COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100A, People's Resource Center, Crownsville, Maryland on May 22, 1998.

Members present:

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

Lowell R. Bowen, Esq.
Bayard Z. Hochberg, Esq.
H. Thomas Howell, Esq.
Hon. G. R. Hovey Johnson
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Timothy F. Maloney, Esq.
Anne C. Ogletree, Esq.
Larry W. Shipley, Clerk
Sen. Norman R. Stone, Jr.
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
Evan Thalenberg, Esq.
James E. Carbine, Esq.
Melvin Hirshman, Esq., Bar Counsel
Joseph Espo, Esq.
Keith Milligan
Anne Blumenberg, Esq.

The Chair convened the meeting. He introduced Timothy Maloney, Esq., the newest member of the Rules Committee. The Chair asked if there were any additions or corrections to the minutes of the April 24, 1998 Rules Committee meeting. There being none, Judge Kaplan moved to accept the minutes as presented, the motion was seconded, and it carried unanimously.

Agenda Item 4. Consideration of proposed rules changes to allow inspection of the property of a nonparty: New Rule 2-422.1 (Inspection of Property -- Nonparty) and Amendment to Rule 2-422 (Discovery of Documents and Property)

The Chair explained that Agenda Item 4 would be considered first, and he noted that Evan Thalenberg, Esq., was present to discuss this agenda item. The Vice Chair presented Rules 2-422.1 (Inspection of Property -- Nonparty) and 2-422 (Discovery of Documents and Property) for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 400 - DISCOVERY

ADD new Rule 2-422.1, as follows:

Rule 2-422.1. INSPECTION OF PROPERTY -- NONPARTY

(a) Definition

For purposes of this Rule, the term "nonparty" includes any person in possession or control of land or other property and, if different, the record owner of the land or other property.

(b) Motion

A party may move for an order to permit entry upon designated land or other property in the possession or control of a nonparty for the purpose of inspection, measuring, surveying, photographing, testing, or sampling the

property or any designated object or operation on the property. The motion shall (1) describe with reasonable particularity the land or other property to be inspected and any related acts to be performed, (2) specify a reasonable time and manner of making the inspection and performing the related acts, and (3) notify a nonparty that the nonparty has the right to object to the inspection and related acts by filing a response, that any response shall be filed within 15 days after the nonparty is served with the motion, and that a nonparty who desires a hearing on the motion shall request it in the response under the heading "Request for Hearing."

(c) Service

The motion shall be served upon each nonparty in the manner provided by Chapter 100 of this Title for service of summons.

Cross reference: For service of the motion upon parties, see Rule 1-321.

(d) Response

A nonparty against whom a motion is directed shall file a response within 15 days after being served with the motion. If the nonparty desires a hearing, the nonparty shall so request in the response under the heading, "Request for Hearing." If the nonparty fails to file a response required by this section, the court may proceed to rule on the motion.

(e) Hearing

If the nonparty requests a hearing, the court shall hold a hearing on the motion. Otherwise, the court shall determine in each case whether a hearing will be held.

(f) Order

The court may enter an order granting the motion only upon good cause shown. An order granting the motion shall specify the

time, place, and manner of inspection and the related acts that may be performed. The order also may include reasonable provisions to protect the interests of the nonparty, including provisions relating to the privacy of the nonparty and the filing of a bond.

Source: This Rule is new.

Rule 2-422.1 was accompanied by the following Reporter's Note.

Proposed new Rule 2-422.1 establishes a procedure for inspection of the property of a nonparty. The Discovery Subcommittee recommends this change in light of Webb v. Joyce Real Estate, 108 Md.App. 512 (1996), cert. denied, 242 Md. 582 (1996) and amendments to Fed.R.Civ.P. 34 that allow inspection of a nonparty's property.

Under proposed new Rule 2-422.1, inspection may be allowed upon motion of a party, for good cause shown. The Rule is derived in part from portions of Rules 2-311 and 2-422, with the inclusion of additional provisions for the protection of the nonparty.

Section (a) defines "nonparty" to include both the record owner of the land or other property and any person in possession or control of the land or property.

The contents of the motion are set out in section (b). Subsections (b)(1) and (b)(2) are derived from the requirements set out in Rule 2-422 (a) and (b). Subsection (b)(3) requires the moving party to notify the nonparty of the nonparty's right to object and how to do so.

Section (c) requires service upon each nonparty in the manner provided by Title 2, Chapter 100.

Sections (d) and (e) are based upon similar provisions in Rule 2-311 (b), (e), and

(f), except that a hearing is mandatory if the nonparty requests one.

Under section (f) of the proposed new Rule, an order allowing the inspection may be entered only upon good cause shown. The second sentence of section (f) requires that an order contain specific information concerning the time, place, and manner of inspection and any related acts that may be performed. The third sentence allows the court to include in the order reasonable provisions for the protection of the privacy and other interests of the nonparty, which may include requiring the party seeking inspection to file a bond.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-422 to change the name of the Rule, as follows:

Rule 2-422. DISCOVERY OF DOCUMENTS AND PROPERTY -- PARTIES

. . .

Rule 2-422 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 2-422 changes the title of the Rule to distinguish it from proposed new Rule 2-422.1, Inspection of Property -- Nonparty.

The Vice Chair explained that the Rule is new and is proposed to allow the inspection of property of nonparties. This arose out of

the lead paint litigation. In the case of Webb v. Joyce Real Estate, 108 Md. App. 512 (1996), cert. denied, 242 Md. 582 (1996), the Court of Special Appeals had held that there is no authority in the Rules of Procedure to allow an inspection of the property of a third person who is not a party to a case. In lead paint cases, this means that the plaintiff or the plaintiff's experts have no way to gain access to a non-party's property which allegedly contains lead paint.

The Vice Chair pointed out that the proposed Rule allows for an inspection by motion only. Section (a) provides a definition of a nonparty which takes into account the landlord-tenant situation, so that both get notice. Section (b) provides for court approval of the inspection, and it notifies the nonparty of his or her rights after a motion to inspect a property is filed. Section (d) tracks the language of Rule 2-311, Motions. Section (e) provides that if a nonparty requests a hearing, the court must hold one. Section (f) states that good cause must be shown for the court to enter an order granting the motion. The order must state the specific details of the inspection and provide for protection of the nonparty. The Subcommittee had discussed a different method which did not provide for a motion in every case. Most members felt that court approval of the inspection was important.

Mr. Sykes commented that section (f) provides for the filing of a bond, but it does not say why a bond is to be filed or what is to be protected against. He suggested that language be added which

indicates that the bond protects against damage to the nonparty's property. The Vice Chair responded that the suggested language is narrower than stating that the bond protects against liability. Mr. Bowen said that a written undertaking should be filed with the motion. The Rule provides no obligation on the part of the party entering the nonparty's property, and if there were any problems, the nonparty would have to file a separate action. The Chair suggested that written undertaking portion of the Rule could track the language of Rule 2-504.3, Computer-Generated Evidence. The Vice Chair asked Mr. Bowen if a separate action has to be filed on the bond. Mr. Bowen replied that a separate action to establish damage would have to be filed if there is no undertaking. There has to be an affirmative duty on the part of the person filing the bond to make it good.

Mr. Thalenberg told the Committee that he represents hundreds of children with lead paint poisoning. He expressed the view that the proposed Rule is a good idea, because currently, a large number of cases are precluded from proceeding due to an inability to inspect the property alleged to contain lead paint on it. He did express the concern that the way the Rule is
drafted puts some burden on Judge Thomas Noel, who hears the lead paint cases in the Baltimore City Circuit Court and would have to hear 100% of the requests for inspection of the property of a party. Mr. Thalenberg questioned whether some of the changes made could be

less burdensome in terms of the mechanics of the Rule. The bond could be simple with minimal court intervention. The Rule is necessary from a litigation as well as a public health standpoint.

Mr. Bowen pointed out that the Rule is broader than just pertaining to lead paint cases, and the nonparty deserves more protection. The Chair commented that Joseph Espo, Esq. was present. Mr. Espo remarked that there needs to be a mechanism to be able to enter upon the land of a nonparty. This is a recurring problem. He expressed his agreement with Mr. Thalenberg that the Rule should be as minimally burdensome as possible. Allowing someone onto property for non-invasive, non-destructive testing is less burdensome than requiring a nonparty to produce business documents.

Mr. Hochberg suggested that in subsection (b)(3) after the first three words which are "notify a party", the words "in writing" be added. He said that he read this subsection to mean that the nonparty had already received notice. Mr. Sykes observed that there would be no reason to give prior notice. Mr. Hochberg questioned whether additional language should be added to section (f) which indicates that the court has leeway to add provisions as justice may require. The Vice Chair responded that section (f) is not intended to preclude the court from taking any action that is necessary. Mr. Hochberg remarked that his concern is that arguments would arise as to the court having no authority under the new rule. The Vice Chair suggested that the last sentence of section (f) could end with the

following language: "and any other provisions the court deems appropriate." Mr. Sykes noted that the Rule already has similar language regarding nonparties. Mr. Hochberg observed that this should apply to parties, as well.

The Chair referred to Mr. Bowen's suggestion about adding in language pertaining to an undertaking by the moving party. The Vice Chair asked for clarification about this. She expressed the view that if the nonparty later alleges damage due to the inspection, the nonparty still has to file an action against the bond, whether or not there has been a written undertaking. Mr. Bowen explained that if an undertaking is filed with the motion, the person filing is admitting financial responsibility, and a bond may not be necessary. If the court requires a bond without an undertaking, the nonparty property owner may have a problem, because there is no underlying obligation upon which the bond is based.

Mr. Sykes commented that in lead paint cases, the plaintiffs may not be financially responsible. A bond is a substantial expense, and a promise by the plaintiff may not be worth much. Mr. Bowen noted that the Rule is broader than just lead paint cases. The Chair commented that there may be a need for a comparable rule in the District Court. Mr. Hochberg inquired where the conditions of the bond appear. Mr. Bowen said that the undertaking of the individual is backed by the promise of the surety. The problem is that a bond is not filed in every case, but the obligation to make good should be

in every case. Judge Kaplan remarked that he would not like to see a requirement of a bond in every case. In many cases, a bond is not justified.

Judge Vaughan pointed out that the nonparty may be forced to hire an attorney to protect his or her interests. The Chair responded that this is not that different from the situation where a nonparty is served with a subpoena and does not want to comply. Judge Vaughan noted that it is more of an intrusion when the situation involves someone's home.

Mr. Titus expressed the concern that this Rule could cause mischief in other areas of the law, such as a domestic case where the wife seeks permission to inspect the house of her husband's alleged girl friend. The Chair agreed that it could apply in such a case. Mr. Titus pointed out that the nonparty has to reply more quickly to the motion than if the person were served with a complaint in a lawsuit. He asked whether the time to reply in section (d) could be changed from 15 to 30 days. The Vice Chair said that 15 days is motions practice. Mr. Titus moved to change the time period in section (d) from 15 to 30 days, the motion was seconded, and it carried unanimously.

The Vice Chair referred to the issue of adding language pertaining to an undertaking. She suggested that the language could be: "The motion shall be accompanied by a written undertaking of a party to assume the liability for damage and related acts."

Mr. Karceski commented that the parties may make a good faith effort to contact the nonparty before filing a motion, and he suggested that language to encourage this could be added into the Rule. Judge Kaplan pointed out that nothing stops the parties from contacting the nonparty. Mr. Karceski said that he reads the Rule to mean that the parties have to file this motion to be able to inspect the property. Mr. Sykes suggested that language could be added to section (b) providing that it applies where a request for entry upon designated land has been denied. The Vice Chair noted that this would force a request by the parties. Mr. Bowen added that no other rule requires a motion after a request has been denied. Mr. Karceski stated that the nonparty is an innocent third party and needs protection. He moved to make Mr. Sykes' suggested language part of the allegations of the motion listed in section (b). The motion was seconded. The Vice Chair asked if the Rule needs to include how the request was denied and how long the party must wait after the request was made before he or she files the motion. The Chair suggested that the language of Rule 2-431, Certificate requirement, which reads: "...the attorney seeking action by the court has filed a certificate describing the good faith attempts to...." could be adapted to Rule 2-422.1 by requiring a description of good faith attempts to discuss with the nonparty the circumstances under which the inspection would take place. Mr. Espo commented that as a practical matter, lead paint inspectors are routinely sent out to houses, and the occupants

may or may not allow the inspection. The Reporter remarked that this is more advantageous to the moving party because it does not require that the other side be notified.

The Vice Chair said that as long as requests for inspections happen anyway, there is no harm building into the Rule a requirement to try to make the inspection before a motion is filed. Mr. Thalenberg noted that this is one more layer of qualitative assessment -- how much effort must the party make to inspect the property before a motion is filed? The Chair expressed the view that the Rule does not impose any hardship if it requires a description of good faith efforts to inspect the property before the motion is filed. Judge Kaplan remarked that this is another burden to the litigants and to the court. The court has to go through another hearing to determine whether there have been good faith efforts. The Chair commented that if Judge Noel gets a stack of inspection motions, it might help him to know of the good faith efforts expended to inspect before the motion was filed. Mr. Titus pointed out that one of the problems caused by adding in a requirement of attempting the inspection before the court is involved would be that the nonparty may be forced to hire an attorney. It could also cause problems in non-lead-paint cases. Mr. Sykes noted that one of the dangers with the way the Rule is drafted now is that in a non-lead-paint case, the plaintiff attorney may think that it is necessary to file a motion, and it may not be obvious that there are

other ways to approach this.

Mr. Thalenberg pointed out that the suggested change to section (b) is more onerous than what Rule 2-431 requires. Mr. Sykes explained that the motion would describe any reasonable efforts made to inspect the property, and if the efforts were not reasonable, the judge could deny the motion to inspect.

The Chair called for a vote on Mr. Karceski's motion to add to section (b) a requirement that the motion describe the previous good faith efforts made to inspect the property. The motion carried with one opposed. The Chair said that the Style Subcommittee will make the change using the suggested language and making it similar to Rule 2-431.

Mr. Howell commented that it may be prudent to have a separate requirement as to the reason for the inspection. The nonparty who receives the motion may not know what is going on. There is no requirement that the moving party has to state the reasons for the inspection. The Vice Chair cautioned that the wording is important, because counsel should not have to divulge his or her strategy. Mr. Bowen suggested that the following language could be added to subsection (b)(1): "the purpose of the inspection."

Mr. Titus said that the nonparty probably knows nothing about the case. No copy of the original complaint was served upon the nonparty. Mr. Karceski pointed out that the inspector who asks to see the property may give the nonparty evasive answers about the

purpose of the inspection. Mr. Titus moved that the motion should include a description of the nature of the controversy and the relationship of the desired inspection to the controversy. The motion was seconded. Mr. Bowen noted that Mr. Titus' motion may cause the moving party to have to tell all about the proceeding, while Mr. Bowen's suggestion, which was to include in the motion the purpose of the inspection, would not be so comprehensive. Mr. Titus remarked that this is not an insignificant difference because simply including the purpose of the inspection may not provide sufficient notice to the nonparty. Mr. Bowen hypothesized a situation where a stream has been polluted. A sues B, and both parties wish to inspect the property of C. Mr. Thalenberg expressed the view that the motion is turning into a brief, and he disagreed with this approach. The Chair commented that previously there has been no rule at all. Judge Kaplan suggested that the Rule could be simplified by being limited to lead paint cases. Including a statement of the reason for the inspection is a good idea. The discovery rules are impractical in lead paint cases. The Reporter commented that one impetus for the Rule was that the federal rule was changed, and that rule applies generally. Mr. Howell reiterated his original suggestion that the Rule should have a statement of the reason or the purpose for the inspection, even if the Rule is limited to lead paint cases. The Chair said that the Rule applies to more than lead paint cases.

The Chair called for a vote on Mr. Titus' motion to include in

the Rule a requirement that the motion state the nature of the controversy and the relationship of the desired inspection to the controversy. The motion passed with two opposed.

The Reporter inquired if the language about the undertaking is to be included. The Committee agreed by consensus to include the language. The Chair asked about having the Rule apply in the District Court. The Vice Chair suggested that the District Court Subcommittee look into this.

The Vice Chair suggested that there be a cross reference to Rule 2-311 following section (d). Mr. Howell cautioned that section (d) should not be construed that parties cannot file responses pursuant to Rule 2-311. The Reporter said that a Committee note could make this clear. The Committee agreed by consensus to add the Committee note. The Reporter asked if parties have 15 days to respond. Mr. Titus replied that in the affirmative.

The Vice Chair moved that the third sentence of section (f) read as follows: "The order may also include any other provision that the court deems appropriate, including provisions relating to the privacy of the nonparty and the filing of a bond." The motion was seconded, and it passed unanimously. The Reporter asked if a reference to "parties" will be included in the third sentence of section (f). The Chair said that parties should be included. The Committee agreed by consensus to this change.

Mr. Karceski moved to approve the Rule as amended at the

meeting. The motion was seconded, and it carried unanimously.

Agenda Item 1. Consideration of policy issues raised by the Style Subcommittee concerning proposed new Rules 16-709 (Confidentiality and Disclosure of Information) and 16-731 (Petition for Disciplinary Action) (See Appendix 1).

Mr. Bowen presented Rules 16-709 (a) and 16-731 (a) for the Committee's consideration. (See Appendix 1). Mr. Bowen explained that when the Style Subcommittee was reviewing Rule 16-709 (a), the question arose as to when does the petition for disciplinary action become public -- when it is filed or when it is served? The Style Subcommittee recommends that the petition become public when filed. Mr. Hirshman pointed out that under the current Rules, the petition becomes public as soon as it is filed in the Court of Appeals. The issue of what becomes public has been raised previously. It is the portions of the file dealing with the Panel hearings and the transcripts. The Chair said that the proposed Rule takes care of this issue. By changing the trigger to filing instead of service, the Rule will be consistent with current practice. The filing of a petition creates an action for everyone to see. There is no need to hide the petition until service has been effected.

Mr. Howell noted that one problem is establishing a bright line between confidentiality and public proceedings. The Subcommittee and the Rules Committee had taken the position that it was unfair to have filing as the bright line, because the attorney has not yet been served and may not be served for some time. To address this problem,

the Style Subcommittee proposes a return to the practice of the present rule and an amendment to proposed Rule 16-731 to provide that Bar Counsel notifies the attorney before the petition is filed, which serves as a manner of alerting the attorney. Mr. Hirshman commented that currently his office sends out a letter informing an attorney that public charges will be filed as of a date named in the notice.

Mr. Titus moved to approve the amendments to proposed new Rules 16-709 and 16-731. The motion was seconded, and it passed unanimously.

Agenda Item 2. Consideration of proposed new Rule 8-115 (Citation Format)

The Chair presented Rule 8-115, Citation Format, 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

ADD new Rule 8-115, as follows:

Rule 8-115. CITATION FORMAT

(a) Sequential Numbering

As a part of the official text of each reported opinion, the Court of Appeals and Court of Special Appeals shall provide a unique sequential decision number which contains the

following three elements, each element separated by a space:

(1) The first element of the decision number shall be the calendar year in which the case was decided.

(2) The second element of the decision number shall be the abbreviated identification of the court rendering the decision. The Court of Appeals shall be identified by the abbreviation, "MD." The Court of Special Appeals shall be identified by the abbreviation, "MD App."

(3) The third element of the decision number shall be the sequential number of the decision within each calendar year cycle.

(b) Paragraph Numbering

The Court of Appeals and Court of Special Appeals shall provide paragraph numbers as a part of the official text of each reported opinion. The paragraph numbers may provide the internal marker for pinpoint citations to specific portions of the text of the opinion.

(c) Approved Citation Format

Any reported opinion of a case decided by the Court of Appeals or the Court of Special Appeals after January 1, 1999, may be cited by use of the format authorized by this Rule, so long as it is accompanied by a parallel citation to a commonly used printed case report. If the internal paragraph marker is used in the primary citation, parallel pinpoint citations are not needed.

Committee note: For the first decision of the Court of Appeals in 1999, the citation format would be, "1999 MD 1." The pinpoint citation to a quotation taken from paragraph 12 would be, "1999 MD 1, 12." The full parallel citation would be, "1999 MD 1, 12, 723 A.2d 452." The first decision of the Court of Special Appeals in 2001 would be cited, "2001

MD App 1." The third decision of the Court of Special Appeals in 2001 would be, "2001 MD App 3."

Source: This Rule is new.

Rule 8-115 was accompanied by the following Reporter's Note.

This Rule presents a new universal citation system which allows for the citation of cases disseminated on the Internet or CD-Rom. The current system cannot cite cases disseminated by computer because there is no pagination on the computer. At least nine other states have similar proposals pending, and eight states have either adopted a parallel system or a system which includes paragraph numbering.

The Chair stated that James Carbine, Esq., a consultant to the General Court Administration Subcommittee, had presented the issue of a uniform citation system to the Subcommittee and would explain this to the Rules Committee. Mr. Carbine told the Committee that the text of the proposed Rule is a variant of the American Bar Association (ABA) Model Rule. In the summer of 1996, the ABA recommended that all jurisdictions adopt a universal system of citation. The draft of Rule 8-115 is not identical to the ABA Rule.

Mr. Carbine said that he would present the background to the Rule. In the late 1980's and early 1990's, grass roots user- driven pressure arose to develop a citation convention, which would be free from page and volume numbers to accommodate electronic citation. This spawned a number of experimental systems. By November, 1994, the ABA got involved in the effort. There were at least four

jurisdictions with experimental systems -- Louisiana, Colorado, Wisconsin, and the U.S. Court of Appeals for the Sixth Circuit. All were different. The ABA feared "do-it-yourself" attempts to solve the problem of electronic citation. Mr. Carbine had been on the ABA committee to analyze the issue.

Mr. Carbine stated that he strongly recommends changing the current citation system in Maryland. It is preferable to use a uniform system which can be used around the country, so that it is not necessary for lawyers to learn 50 different citation systems. The system can work equally well for an attorney without a computer. The Committee note explains how the system works. The citation contains the year and the court identifier. The decisions are numbered in the sequence in which they are rendered. It is within the discretion of the court to decide which judicial acts get a number and how to assign sequential numbers. The ABA recommends that each paragraph be numbered. The case citation is part of the official text of the opinion. The new form of citation in the ABA Rule is mandatory, but in proposed Rule 8-115, it is permissive, providing that the new form of citation "may" be used. This allows for a first step in the process of converting to a new system in which the ABA system would totally replace the Maryland Reports. For example, in 1999, the book of cases would look the same, but the spine of the book would read "1999 MD. 1 - 50." The first 50 opinions would be in the book in sequential order with numbered

paragraphs. Under this proposal, there are two parallel citations which are functionally equivalent. Eventually the system will be the same as the ABA system. In 10 or 15 years, there may be no more case books, and the marketplace will demand the universal citator.

Mr. Klein pointed out that the transitional book would continue to have page numbers. Ms. Ogletree noted that a parallel citation could be 1999 MD. 1, 400 Md. 253. Mr. Carbine explained that the proposal recommended by the Subcommittee is less aggressive than the ABA proposal. It would require the opinions to be cited as "1999 MD. 1", and the paragraphs would be numbered, but the case book would look like it does currently. Mr. Titus asked if the Atlantic 2nd citation would be used. Mr. Carbine explained that either the Maryland or the Atlantic 2nd citation could be used. Mr. Titus remarked that it is a benefit to be liberated from page numbers. Mr. Carbine noted that the beauty of this system is that one would have access to slip opinions with a workable cite.

Mr. Howell commented that one issue which the Subcommittee had discussed was how the new system would work if the appellate court modified an opinion after its initial release by adding paragraphs. Mr. Carbine responded that this is not a problem. Currently what happens is that the slip opinion looks different from what is in the book. In the new scheme, it would be similar, with the book varying from the initial opinion. In the future, it will become a bigger problem, because the day the opinion is issued, it will become

available on the Internet. To modify it, the revised opinion will have to be given a new number, such as 1999 MD. 1, as modified by 1999 MD. 32. The Chair pointed out that the appellate courts withdraw an opinion and refile it if there is a substantive change. Rarely are the opinions in the green book of Court of Special Appeals decisions different than when the reported opinion was filed. The new system will help the courts deal with the problem of attorneys using unreported opinions.

Mr. Howell inquired what would happen if the court issues an unreported opinion and later decides to report it. The Chair replied that this is not a problem; it would be published in a citable format. Mr. Howell observed that this would not be in sequence. The Chair said that unreported opinions are handled differently. Mr. Howell noted that an unreported opinion could be issued in January, and then in March, the court decides to publish it. Mr. Carbine explained that the opinion would be the functional equivalent of a March opinion.

The Chair stated that under the new system, there would be three citations, the new one which would be 1999 MD. 1, the bound volume citation, and the Atlantic 2nd citation. The old system is not being abandoned. Mr. Bowen asked why the new system is not the same as the one proposed by the ABA. The Reporter said that she had spoken with Alex Cummings, Esq., the Clerk of the Court of Appeals, who had explained that the contract with West Publishing Company for

publishing Maryland opinions is renegotiated each December. After that, the new system could be started. The Chair pointed out that under the new system, there would be no page numbers. Mr. Carbine remarked that the paragraphs would be numbered. The Vice Chair suggested that West could be asked to put the number of the case in the right-hand corner of each page.

Judge Kaplan expressed the view that the Subcommittee was timid, and it should have adopted the new system entirely. Mr. Klein noted that section (c) of Rule 8-115 could be changed to mandatory instead of permissive, as it is now. The universal cite would be mandatory, and the parallel cite strongly encouraged. Mr. Howell observed that there is a statute which refers to "Maryland Reports." Ms. Ogletree noted that this will not be changed -- only the numbering system is changed. The Reporter commented that the Maryland Report is the official cite, and parallel cites may be added. The Vice Chair asked if Rule 8-504 requires both cites, and the Chair replied that only the Maryland cite is necessary. Mr. Sykes remarked that this may be more burdensome. Mr. Bowen moved that the Rule shall be mandatory, using the same citation for the bound volume and CD-Rom, and it may be accompanied by a parallel citation. The motion was seconded and passed.

Mr. Karceski suggested that the subscription to Atlantic 2nd could be stopped as of January, 1999. The Chair said that the

opinion printed in the Atlantic 2nd Reporter as of that date would have numbered paragraphs. Mr. Karceski inquired if the spine of the new volume would have a new sequential number. Mr. Carbine answered that the volume number could be numbered just as it is now, except that the year and case numbers would be printed on the spine. The Vice Chair stated that she was impressed with the foresight of the Rules Committee.

Mr. Hochberg asked about citation of denials of writs of certiorari. Mr. Carbine replied that the principle is that each reported decision is cited by the new system. It would be up to the Court of Appeals as to whether it will assign a number to the denial of a writ of certiorari. Mr. Maloney suggested that the words "and order" could be added into the first sentence of section (a) after the word "opinion." Mr. Bowen observed that the cases should be cited using the abbreviation "MD" because this is the abbreviation used by the U.S. postal service. Mr. Carbine added that the ABA recommends that each state use the postal abbreviation.

The Chair suggested that something be added to the Rule to refer to decisions other than opinions. Mr. Carbine proposed using the language "and such other judicial acts as the court deems appropriate." The Chair expressed doubt about this language. The fact that certiorari was granted or that certiorari is pending may need to be in the citation as well as the date on which the petition for certiorari was filed and the date on which it was granted. Mr.

Carbine commented that this may be going beyond the needs of the Rule, which does not address the history of the case. Mr. Maloney remarked that what is now in the bound volumes goes into the new citation. Mr. Klein expressed his agreement that the word "opinion" in section (a) is too limited.

The Chair said that the Court of Appeals probably would not want to assign a decision number to every petition for certiorari. Counsel can find them the same way they do now by going to the page which has on it the grants and denials of certiorari. Mr. Titus pointed out that no other rule provides how to cite grants and denials of certiorari. This is a mechanical matter for the court. Ms. Ogletree noted that memorial services are listed in the bound volumes, and Mr. Sykes added that rules orders are also listed. The Chair reiterated that the suggestion had been made to include the words "and order" after the word "opinion" in the first line of section (a). Mr. Howell suggested that section (a) could be broken down into two parts, one of which would clarify that sequential numbers may be given to items other than opinions. Mr. Sykes questioned whether the Rule should refer to the sequential number of a denial of certiorari. Mr. Howell explained that it is not necessary to cite it, but the court may wish to number it. Orders dealing with disciplinary actions are published frequently. The Chair said that no rule requires that the Court of Appeals number sequentially each denial of certiorari. The denial of 50 petitions

could be given one number. A separate subsection dealing with certiorari petitions in the Court of Appeals could be included in the Rule.

Mr. Sykes commented that now when certiorari is denied, the page number is referenced. If certiorari is granted, the date could be listed in the book. A number can be assigned later. Judge Kaplan suggested that there could be a separate sentence in the Rule which provides that any reported order of the court may be given a number. Mr. Howell noted that there is no requirement that the court publish its orders. The Chair stated that if the Court of Appeals does publish an order, the Court will do what it is doing now. Mr. Bowen remarked that denials can go into one order with pinpoint paragraphs, such as 1999 MD. 26, 10. Judge Kaplan asked how the ABA handles this. Mr. Carbine replied that the ABA gives the courts latitude, including as little in the Rule as possible. The Chair commented it is better that the Court of Appeals does not have to report the denial of certiorari.

Mr. Bowen moved that the words "and order" be added in after the word "opinion" in the first line of section (a), the motion was seconded, and it passed unanimously.

Mr. Sykes inquired about citing cases from other jurisdictions. Mr. Bowen responded that those jurisdictions that have adopted this system will be cited similarly. Otherwise, the case is cited using the system of that jurisdiction. Citing other

jurisdictions is not part of Rule 8-115. Mr. Howell suggested that the Courts Article should be checked to make sure that the new system is not inconsistent with any statutes. Mr. Sykes asked about Rule 8-504 (a)(1). Mr. Maloney observed that no substantive change is required, and the Reporter stated that she would draft any conforming amendment that may be needed for clarity. Mr. Bowen moved to adopt Rule 8-115 as it was amended at the meeting. The motion was seconded and passed unanimously. The Chair thanked Mr. Carbine for his assistance in developing Rule 8-115.

Agenda Item 3. Continued consideration of proposed new Rule 3-721 (Receivers)

The Reporter presented Rule 3-721, Receivers, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE -- DISTRICT COURT

CHAPTER 700 - SPECIAL PROCEEDINGS

ADD new Rule 3-721, as follows:

Rule 3-721. RECEIVERS

(a) Applicability

This Rule applies when a receiver is appointed by the District Court to take charge of property, pursuant to the statutory

provisions granting equitable jurisdiction to the court, for the enforcement of a local or state code, or to abate a nuisance.

(b) Applicability of Other Rules

Except as otherwise specifically provided in this Chapter, the procedures for making a sale of property by the receiver shall be governed by Title 14, Chapter 300 of these Rules.

(c) Bond

The court may require bond to the State of Maryland, to be filed with the court, in an amount not to exceed the value of the property.

(d) Order

An order appointing a receiver shall specify (1) the powers of the receiver, including the ability to incur expenses and create liens on the property to secure payment of those expenses, and (2) the terms of sale.

(e) Employment of Other Professionals

A receiver shall not employ an attorney, accountant, appraiser, auctioneer, or other professional without prior approval by the court.

(f) Procedures Following Sale of the Property

(1) Notice by Certified Mail

In lieu of the clerk issuing notice and publication thereof when filing the Report of Sale, the receiver shall send a notice, which states that the sale has been completed, by certified mail to the last known address of: the mortgagor; the present record owner of the property; and the holder of a recorded subordinate mortgage, deed of trust, or other recorded or filed subordinate interest, including a judgment in the property. The

notice shall provide that the sale of the property shall be final unless cause to the contrary is shown within 30 days after the date of the notice.

(2) Posting of Property

The receiver shall cause the sheriff to post a notice in a conspicuous place on the property. The notice shall provide that the sale of the property shall be final unless cause to the contrary is shown within 30 days after the date of the notice.

(3) Exceptions to Sale

An exception to a sale may be filed within 30 days after the date of the notice issued pursuant to subsections (f)(1) and (f)(2) of this Rule.

(g) Final Accounting

After a sale has been ratified by the court, the receiver shall file a proposed accounting. The receiver shall send notice of the accounting to the persons listed in subsection (f)(1) of this Rule, who shall have ten days after the date of the notice to file exceptions. The court may decide exceptions without a hearing unless a hearing is requested with the exceptions.

(h) Conveyance to Purchaser

After a sale has been ratified by the court and the purchase money paid, the receiver shall promptly convey the property to the purchaser, and cause to be recorded among the land records of each county where any part of the property is located a certified copy of the docket entries, the report of sale, the final order of ratification and any other orders affecting the property.

(i) Distribution and Termination

After the final account has been

ratified by the court, the receiver shall distribute the proceeds of the sale. Once the proceeds have been distributed, the receiver shall petition the court to terminate the receivership.

(j) Removal of Receiver

Removal of a receiver or of any person employed by the receiver, may be instituted on the court's own initiative or upon petition of any person having an interest in the property. A petition shall state the reasons for the requested removal and may include a request for the appointment of a successor receiver. The court may grant or deny the relief requested with or without a hearing.

(k) Resignation of Receiver

(1) Petition to Resign

A receiver may file a petition to resign. The petition shall state the reasons for the proposed resignation and may include a request for the appointment of a successor receiver.

(2) Report of Resigning Receiver

The resigning receiver shall file with the petition a report and accounting from the date the receiver was appointed. Resignation of a receiver does not terminate the appointment until the resignation has been approved by the court. The court may grant or deny the requested relief with or without a hearing.

Source: This Rule is derived as follows:

Section (a) is in part derived from Rule 13-102 and is in part new.
Section (b) is derived from Rule 13-103.
Section (c) is derived from Rule 13-107.
Section (d) is new.
Section (e) is derived from Rule 13-301 (a).

Subsection (f)(1) if derived from Rule 14-206 (b)(2).

Subsection (f)(2) is derived from Rule 14-503 (c).

Subsection (f)(3) is derived from Rule 14-305 (d).

Section (g) is in part derived from Rule 2-543 and is in part new.

Section (h) is in part derived from Rule 14-207 (f)(1) and Rule 14-306.

Section (i) is in part derived from Rule 13-503 and is in part new.

Section (j) is in part derived from Rule 13-701 and in part from Rule 13-702.

Section (k) is derived from Rule 13-702.

Rule 3-721 was accompanied by the following Reporter's Note.

This Rule was requested by the Community Law Center because of problems that have arisen when organizations are appointed by the District Court as receivers to sell properties, many of which are vacant, at public auction. Because there are no rules, some title companies are hesitant about insuring properties that have been sold by a receiver appointed by the District Court.

Section (a) is partly derived from Rule 13-102, Scope, which is one of the Rules pertaining to receivers and assignees in the circuit court. Rule 3-721 (a) covers those areas specifically excluded from subsection (b)(2) of Rule 13-102, such as enforcement of local or state codes and abatement of a nuisance.

Section (b) is derived from Rule 13-303 (c), Applicability of Other Rules, which pertains to receivers and assignees in the circuit court. Since proposed Rule 3-721 is a District Court rule, the Title 2 Rules do not apply as they do in the circuit court receiverships, but Title 14, Chapter 300 does apply.

Section (c) is derived from a few of the salient provisions of Rule 13-107, Bond.

Section (d) is new. Neither Titles 13 nor 14 has a provision exactly parallel to this one which clarifies that the court may give the receiver certain powers and may set out the terms of the sale of the property.

Section (e) is derived from section (a) of Rule 13-301, Employment of Attorney, Account, Appraiser, Auctioneer, or Other Professional.

Subsection (f)(1) is derived from subsection (b)(2) of Rule 14-206, Procedure Prior to Sale. To simplify the procedure in the District Court, there is no publication requirement by the clerk as there is with circuit court receiverships. Instead, the receiver sends notice to the persons who have an interest in the property informing them of the sale of the property.

Subsection (f)(2) is derived from section (c) of Rule 14-503, Process. Because there is no publication requirement, the posting provision has been added as an extra due process protection.

Subsection (f)(3) is derived from section (d) of Rule 14-305, Procedure Following Sale. It provides a simple mechanism for someone with an interest in the property to contest the sale.

Section (g) is in part derived from Rule 2-543, Auditors, but since there is no auditor available in District Court, the rule could not directly follow the circuit court receivership procedure. The receiver files the accounting and send notice of it to interested persons who have the right to file exceptions.

Section (h) is derived from subsection (f)(1) of Rule 14-207, Sale, and Rule 14-306, Real Property--Recording. It provides for the property to be conveyed to the purchaser after the sale has been ratified and for recordation

of the sale transaction in the appropriate land records.

Section (i) is in part derived from Rule 13-503, Distribution, which is the distribution provision in the circuit court receivership rules. The second sentence is new and was added to provide a method to close the case.

Section (j) is mostly derived from Rule 13-701, Removal of Assignee, Receiver, or Professional, which is the removal provision in the circuit court receivership rules. The third sentence is derived from Rule 13-702, Resignation of Receiver or Assignee, in the circuit court receivership rules.

Section (k) is derived from Rule 13-702, Resignation of Receiver or Assignee, the parallel circuit court rule. It provides the mechanism for a receiver to resign.

The Reporter explained that Judge Rinehardt, District Court Subcommittee Chair, was unable to attend today's meeting to present Rule 3-721 (Receivers). The Reporter told the Committee that the proposed Rule includes what has been excluded from Rule 13-102 (b), Scope, in the Rules pertaining to Receivers and Assignees. Michael I. Gordon, Esq., sent in a comment letter in which he suggested that section (h) should be amended to mirror the wording of Rule 14-306, since that Rule requires recordation among the land records only when the sale is made of an interest in real property in a county other than one in which all of the property is located. The Reporter said that Anne Blumenberg, Esq., and Keith Milligan of the Community Law Center were present to discuss Rule 3-721.

The Reporter said that she had included in the meeting

materials a recent Court of Appeals case, Martin v. Howard County, Maryland, No. 13, September Term, 1996, filed May 13, 1998, which held that there is a right to a jury trial in an action to abate a nuisance when real property is used in connection with controlled dangerous substances or controlled paraphernalia. The Committee agreed that this would not cause a problem with the Rule. Mr. Sykes suggested that section (a) should contain a cross reference to the list of relevant ordinances and statutes which allow the appointment of a receiver. This list is contained in the May 7, 1998 memorandum sent by Ms. Blumenberg, a copy of which appears in the meeting materials. The Reporter inquired if the list is exhaustive, and Ms. Blumenberg replied that it is. The Committee agreed by consensus with this suggestion to cross reference the list. Mr. Sykes suggested that the cross reference could be worded as follows: "For the power of the District Court to appoint a receiver, see....".

Mr. Sykes suggested that in section (c), the word "appraised" should be added in before the word "value" and after the word "the." The Committee agreed by consensus with this change. Mr. Sykes suggested that in section (d), the word "ability" should be changed to the word "power." The Committee also agreed by consensus with this suggestion.

Turning to section (e), the Chair asked if the receiver can employ anyone without prior court approval. Ms. Blumenberg answered that the receiver always needs court approval, and this is always in

the court order. Mr. Sykes suggested that sections (d) and (e) could be collapsed by adding language to section (d) which includes the power to employ professionals. The Reporter noted that after the time of the order appointing the receiver, a professional may be needed. Mr. Sykes suggested that the new language in section (d) could include the substance of the language in section (e) by providing that the receiver should not employ a professional without prior court approval. The Committee agreed by consensus to this suggestion.

Mr. Bowen pointed out that in subsection (f)(1), there should be a comma after the word "judgment." The Committee agreed by consensus with this. The Chair asked about the term "subordinate interest" in subsection (f)(1). Mr. Bowen said that the mortgagee gets the benefit of the sale and that the mortgagor needs notice as well as any subordinate mortgagees. The wording of subsection (f)(1) appears to be correct.

Mr. Howell suggested that in the first sentence of subsection (f)(2), the word "a" should be changed to the word "the," since the notice has already been referred to previously. The Committee agreed by consensus to this change. Mr. Sykes suggested that in the second sentence of subsection (f)(2), the word "provide" should be changed to the word "state." The Committee agreed by consensus to this suggestion.

There was no discussion of subsection (f)(3). Turning to

section (g), Ms. Ogletree asked who can do the accounting since no auditor is available in the District Court. Mr. Maloney asked what the current procedure is. Ms. Blumenberg replied that the receiver submits a final accounting. Judge Vaughan remarked that the judge could do the accounting, since an auditor is an added expense. Ms. Ogletree cautioned that in a county which has one judge one day a week, it would be difficult for that judge to be responsible for the account.

The Chair suggested that the word "proposed" be deleted from the first sentence of section (g). Ms. Blumenberg commented that the accounting is a very simple one, consisting of no more than two pages. The Committee agreed by consensus with the Chair's suggestion to delete the word "proposed."

Judge Johnson inquired if someone can file in the circuit court to stop the proceedings if a receiver has been appointed to take charge of a property with a mortgage on it. Ms. Blumenberg answered that anyone with an interest in the property can come in initially after the receivership petition is filed, to bring the property up to Code standards. Judge Vaughan noted that the statute allows the District Court to decide title. Ms. Ogletree said that she had problems with notice and process in the Rule. She questioned whether the mortgagee has notice of the Code enforcement violation. Ms. Blumenberg responded that the mortgagee was notified initially. Ms. Ogletree pointed out that the mortgage may have been transferred

three or four times to various companies. The notice may have gone to the original mortgage company. Then the property is foreclosed, and the latest mortgagee does not get due process. The Chair noted that the property involved is usually not in good shape. The situation has already reached the point where a judge is involved with the enforcement of Code violations. The protections were afforded earlier in the proceedings. The judge has said that the Code violations are so bad that the judge is ordering the sale of the property. Mr. Maloney inquired if the District Court is administratively equipped to handle the sale of the property. The Chair answered that the statute provides that the proceeding is to take place in the District Court.

Ms. Ogletree reiterated that due process problems exist. The Chair stated that if the Committee can agree on the rest of the Rule, at the next meeting, Judge Rinehardt can give the District Court perspective. She had attended the April meeting at which Rule 3-721 was discussed, and she had indicated that she thought the Rule would work. Ms. Blumenberg remarked that the Rule is similar to a tax sale in terms of getting title insurance. Ms. Ogletree expressed the view that it is not the same as a tax sale, and she asked whether title insurance companies are willing to write policies after the title is transferred by these proceedings. The Chair questioned whether the Rule should build in extra protections. Ms. Ogletree stated that when a tax sale takes place, there is proof offered to the title

insurance company that all persons have been notified. Ms. Blumenberg said that she does that in the receivership cases. Ms. Ogletree suggested that the Rule should specify this. Judge Johnson added that this is to be done before the sale. Mr. Bowen pointed out that Rules 14-300 *et. seq.* pertain to the sale of the property. This Rule covers what happens after the sale.

The Chair drew the Committee's attention to section (h). Ms. Blumenberg referred to the comment letter from Mr. Gordon. She said that a compromise to this issue could be accomplished by referencing the case in the deed. Ms. Ogletree told the Committee that she had spoken with Julia Freit, Esq., an Assistant Attorney General who represents the court clerks, and Ms. Freit had had a problem with a similar provision in Rule
14-306, concerning the recordation of a sale among the land records of other counties. Ms. Ogletree agreed that the case should be indexed where the title would be searched. Should it be in the circuit court or the land records? The Chair answered that the case should be indexed in the land records. Judge Vaughan remarked that there are deed references, and Ms. Ogletree said that these should be attached to the deed. The Chair suggested that there be a requirement that the report of sale and final order be filed among the land records. Ms. Ogletree said that it should be a copy of the docket entries and the final order of ratification, and the Committee agreed by consensus with this suggestion.

Turning to section (i), the Chair suggested that the words "final account" be changed to the word "accounting." The Committee agreed by consensus with this suggestion. Mr. Sykes suggested that section (i) be collapsed to read: "After the accounting has been ratified by the court, the receiver shall distribute the proceeds of the sale and petition the court to terminate the receivership." The Committee agreed by consensus to this change. Judge Vaughan asked what happens if the receivership is not terminated. The Chair responded that it is the receiver's duty to terminate, but there is no consequence if the receivership is not terminated.

The Chair drew the Committee's attention to section (j). Mr. Hochberg inquired as to the meaning of "any person having an interest in the property." The Reporter replied that those persons are the ones listed in subsection (f)(1). Mr. Sykes asked if the receivers get paid. Ms. Blumenberg said that usually the receivers work for non-profit organizations. Mr. Sykes questioned whether receivers can be removed without a hearing. The Chair asked from where the language of section (j) is derived. The Reporter answered that it is from Title 13. Mr. Sykes expressed his concern with removal of a receiver without a hearing, because there is no procedure available for the receiver to respond. Mr. Howell suggested that the last sentence of section (j) be patterned after the last sentence of section (g). The Committee agreed by consensus to this suggestion.

The Chair drew the Committee's attention to subsection (k)(1).

He suggested that the subsection be changed to read as follows: "A petition to resign shall state the reasons for the proposed resignation and may include a request for the appointment of a successor receiver." The Committee agreed by consensus with this suggestion. Mr. Hochberg asked about a notice provision. The Chair suggested that subsection (k)(1) could read as follows: "A petition to resign must certify that notice has been given to all persons entitled to notice under subsection (f)(1) were sent notice of the proposed resignation." The Committee agreed by consensus to this change.

Mr. Howell pointed out that the title of subsection (k)(2) is not applicable to the last two sentences in that subsection. The Chair suggested that the last two sentences of subsection (k)(2) should be moved to subsection (k)(1). The Committee agreed by consensus with this change.

The Chair said that Rule 3-721 will again be considered when Judge Rinehardt is present. The Committee can take one final look at it, and if satisfied with the Rule, approve it.

The Chair adjourned the meeting.