vice Chair expressed the opinion that it would be preferable to provide elsewhere in the Rule, instead of in a Committee note, that OAH is the agency making the final decision.

The Chair pointed out that Rule 7-201 (b) defines the term "administrative agency." He suggested that a second sentence be added to section (b) which would provide as follows: "In cases in which the Office of Administrative Hearings issues the final decision, it is the decision-making agency for purposes of the Rules in this Chapter." A cross reference to the case Beeman v. Department of Health and Mental Hygiene, 105 Md. App. 147 (1995) would be added after the new sentence. He also suggested that in place of the Committee note which was proposed for addition to Rule 7-202, a cross reference to Rule 7-201 (b) be added which would provide as follows: "See Rule 7-201(b) concerning cases in which the Office of Administrative Hearings issues the final decision." The Committee agreed by consensus to the Chair's suggestions to amend Rules 7-201 and 7-202.

Mr. Titus presented Rule 7-206, Record, for the Committee's consideration.

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 200 - JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY DECISIONS

AMEND Rule 7-206 (a) to add a sentence requiring an agency to submit a statement of the costs of transcripts, as follows:

Rule 7-206. RECORD

(a) Contents; Expense of Transcript

The record shall include the transcript of testimony and all exhibits and other papers filed in the agency proceeding, except those papers the parties agree or the court directs may be omitted by written stipulation or order included in the record. If the testimony has been recorded but not transcribed before the filing of the petition for judicial review, the first petitioner, if required by the agency and unless otherwise ordered by the court or provided by law, shall pay the expense of transcription, which shall be taxed as costs and apportioned as the court directs. If the agency has required a petitioner to pay the expenses of transcription, the agency shall prepare and transmit with the record a statement of the cost of all transcripts.

(b) Statement in Lieu of Record

If the parties agree that the questions presented by the action for judicial review can be determined without an examination of the entire record, they may sign and, upon approval by the agency, file a statement showing how the questions arose and were decided and setting forth only those facts or allegations that are essential to a decision of the questions. The parties are strongly encouraged to agree to such a statement. The statement, any exhibits to

it, the agency's order of which review is sought, and any opinion of the agency shall constitute the record in the action for judicial review.

(c) Time for Transmitting

Except as otherwise provided by this Rule, the agency shall transmit to the clerk of the circuit court the original or a certified copy of the record of its proceedings within 60 days after the agency receives the first petition for judicial review.

(d) Shortening or Extending the Time

Upon motion by the agency or any party, the court may shorten or extend the time for transmittal of the record. The court may extend the time for no more than an additional 60 days. The action shall be dismissed if the record has not been transmitted within the time prescribed unless the court finds that the inability to transmit the record was caused by the act or omission of the agency, a stenographer, or a person other than the moving party.

(e) Duty of Clerk

Upon the filing of the record, the clerk shall notify the parties of the date that the record was filed.

Committee note: Code, Article 2B, §175 (e)(3) provides that the decision of a local liquor board shall be affirmed, modified, or reversed by the court within 90 days after the record has been filed, unless the time is "extended by the court for good cause."

Source: This Rule is in part derived from former Rule B7 and in part new.

Rule 7-206 was accompanied by the following Reporter's Note.

Julia M. Andrew, Esq., Assistant Attorney General, wrote a letter pointing out that Rule 2-603 (b) was amended to provide

> that the circuit court clerk, when assessing costs in a case, shall include the costs specified by Rule 7-206 (a). She points out the clerk cannot always comply with this requirement because the cost of the transcription is not a matter of record in the circuit court file. The clerks need a statement of costs transmitted with the record to the circuit court. The Subcommittee is proposing new language to be added to Rule 7-206 (a) requiring the agency to prepare a statement of the costs of the transcript when the petitioner is required to pay the expenses of transcription.

Mr. Titus explained that Rule 7-206 requires the first petitioner to pay the costs for preparation of the transcript. The problem is that the clerk cannot assess the costs, because it is not clear what they are. The Subcommittee is suggesting that language be added to section (a) which provides that the agency shall prepare and transmit with the record a statement of the cost of all transcripts if the agency has required a person who files a petition for judicial review to pay the expenses of transcription.

Mr. Titus noted that there are large numbers of cases where the agency does not recover the costs. It is helpful if the agency prepares a statement of the costs of preparing the transcript because the clerk does not know what the costs are. Not all agencies charge for transcripts and not all transcripts are taxed as costs in an appeal. The Chair commented that if the agency expends money, once it prevails, it should get the money back. Mr. Titus said that if a party appeals and pays for the transcript, and if the decision is reversed, the other party is

taxed for the costs. Mr. Hochberg asked against whom is the assessment of costs, if the agency is a party. Mr. Titus replied that costs would be assessed against all losing parties. The Vice Chair inquired as to why the agency prepares the statement of costs. Mr. Titus answered that this is part of the agency record, and the agency is arranging for reimbursement.

The Committee approved the changes to Rule 7-206 as presented.

Mr. Titus presented Rule 8-122, Appeals from Proceedings for Adoption or Guardianship - Confidentiality, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 100 - GENERAL PROVISIONS

AMEND Rule 8-122 (b) to change the caption of an appeal from adoption or guardianship proceedings, as follows:

Rule 8-122. APPEALS FROM PROCEEDINGS FOR ADOPTION OR GUARDIANSHIP - CONFIDENTIALITY

(a) Scope

This Rule applies to an appeal from an order relating to a child in a proceeding for adoption or for guardianship with right to consent to adoption or long-term care short of adoption.

(b) Caption

The proceeding shall be styled "In re Adoption/ Guardianship ~~No. ..... in the Circuit Court for~~ of .....

.....(first name and initial of last name of adoptee or ward)".

(c) Confidentiality

The last name of the child, the natural parents of the child, and the adopting parents shall not be used in any opinion, oral argument, brief, record extract, petition, or other document pertaining to the appeal that is generally available to the public. The parties, with the approval of the appellate court, may waive the requirements of this section.

(d) Transmittal of Record

The record shall be transmitted to the appellate court in a manner that ensures the secrecy of its contents.

(e) Access to the Record

(1) Adoption Proceeding

Except by order of the Court and subject to reasonable conditions and restrictions imposed by the Court, the record in an appeal from an adoption proceeding shall be open to inspection only by the Court and authorized court personnel.

(2) Guardianship Proceeding

Except by order of the Court, the record in an appeal from a guardianship proceeding shall be open to inspection only by the Court, authorized court personnel, parties, and their attorneys.

Source: This Rule is new.

Rule 8-122 was accompanied by the following Reporter's Note.

Michael Braudes, Esq. of the Appellate Division of the Office of the Public Defender has requested that the caption in appeal from adoption or guardianship cases be changed by adding to the caption the first name and first initial of the surname of the eldest

child involved in the case. In response to this suggestion, Catherine M. Shultz, Esq., Assistant Attorney General in the Department of Human Resources, proposed another modification which would eliminate all reference to the case number in the lower court. Based on these two suggestions, the Appellate Subcommittee is proposing to amend Rule 8-122 (b) to make it similar to Rule 8-121 (b), except substituting the language "adoptee or ward" for the word "child", since some subjects of adoption or guardianship are adults.

Mr. Titus explained that a request had come from the Office of the Public Defender to change the caption in an appeal from an adoption or guardianship by adding to the caption the first name and first initial of the surname of the eldest child involved in the case. The Office of the Attorney General had responded to this by proposing that the reference to the case number also be deleted. The Committee approved by consensus the change to Rule 8-122.

Mr. Titus presented Rules 8-501, Record Extract, and 8-504, Contents of Brief, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 500 - RECORD EXTRACT, BRIEFS, AND ARGUMENT

AMEND Rule 8-501 to delete the second sentence of section (k), as follows:

Rule 8-501. RECORD EXTRACT

. . .

(k) Record Extract in Court of Appeals on Review of Case From Court of Special Appeals

When a writ of certiorari is issued to review a case pending in or decided by the Court of Special Appeals, unless the Court of Appeals orders otherwise, the appellant shall file in that Court 20 copies of any record extract that was filed in the Court of Special Appeals within the time the appellant's brief is due. ~~In those cases, any opinion of the Court of Special Appeals shall be included as an appendix to the appellant's brief in the Court of Appeals.~~ If a record extract was not filed in the Court of Special Appeals or if the Court of Appeals orders that a new record extract be filed, the appellant shall prepare and file a record extract pursuant to this Rule.

. . .

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

The Appellate Subcommittee is recommending the deletion of the second sentence of section (k) and its transfer to Rule 8-504. See the Reporter's Note to Rule 8-504.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 500 - RECORD EXTRACT, BRIEFS, AND ARGUMENT

AMEND Rule 8-504 by adding a new subsection (a)(9) and a cross reference, as follows:

Rule 8-504. CONTENTS OF BRIEF

(a) Contents

A brief shall contain the items listed in the following order:

(1) A table of contents and a table of citations of cases, constitutional provisions, statutes, ordinances, rules, and regulations, with cases alphabetically arranged. When a reported Maryland case is cited, the citation shall include a reference to the official Report.

(2) A brief statement of the case, indicating the nature of the case, the course of the proceedings, and the disposition in the lower court, except that the appellee's brief shall not contain a statement of the case unless the appellee disagrees with the statement in the appellant's brief.

(3) A statement of the questions presented, separately numbered, indicating the legal propositions involved and the questions of fact at issue expressed in the terms and circumstances of the case without unnecessary detail.

(4) A clear concise statement of the facts material to a determination of the questions presented, except that the appellee's brief shall contain a statement of only those additional facts necessary to correct or amplify the statement in the appellant's brief. Reference shall be made to the pages of the record extract supporting the assertions. If pursuant to these rules or by leave of court a record extract is not filed, reference shall be made to the pages of the record or to the transcript of testimony as contained in the record.

Cross reference: Rule 8-111 (b).

(5) Argument in support of the party's position.

(6) A short conclusion stating the

precise relief sought.

(7) The citation and verbatim text of all pertinent constitutional provisions, statutes, ordinances, rules, and regulations except that the appellee's brief shall contain only those not included in the appellant's brief.

(8) If the brief is prepared with proportionally spaced type, the font used and the type size in points shall be stated on the last page.
Cross reference: For requirements concerning the form of a brief, see Rule 8-112.

(9) Any opinion of the Court of Special Appeals shall be included as an appendix to the appellant's brief in the Court of Appeals.

Cross reference: Rule 8-501.

(b) In the Court of Special Appeals -- Extract of Instructions or Opinion in Criminal Cases

In criminal cases in the Court of Special Appeals, the appellant shall reproduce, as an appendix to the brief, the pertinent part of any jury instructions or opinion of the lower court that deals with points raised by the appellant on appeal. If the appellee believes that the part reproduced by the appellant is inadequate, the appellee shall reproduce, as an appendix to the appellee's brief, any additional part of the instructions or opinion believed necessary by the appellee.

(c) Effect of Noncompliance

For noncompliance with this Rule, the appellate court may dismiss the appeal or make any other appropriate order with respect to the case, including an order that an improperly prepared brief be reproduced at the expense of the attorney for the party for whom the brief was filed.

Source: This Rule is derived as follows:

Section (a) is derived from former Rules 831 c and d and 1031 c 1 through 5 and d 1 through 5, with the exception of subsection (a)(6) which is derived from FRAP 28 (a)(5).

Section (b) is derived from former Rule 1031 c 6 and d 6.

Section (c) is derived from former Rules 831 g and 1031 f.

Rule 8-504 was accompanied by the following Reporter's Note.

The Appellate Subcommittee is recommending the transfer of language in section (k) of Rule 8-501 to a new subsection (a)(9) of Rule 8-504 to emphasize that a Court of Special Appeals opinion is to be included as an appendix to the appellant's brief in the Court of Appeals.

Mr. Titus explained that the Subcommittee is recommending that for clarity, the statement that an opinion of the Court of Special Appeals shall be included as an appendix to the appellant's brief in the Court of Appeals should be moved from Rule 8-501 to Rule 8-504. There being no discussion, the Committee approved the changes to Rules 8-501 and 8-504 by consensus.

Mr. Titus presented Rule 8-502, Filing of Briefs, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 500 - RECORD EXTRACTS, BRIEFS, AND ARGUMENT

AMEND Rule 8-502 (c) to add language pertaining to the filing of record extracts, as follows:

Rule 8-502. FILING OF BRIEFS

(a) Duty to File; Time

Unless otherwise ordered by the appellate court:

(1) Appellant's Brief

Within 40 days after the filing of the record, an appellant other than a cross-appellant shall file a brief conforming to the requirements of Rule 8-503.

(2) Appellee's Brief

Within 30 days after the filing of the appellant's brief, the appellee shall file a brief conforming to the requirements of Rule 8-503.

(3) Appellant's Reply Brief

The appellant may file a reply brief within 20 days after the filing of the appellee's brief, but in any event not later than ten days before the date of scheduled argument.

(4) Cross-appellant's Brief

An appellee who is also a cross-appellant shall include in the brief filed pursuant to subsection (2) of this section the issues and arguments on the cross-appeal as well as the response to the brief of the appellant, and shall not file a separate cross-appellant's brief.

(5) Cross-appellee's Brief

Within 30 days after the filing of that brief, the appellant/cross-appellee shall file a brief in response to the issues and argument raised on the cross-appeal and shall include any reply to the appellee's

response that the appellant wishes to file.

(6) Cross-appellant's Reply Brief

The appellee/cross-appellant may file a reply to the cross-appellee's response within 20 days after the filing of the cross-appellee's brief, but in any event not later than ten days before the date of scheduled argument.

(7) Multiple Appellants or Appellees

In an appeal involving more than one appellant or appellee, including actions consolidated for purposes of the appeal, any number of appellants or appellees may join in a single brief.

(8) Court of Special Appeals Review of Discharge for Unconstitutionality of Law

No briefs need be filed in a review by the Court of Special Appeals under Code, Courts Article, §3-706.

(b) Extension of Time

The time for filing a brief may be extended by (1) stipulation of counsel filed with the clerk so long as the appellant's brief and the appellee's brief are filed at least 30 days, and any reply brief is filed at least ten days, before the scheduled argument, or (2) order of the appellate court entered on its own initiative or on motion filed pursuant to Rule 1-204.

(c) Filing and Service

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

(d) Default

> If an appellant fails to file a brief within the time prescribed by this Rule, the appeal may be dismissed pursuant to Rule 8-602 (a)(7). An appellee who fails to file a brief within the time prescribed by this Rule may not present argument except with permission of the Court.
>
> Source: This Rule is derived from former Rules 1030 and 830 with the exceptions of subsection (a)(8) which is derived from the last sentence of former Rule Z56 and of subsection (b)(2) which is in part derived from Rule 833 and in part new.

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

> The Appellate Subcommittee is recommending the addition of language to section (c) to clarify that the same number of copies of the record extract as the number of copies of each brief are to be filed in an appeal.

Mr. Titus told the Committee that the Subcommittee is recommending that the language "and record extract" be added to section (c) to make it clear that the number of copies of the record extract is the same as the number of copies of each brief. The Committee approved Rule 8-502 as presented.

Mr. Titus presented Rule 8-602, Dismissal of Appeal, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 600 - DISPOSITION

AMEND Rule 8-602 to allow one judge designated by the Chief Judge to rule on any motion to dismiss, to preclude the judge who dismissed an appeal from being one of the number of judges of the Court required by law to decide an appeal reconsidering the order to dismiss, and to extend the time for filing a motion to reconsider a dismissal, as follows:

Rule 8-602. DISMISSAL ~~BY COURT~~ OF APPEAL

(a) Grounds

On motion or on its own initiative, the Court may dismiss an appeal for any of the following reasons:

(1) the appeal is not allowed by these rules or other law;

(2) the appeal was not properly taken pursuant to Rule 8-201;

(3) the notice of appeal was not filed with the lower court within the time prescribed by Rule 8-202;

(4) an information report was not filed as required by Rule 8-205;

(5) the record was not transmitted within the time prescribed by Rule 8-412, unless the court finds that the failure to transmit the record was caused by the act or omission of a judge, a clerk of court, the court stenographer, or the appellee;

(6) the contents of the record do not comply with Rule 8-413;

(7) a brief or record extract was not filed by the appellant within the time prescribed by Rule 8-502;

(8) the style, contents, size, format, legibility, or method of reproduction of a brief, appendix, or record extract does not comply with Rules 8-112, 8-501, 8-503, or 8-504;

(9) the proper person was not substituted for the appellant pursuant to Rule 8-401; or

(10) the case has become moot.
Cross reference: Rule 8-501 (m).

(b) ~~Determination by Court~~ Ruling on Motions to Dismiss

~~Except as otherwise permitted in this section, a~~ A motion to dismiss under section (a) ~~shall~~ may be ruled on for the court by ~~the number of judges of the Court required by law to decide an appeal.~~ ~~T~~the Chief Judge, ~~or a~~ an individual judge of the Court designated by the Chief Judge ~~may rule on a motion to dismiss that is based on any reason set forth in subsections (2), (3), (5), (7), or (8) of section (a) of this Rule or on a motion to dismiss based on subsection (a)(4) of this Rule challenging the timeliness of the information report~~, or the number of judges of the Court required by law to decide an appeal. If an appeal was dismissed by the ruling of one judge, the order dismissing the appeal, on motion filed within 30 days after entry of the order, shall be reviewed by the number of judges of the Court required by law to decide an appeal, and the judge who dismissed the appeal shall not participate.

(c) Reconsideration of Dismissal

(1) ~~When Order Was Entered by Individual Judge~~ Rescission of Order

If an appeal was dismissed ~~by the ruling of an individual judge~~ pursuant to subsections (4), (5), (6), (7), (8), or (9) of section ~~(b)~~ (a) of this Rule, the order dismissing the appeal~~, on motion filed within~~

~~ten days after entry of the order, shall be reviewed by the number of judges of the Court required by law to decide an appeal. The order dismissing the appeal~~ (A) shall be rescinded if the Court or, in the case of a ruling by an individual judge, a majority of ~~those~~ the number of judges of the Court required by law to decide an appeal decides that the motion to dismiss should not have been granted, (B) may be rescinded if the appeal was dismissed pursuant to subsection (4), (5), or (7) of section (a) of this Rule, and the Court is satisfied that the failure to file a report, transmit the record, or file a brief or record extract within the time prescribed by these Rules was unavoidable because of sickness or other sufficient cause, ~~and~~ (C) may be rescinded if the appeal was dismissed pursuant to subsection (a)(8) of this Rule and the Court is satisfied that a brief, appendix, or record extract complying with the Rules will be filed within a time prescribed by the Court and (D) may be rescinded if the appeal was dismissed pursuant to subsection (a)(9) and the Court is satisfied that the proper person has been substituted for the appellant pursuant to Rule 8-401.

~~(2) When Order Was Entered by Court~~

~~If an appeal has been dismissed by the ruling of the Court or a panel pursuant to subsection (4), (6), (8), or (9) of section (a) of this Rule, the order dismissing the appeal, on motion filed within ten days after entry of the order, may be rescinded if the Court is satisfied that a report, record, brief, appendix, or record extract complying with the Rules will be filed or the proper party will be substituted within a time to be prescribed by the Court.~~

~~(3)~~ (2) Reinstatement on Docket

If the order of dismissal is rescinded, the case shall be reinstated on the docket on the terms prescribed by the Court.

~~(4)~~ (3) No Further Reconsideration by

the Court

When an order dismissing an appeal is reviewed by the Court on motion filed pursuant to this section, the moving party may not obtain further reconsideration of the dismissal pursuant to Rule 8-605.

(d) Judgment Entered After Notice Filed

A notice of appeal filed after the announcement or signing by the trial court or a ruling, decision, order, or judgment but before entry of the ruling, decision, order, or judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.

(e) Entry of Judgment Not Directed Under Rule 2-602

(1) If the appellate court determines that the order from which the appeal is taken was not a final judgment when the notice of appeal was filed by that the lower court has discretion to direct the entry of a final judgment pursuant to Rule 2-602 (b), the appellate court may, as it finds appropriate, (A) dismiss the appeal, (B) remand the case for the lower court to decide whether to direct the entry of a final judgment, (C) enter a final judgment on its own initiative or (D) if a final judgment was entered by the lower court after the notice of appeal as filed, treat the notice of appeal as if filed on the same day as, but after, the entry of the judgment.

(2) If, upon remand, the lower court decides not to direct entry of a final judgment pursuant to Rule 2-602 (b), the lower court shall promptly notify the appellate court of its decision and the appellate court shall dismiss the appeal. If, upon remand, the lower court determines that there is not just reason for delay and directs the entry of a final judgment pursuant to Rule 2-602 (b), the case shall be returned to the appellate court after entry of the judgment. The appellate court shall treat the notice of appeal as if filed on the

date of entry of the judgment.

(3) If the appellate court enters a final judgment on its own initiative, it shall treat the notice of appeal as if filed on the date of the entry of the judgment and proceed with the appeal.

Cross reference: Rule 8-206.

Source: This Rule is in part derived from former Rules 1035 and 835 and in part new.

Rule 8-602 was accompanied by the following Reporter's Note.

The amendments to Rule 8-602 are proposed at the request of the Chief Judge of the Court of Special Appeals. They allow one judge designated by the Chief Judge to rule on any motion to dismiss. That judge would be precluded from being one of the number of judges required by law to decide an appeal reconsidering the order to dismiss.

One of the proposed amendments also extends to 30 days the time for filing a motion to reconsider the dismissal of an appeal under this Rule.

At the suggestion of the Style Subcommittee, the Appellate Subcommittee is proposing that subsections (c)(1) and (c)(2) be collapsed into one provision because of the deletion of the references to certain of the grounds for dismissal in section (a), which eliminated the distinction between subsections (c)(1) and (c)(2).

Mr. Titus explained that Rule 8-602 had been sent back from the Style Subcommittee to the Appellate Subcommittee for another look. The Chair had initially requested that the Rule be amended to allow an individual judge of the Court of Special Appeals designated by the Chief Judge to rule on motions to dismiss. The

Style Subcommittee was of the opinion that the Rule could be shortened. A motion to dismiss under (a) can be ruled upon by the Chief Judge, an individual judge designated by the Chief Judge, or the number of judges of the Court required by law to decide an appeal. Mr. Sykes questioned as to what this number is. Mr. Titus responded that the number is three in the Court of Special Appeals, and five in the Court of Appeals. If the appeal is dismissed by one judge, the order shall be reviewed by the number of judges of the Court required by law to decide an appeal, but the judge who initially dismissed the appeal is not to participate in the review. The Rule has more effect in the Court of Special Appeals.

The Vice Chair commented that if one judge dismisses the appeal, whoever lost has 30 days to have three judges review the dismissal. Mr. Titus remarked that the number of judges required to act may be a constitutional issue. The order becomes an order on behalf of the entire court. How it is treated depends on the grounds set forth in the motion. The grounds set forth in subsections (a)(4) through (a)(9) are technical, and the order may be rescinded if certain conditions are met. The Vice Chair inquired about subsection (a)(10). Mr. Titus answered that this is governed by an earlier part of section (b). The Chair added that the grounds in subsections (a)(1), (2), (3), and (10) cannot be cured. Mr. Titus said that the proposed Rule is clearer than the current one as to special reconsideration for technicalities.

The Chair pointed out that if a brief has been misfiled, the

appeal may be reinstated. If there is a good reason for a brief being tardy, the dismissal of the appeal may be rescinded. The Rule works well. The Vice Chair questioned as to why section (c) is necessary. The Chair responded that under section (c), when there is no choice by the Court, the word "shall" is used; when the Court has a choice, the word "may" is used. Mr. Titus noted that section (b) has new language providing for automatic review by three or five judges. Mr. Hochberg inquired as to why it takes five judges to review the dismissal. Mr. Titus replied that this is a Constitutional requirement for the Court of Appeals.

The Vice Chair expressed the view that subsection (c)(1)(B) should use the word "shall." The Chair agreed that if the court is satisfied that a party's failure to comply was unavoidable because of sufficient cause, subsection (c)(1)(B) should use the word "shall." The Committee agreed by consensus to this change.

The Vice Chair questioned whether subsection (c)(1)(C) also should be changed to "shall." The Chair expressed his preference that this subsection should not be mandatory. Mr. Sykes said that in subsection (c)(1)(C) the court can prescribe the time, which affords some flexibility. The Chair pointed out that, read another way, the Court can set a time in which the person can attempt to get the brief, appendix, or record extract in. The Vice Chair said that this must mean that the judges will not refuse to rescind the order dismissing the appeal if everything is properly completed.

The Vice Chair told the Committee that her problem was the structure of the Rule. If the decision to rescind the order dismissing the appeal is within the court's discretion, the Rule should say that. Mr. Sykes remarked that this is similar to a sanction which shall be imposed if the court finds bad faith. The Vice Chair suggested that subsection (c)(1)(C) should read as follows: "may be rescinded if the appeal was dismissed pursuant to subsection (a)(8) or (a)(9) of this Rule" and the remainder of the Rule should be stricken. The Committee agreed by consensus to this change. The Committee approved the Rule as amended.

Mr. Titus presented Rule 8-605.1. Reporting of Opinions of the Court of Special Appeals, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 600 - DISPOSITION

ADD new Rule 8-605.1, as follows:

Rule 8-605.1. REPORTING OF OPINIONS OF THE COURT OF SPECIAL APPEALS

(a) Publication of Opinions

The Court of Special Appeals shall designate for publication only those opinions that have substantial general interest as precedent.

(b) Request for Publication of Unreported Opinion

At any time prior to the issuance of the mandate, the Court of Special Appeals, on its own motion or at the request of a party or nonparty filed prior to the date on which the mandate is due to be issued, may designate for publication an opinion that was previously designated as unreported at the time that it was filed. Once the mandate has issued, an unreported opinion may not be designated for publication.

Cross reference: Rule 8-606 (f).

Source: This Rule is derived as follows:
Section (a) is derived from Rule 8-113 (a).
Section (b) is new.

Rule 8-605.1 was accompanied by the following Reporter's Note.

At the suggestion of the Rules Committee, the Appellate Subcommittee proposes adding a new rule which provides that an unreported opinion may be converted

> to a reported one before the mandate has issued. This avoids the unfair situation of an opinion being converted from unreported to reported when it is too late for the other party to file a petition for a writ of certiorari.

Mr. Titus explained that the Subcommittee is proposing a new Rule to cover the conversion of unreported opinions to reported ones. The Subcommittee is recommending that a sentence from Rule 8-113 (a) be moved to the new Rule as section (a). Section (b) pertains to the situation where the Court of Special Appeals issues an unreported opinion which later is changed to a reported opinion. Currently no rule governs this conversion. Mr. Titus said that he had received a letter from an attorney who learned that the unreported opinion of a case he lost was being converted to a reported opinion after it was too late for the attorney to petition for certiorari. If the attorney's client had known that the opinion would be reported and therefore become precedent as to the client's other pending cases, the client would have petitioned for a writ of certiorari in the case.

The idea of the proposed new Rule is that before the mandate issues, the Court must decide whether to report the opinion. Section (b) allows the Court on its own motion or at the request of a party or non-party to designate an unpublished case for publication. Leslie Gradet, Esq., Clerk of the Court of Special Appeals, requested that the Rule not include language requiring a stay of the mandate if the request to publish is made at the eleventh hour, such as on the 29th day. This would avoid

offering a delay tactic.

The Chair said that another way to handle this is to use the language in Rule 8-113 (a), which allows the Court of Special Appeals to designate for publication opinions that have substantial general interest, but to also add a provision that the Court can publish cases important to a small group of interested people. Mr. Titus expressed the view that Rule 8-113 (a) is working well and should not be changed. The Vice Chair suggested that the word "general" should be deleted from section (a) of Rule 8-605.1. Mr. Bowen pointed out that the word "have" is incorrect and should be changed to "are of." The Vice Chair suggested that the end of section (a) read as follows: "are of substantial precedential value." The Reporter suggested that the word "value" be changed to "interest," so the language of section (a) would read as follows: "The Court of Special Appeals shall designate for publication only those opinions that are of substantial interest as precedents." The Committee agreed by consensus to this change.

The Vice Chair suggested that in place of the language in section (b) which reads: "on its own motion", the language "on its own initiative" should be substituted. The Committee agreed by consensus to this change.

The Chair said that in the past when the Court of Special Appeals has decided to publish a previously unpublished opinion, it has recalled the mandate and issued a new one. Mr. Titus pointed out that the last sentence of section (b) would prevent

this. The Reporter commented that pursuant to Rule 8-302 (a), a petition for certiorari may be filed not later than 15 days after the Court of Special Appeals issues its mandate. The Chair questioned whether the time for filing a petition for certiorari should be linked to the date of the mandate or the date of a decision to publish. Mr. Titus answered that a decision to publish should not be made after the issuance of the mandate. The Chair observed that if the Rule provided that publication upon request could occur after the mandate, this could interfere with the time frame for filing a petition for a writ of certiorari. A person who objects to the decision to publish may not have enough time to file a petition for certiorari. The Rule could allow a person to file for certiorari 15 days after the date of a decision to publish. Mr. Titus commented that in the 30 day period between the date of an unpublished opinion and the date of the mandate, there is uncertainty for the litigants. Someone could request publication on the 29th day after the opinion and initial decision not to publish, and this could potentially change the character of the case. If the Court grants a request filed on the 29th day and the losing party has a problem with this, the problem can be cured by allowing the filing of a petition for a writ of certiorari within 15 days after the case is published.

Mr. Sykes pointed out that it may take a long time to publish a case designated for publication. Mr. Titus said it is appropriate to extend the time for a mandate, but once the

mandate is issued, that is the end of the case. The Chair stated that if the letter requesting publication comes on the 29th day, the Clerk has to hold the case. Mr. Titus noted that there is a potential for abuse. The Vice Chair suggested that there could be a shorter time frame. Mr. Titus told the Committee that Ms. Gradet had reassured the Subcommittee that if a request for publication is received on the 29th day, the mandate would not be issued until action has been taken on the request.

Mr. Titus presented Rule 8-606, Mandate, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 600 - DISPOSITION

AMEND Rule 8-606 to add a new section (f) providing for revisory power of an appellate court over a mandate, as follows:

Rule 8-606. MANDATE

(a) To Evidence Order of the Court

Any disposition of an appeal, including a voluntary dismissal, shall be evidenced by the mandate of the Court, which shall be certified by the Clerk under the seal of the Court and shall constitute the judgment of the Court.

(b) Issuance of Mandate

Upon a voluntary dismissal, the Clerk shall issue the mandate immediately. In all other cases, unless a motion for

reconsideration has been filed or the Court orders otherwise, the Clerk shall issue the mandate upon the expiration of 30 days after the filing of the Court's opinion or entry of the Court's order.

(c) To Contain Statement of Costs

The mandate shall contain a statement of the order of the Court assessing costs and the amount of the costs taxable to each party.

(d) Transmission - Mandate and Record

Upon issuance of the mandate, the Clerk shall transmit it to the appropriate lower court. Unless the appellate court orders otherwise, the original papers comprising the record shall be transmitted with the mandate.

(e) Effect of Mandate

Upon receipt of the mandate, the clerk of the lower court shall enter it promptly on the docket and the lower court shall proceed in accordance with its terms. Except as otherwise provided in Rule 8-611 (b), the assessment of costs in the mandate shall not be recorded and indexed as provided by Rule 2-601 (c).

(f) Revisory Power

The court on its own motion or on motion of any party filed at any time may exercise revisory power and control over a mandate in case of fraud, mistake, or irregularity.

Cross reference: Code, Courts Article, §6-408.

Source: This Rule is derived from former Rules 1076, 1077, 876, and 877.

Rule 8-606 was accompanied by the following Reporter's Note.

In conjunction with the addition of

> proposed Rule 8-605.1, the Appellate Subcommittee is suggesting that a new section (f) be added to Rule 8-606 to clarify that the court has revisory power over the mandate in cases of fraud, mistake, or irregularity.

Mr. Titus explained that the language added to section (f) tracks the language of Rule 2-535. The Chair pointed out that Rule 2-535 provides that within 30 days after entry of judgment, the court on its own motion or on the motion of any party may exercise revisory power and control over the judgment. He asked if Rule 8-606 should have the same 30-day period after the mandate. It would be proper for an extra 30-day period for the court to consider the request for publication. Mr. Titus commented that Rule 8-302 would have to have a parallel extension of time to seek a writ of certiorari. The last sentence of Rule 8-605 would have to be changed to be parallel.

The Vice Chair remarked that she prefers the Rule the way it is written. Recalling a mandate is unusual and would most likely be based on mistake. Mr. Titus observed that a petition for a writ of certiorari would be filed not later than 15 days after the last to occur of the issuance of the mandate or an order for publication. The Chair noted that there can be problems with the costs because of the language of the mandate. Mr. Titus noted that this would be for mistake. Ms. Ogletree added that it would be for fraud, mistake, or irregularity. There have been opinions interpreting Rule 2-535 which hold that mistake includes errors by clerks' office employees.

The Chair suggested that section (f) should be parallel to section (a) of Rule 2-535 by beginning with the following language: "on motion of any party filed within 30 days of the mandate." Ms. Ogletree pointed out that Rule 8-302 provides that a petition for writ of certiorari may be filed either before or after the Court of Special Appeals has rendered a decision, but not later than 15 days after the Court has issued its mandate. The addition of the 30-day period would add up to a 45-day period. Mr. Sykes suggested that the Committee needs to discuss this when more members are present. The time for filing a petition for writ of certiorari should not be lengthened. The Reporter stated that Rules 8-605.1, 8-606, and 8-113 will be on the agenda for the May or June meeting.

Mr. Titus announced that the legislature passed the resident agent bill for local governments. The Committee will have to

consider a rule change to be consistent with the new statute.

The Chair adjourned the meeting.