COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 of the Judicial Education and Training Center, 2011-D Commerce Park Drive, Annapolis, Maryland on April 10, 2015.

Members present:

Hon. Alan M. Wilner, Chair
Hon. Robert A. Zarnoch, Vice Chair

A. Gillis Allen, II, Esq.
H. Kenneth Armstrong, Esq.
James E. Carbine, Esq.
Mary Anne Day, Esq.
Christopher R. Dunn, Esq.
Hon. Angela M. Eaves
Hon. JoAnn M. Ellinghaus-Jones
Alvin I. Frederick, Esq.
Ms. Pamela Q. Harris
Hon. Joseph H. H. Kaplan
Bruce L. Marcus, Esq.
Hon. Danielle M. Mosley
Scott G. Patterson, Esq.
Hon. W. Michel Pierson
Hon. Paula A. Price
Steven M. Sullivan, Esq.
Hon. Julia B. Weatherly
Robert Zarbin, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
David R. Durfee, Jr., Esq., Assistant Reporter
Sherie B. Libber, Esq., Assistant Reporter
Kathleen M. Murphy, President, Maryland Bankers Association
Benjamin Woolery, Esq.
Glenn Grossman, Esq., Bar Counsel, Attorney Grievance Commission
Susan M. Erlichman, Esq., Executive Director, Maryland Legal Services Corporation
Connie Kratovil-Lavelle, Esq., Director, Child and Family Services, Administrative Office of the Courts
Hon. Deborah S. Eyler, Court of Special Appeals

The Chair convened the meeting. With regret he announced the retirement of Judge Weatherly from the Circuit Court for Prince George's County and from the Rules Committee. He said that he and the Committee would miss her exuberance, her charm, her devotion, and her experience. He announced the appointment

to the Rules Committee of Senator H. Wayne Norman, a member of the State Senate from Harford County, who is replacing Senator Norman R. Stone. The Chair introduced David R. Durfee, Jr., Esq., as the new Deputy Director and Assistant Reporter of the Rules Committee. Mr. Durfee has previously served as an Assistant Attorney General and as counsel to the Administrative Office of the Courts. The Chair welcomed Mr. Durfee.

The Chair said that the first matter to be discussed was the approval of several sets of minutes that had been sent out to the Committee. The attempt is to catch up on the minutes. They were updated a while ago, but it is difficult to keep up with them because of more pressing matters that need attention. The Reporter, the Chair, and Ms. Cox, the Administrative Assistant to the Committee, all read through the minutes to make sure that they are accurate before they are sent out to the Committee. The minutes that had been sent out were April, May, June, October, and November of 2013 and May, June, and September of 2014. Mr. Frederick had made a correction to the November, 2013 minutes, and this had been sent out to the Committee. Mr. Frederick moved that the minutes, including the correction to the November, 2013 minutes, be approved, the motion was seconded, and it carried by a majority vote.

The Chair told the Committee that Agenda Item 5, consideration of proposed amendments to Rule 1-104, Unreported Opinions, and Agenda Item 12, consideration of proposed amendments to the Rules in Title 17, Chapter 400, Proceedings in

the Court of Special Appeals, had been deferred as a courtesy to the Honorable Peter Krauser, Chief Judge of the Court of Special Appeals, who had been unable to attend the meeting today.

Agenda Item 1. Reconsideration of proposed new Rule 9-205.3 (Custody and Visitation-related Assessments)

Judge Weatherly presented Rule 9-205.3, Custody and Visitation-related Assessments, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 200 - DIVORCE, ANNULMENT, ALIMONY, CHILD SUPPORT AND CHILD CUSTODY

ADD new Rule 9-205.3, as follows:

Rule 9-205.3. CUSTODY AND VISITATION-RELATED ASSESSMENTS

(a) Applicability

This Rule applies to the appointment or approval by a court of a person to perform an assessment in an action under this Chapter in which child custody or visitation is at issue.

Committee note: In this Rule, when an assessor is selected by the court, the term "appointment" is used. When the assessor is selected by the parties and the selection is incorporated into a court order, the term "approval" is used.

(b) Definitions

In this Rule, the following definitions apply:

(1) Assessment

"Assessment" includes a custody evaluation, a home study, a specific issue evaluation, and a mental health evaluation.

(2) Assessor

"Assessor" means an individual who performs an assessment.

(3) Custody Evaluation

"Custody evaluation" means a study and analysis of the needs and development of a child who is the subject of an action or proceeding under this Chapter and of the abilities of the parties to care for the child and meet the child's needs.

(4) Custody Evaluator

"Custody evaluator" means an individual appointed or approved by the court to perform a custody evaluation.

(5) Home Study

"Home study" means an inspection of a party's home that focuses upon the safety and suitability of the physical surroundings and living environment for the child.

(6) Mental Health Evaluation

"Mental health evaluation" means an evaluation of an individual's mental health performed by a qualified and licensed mental health care provider, as defined in the Code, Health Occupations Article. A mental health evaluation may include psychological testing.

(7) Specific Issue Evaluation

"Specific issue evaluation" means a targeted investigation into a specific issue raised by a party, the child's attorney, or the court affecting the safety, health, or

welfare of the child.

Committee note: An example of a specific issue evaluation is an evaluation of a party as to whom the issue of a problem with alcohol consumption has been raised, performed by an individual with expertise in alcoholism.

(8) State

"State" includes the District of Columbia.

[Contingent] Committee note: Code, Family Law Article, Title 9, as amended in 2015, uses the terms "legal decision making" and "parenting time" in lieu of the traditional terms "custody" and "visitation." For convenience, the Rules in this Title continue to use the traditional terms. No distinction between the terms used on the Rules and the terms used in the statute is intended.

(c) Authority

(1) On motion of any party or child's counsel, or on its own initiative, the court may order an assessment to aid the court in evaluating the health, safety, welfare, or best interests of a child in a contested custody or visitation case.

(2) The court may appoint or approve any person deemed competent by the court to perform a home study or a specific issue evaluation. The court may not appoint or approve a person to perform a custody evaluation unless (A) the assessor has the qualifications set forth in subsections (d)(1) and (d)(2) of this Rule, or (B) the qualifications have been waived for the assessor pursuant to subsection (d)(3) of this Rule.

(3) The court may not order an assessment to be paid for by a party or the parties in whole or in part without giving the parties notice and an opportunity to object.

(d) Qualifications of Custody Evaluator

(1) Education and Licensing

A custody evaluator shall be:

(A) a physician licensed in any State who is board certified in psychiatry or has completed a psychiatry residency accredited by the Accreditation Council for Graduate Medical Education or a successor to that Council;

(B) a psychologist licensed in any State;

(C) a marriage and family therapist licensed in any State; or

(D) a social worker - clinical licensed in any State.

(2) Training and Experience

In addition to complying with the continuing requirements of his or her field, a custody evaluator shall have training or experience in observing or performing custody evaluations and shall have current knowledge of the following areas:

(A) domestic violence;

(B) child neglect and abuse of any type;

(C) family conflict and dynamics;

(D) child and adult development; and

(E) impact of divorce and separation on children and adults.

(3) Waiver of Requirements

If a court employee has been performing custody evaluations on a regular basis for at least five years prior to [effective date of the Rule], the court may waive any of the requirements set forth in subsection (d)(1) of this Rule, provided that the individual participates in at least 20 hours per year of continuing education

relevant to the performance of custody evaluations, including one or more of the areas listed in subsection (d)(2) of this Rule.

(e) Custody Evaluator Lists and Selection

(1) Custody Evaluator Lists

If the circuit court for a county appoints custody evaluators who are not court employees, the family support services coordinator for the court shall maintain a list of qualified custody evaluators. An individual, other than a court employee, who seeks appointment by a circuit court as a custody evaluator shall submit an application to the family support services coordinator for that court. If the applicant has the qualifications set forth in section (d) of this Rule, the applicant's name shall be placed on a list of qualified individuals. The family support services coordinator shall, upon request, make the list and the information submitted by each individual on the list available to the public.

(2) Selection of Custody Evaluator

(A) By the Parties

By agreement, the parties may employ a custody evaluator of their own choosing who may, but need not, be on the court's list. They may, but need not, request the court to enter a consent order approving the agreement and selection. The court shall enter the order if one is requested and the court finds that the custody evaluator has the qualifications set forth in section (d) and that the agreement contains the relevant information set forth in section (g) of this Rule.

(B) By the Court

An appointment of an individual, other than a court employee, as a custody evaluator by the court shall be made from the list maintained by the family support services coordinator. In appointing a

custody evaluator from a list, the court is not required to choose at random or in any particular order from among the qualified evaluators on the list. The court should endeavor to use the services of as many qualified individuals as practicable, but the court may consider, in light of the issues and circumstances presented by the action or the parties, any special training, background, experience, expertise, or temperament of the available prospective appointees. An individual appointed by the court to serve as a custody evaluator shall have the qualifications set forth in section (d) of this Rule.

(f) Description of Custody Evaluation

(1) Mandatory Elements

Subject to any protective order of the court, a custody evaluation shall include:

(A) a review of the relevant court records pertaining to the litigation;

(B) an interview of each party;

(C) an interview of the child, unless the custody evaluator determines and explains that by reason of age, disability, or lack of maturity, the child lacks capacity to be interviewed;

(D) a review of any relevant educational, medical, and legal records pertaining to the child;

(E) if feasible, observations of the child with each party, whenever possible in that party's household;

(F) factual findings about the needs of the child and the capacity of each party to meet the child's needs; and

(G) a custody and visitation recommendation based upon an analysis of the facts found or, if such a recommendation cannot be made, an explanation of why.

(2) Optional Elements – Generally

Subject to subsection (f)(3) of this Rule, at the discretion of the custody evaluator, a custody evaluation also may include:

(A) contact with collateral sources of information;

(B) a review of additional records;

(C) employment verification;

(D) an interview of any other individual residing in the household;

(E) a mental health evaluation;

(F) consultation with other experts to develop information that is beyond the scope of the evaluator's practice or area of expertise; and

(G) an investigation into any other relevant information about the child's needs.

(3) Optional Elements Requiring Court Approval

The custody evaluator may not include an optional element listed in subsection (f)(2)(E), (F), or (G) if any additional cost is to be assessed for the element unless, after notice to the parties and an opportunity to object, the court approved inclusion of the element.

(g) Order of Appointment

An order appointing or approving a person to perform an assessment shall include:

(1) the name, business address, and telephone number of the person being appointed or approved;

(2) if there are allegations of domestic violence committed by or against a party or child, any provisions the court deems

necessary to address the safety and protection of the parties, all children of the parties, any other children residing in the home of a party, and the person being appointed or approved;

(3) a description of the task or tasks the person being appointed or approved is to undertake;

(4) a provision concerning payment of any fee, expense, or charge, including a statement of any hourly rate that will be charged which, as to a court appointment, may not exceed the maximum rate established under section (n) of this Rule and, if applicable, a time estimate for the assessment;

(5) the term of the appointment or approval and any deadlines pertaining to the submission of reports to the parties and the court, including the dates of any pre-trial or settlement conferences associated with the furnishing of reports;

(6) any restrictions upon the copying and distribution of reports, whether pursuant to this Rule, agreement of the parties, or entry of a separate protective order;

(7) whether a written report or a transcript of an oral report on the record is required; and

(8) any other provisions the court deems necessary.

(h) Removal or Resignation of Person Appointed or Approved to Perform an Assessment

(1) Removal

The court may remove a person appointed or approved to perform an assessment upon a showing of good cause.

(2) Resignation

A person appointed or approved to perform an assessment may resign prior to

completing the assessment and preparing a report pursuant to section (i) of this Rule only upon a showing of good cause, notice to the parties and an opportunity to be heard, and approval of the court.

(i) Report of Assessor

(1) Custody Evaluation Report

A custody evaluator shall prepare a report and provide the parties access to the report in accordance with subsection (i)(1)(A) or (i)(1)(B) of this Rule.

(A) Oral Report on the Record

The custody evaluator may present the custody evaluation report orally to the parties at a pre-trial or settlement conference held at least 45 days before the scheduled trial date or hearing at which the evaluation may be offered or considered. The custody evaluator shall produce and provide to the court and parties at the conference a written list containing an adequate description of all documents reviewed in connection with the custody evaluation. If custody and access have not been resolved at the conference, and no written report has been provided, a transcript of the report shall be provided to the parties by the court free of charge.

(B) Written Report Prepared by the Custody Evaluator

If an oral report is not prepared and presented pursuant to subsection (i)(1)(A) of this Rule, the custody evaluator shall prepare a written report of the custody evaluation and shall include in the report a list containing an adequate description of all documents reviewed in connection with the custody evaluation. The report shall be furnished to the parties at least 30 days before the scheduled trial date or hearing at which the evaluation may be offered or considered. The court may shorten or extend the time for good cause shown but the report shall be furnished to the parties no later

than 15 days before the scheduled trial or hearing.

(2) Report of Home Study or Specific Issue Evaluation

As soon as practicable after completion of the assessment, unless a date is specified in the order of appointment or approval, and unless waived by the parties, a home study assessor or a specific issue assessor shall prepare a written report of the assessment and furnish it to the parties.

(3) Report of Mental Health Evaluation

As soon as practicable after completion of a mental health evaluation, unless a date is specified in the order of appointment or approval, the mental health care provider who performed the evaluation shall prepare a written report and make it available to the parties solely for use in that case.

(j) Copying and Dissemination of Report

A party may copy a written report of an assessment or the transcript of an oral report prepared pursuant to subsection (i)(1)(A) of this Rule but, except as permitted by the court, shall not disseminate the report or transcript other than to individuals intended to be called as experts by the party.

Cross reference: See subsection (g)(6) of this Rule concerning the inclusion of restrictions on copying and distribution of reports in an order of appointment or approval of an assessor. See the Rules in Title 15, Chapter 200, concerning proceedings for contempt of court for violation of a court order.

(k) Court Access to Written Report

(1) Generally

Except as otherwise provided by this Rule, the court may receive access to a

report by an individual appointed or approved by the court to perform an assessment only if the report has been admitted into evidence at a hearing or trial in the case.

(2) Advance Access to Report by Stipulation of the Parties

The parties may agree that the court may receive and read the assessor's report in advance of the hearing or trial.

(3) Access to Report by Settlement Judge

A judge conducting a settlement conference shall have access to the assessor's report.

(l) Discovery

(1) Generally

Except as provided in this section, an individual who performs an assessment under this Rule is subject to the Maryland Rules applicable to discovery in civil actions.

(2) Deposition of Court-paid Assessor

Unless leave of court is obtained, any deposition of an assessor who is a court employee or is working under contract for the court and paid by the court shall: (A) be held at the courthouse where the action is pending or other court-approved location; (B) take place after the date on which an oral or written report is presented to the parties; and (C) not exceed two hours, with the time to be divided equally between the parties.

(m) Testimony and Report of Assessor at Hearing or Trial

(1) Admission of Report into Evidence Without Presence of Assessor

Subject to objections based other than on the presence or absence of the assessor, the court may admit an assessor's report into evidence without the presence of

the assessor. If the court does so, a party may call the assessor for cross-examination, provided the assessor has been subpoenaed to testify no less than ten days before the hearing or trial.

(2) Court or Party May Call Assessor as Witness

Nothing in subsection (m)(1) of this Rule precludes the court or a party from calling the assessor to testify as a witness at a hearing or trial. A party requesting the presence of the assessor at a hearing or trial shall subpoena the assessor no less than ten days before the hearing or trial.

(n) Fees

(1) Fee Schedules

Subject to the approval of the Chief Judge of the Court of Appeals, the county administrative judge of each circuit court shall develop and adopt maximum fee schedules for custody evaluations. In developing the fee schedules, the county administrative judge shall take into account the availability of qualified individuals willing to provide custody evaluation services and the ability of litigants to pay for those services. A custody evaluator appointed by the court may not charge or accept a fee for custody evaluation services in that action in excess of the fee allowed by the applicable schedule. Violation of this subsection shall be cause for removal from all lists maintained pursuant to subsection (e)(1) of this Rule.

(2) Allocation of Fees and Expenses

As permitted by law, the court may order the parties or a party to pay the reasonable and necessary fees and expenses incurred by an individual appointed by the court to perform an assessment in the case. The court may fairly allocate the reasonable and necessary fees of the assessment between or among the parties. In the event of the removal or resignation of an assessor, the

court may consider the extent to which any fees already paid to the assessor should be returned.

Source: This Rule is new.

Judge Weatherly explained that Rule 9-205.3 applies to custody and visitation assessments. These include home studies or psychological evaluations that the circuit court orders to assist the court in the myriad of issues that come up in custody cases. Judge Weatherly cautioned that the Committee should recognize that in more and more of those cases, one or both parties are unrepresented. It is sometimes a lifeline to the court to have this independent view that the assessment provides, particularly when there are allegations that conditions at home or parenting abilities put a child at risk. The drafters of Rule 9-205.3 had some prior experience in drafting Rules pertaining to mediators and the qualifications to be a mediator and Rules pertaining to best interest attorneys, including what their qualifications should be, what their representation should be, and how itemized their activities should be.

Judge Weatherly commented that another important aspect of these custody and visitation assessments are the reports made by the evaluators. Each evaluator had been doing what he or she thought was right, but there had been no uniformity as to whether the evaluators were available to the attorneys and to the parties, whether the parties could get a copy of the reports or only read them and then be required to give them back, and

whether the reports were available the day of trial or ahead of time.

Judge Weatherly commented that a group of consultants headed by Judge Deborah Eyler had looked at this and were taken aback by the variety of ways this issue was handled throughout the State. Much of this is dependent on finances. Some jurisdictions have more money; some parties have more money. Those parties are able to hire well-known psychologists, whose fees are high, to do lengthy, costly custody evaluations. Judge Weatherly noted that her concern had been the problem of the low-end evaluations, the courts who were getting by at the smallest expense to the parties but making sure that the evaluations were available. Then *Sumpter v. Sumpter,* 427 Md. 668 (2012), which addressed the availability of the reports and how the court should handle them, was decided. After looking over and discussing Rule 9-205.3, the Family Law Committee has recommended the Rule.

Judge Weatherly said that Rule 9-205.3 starts out by defining what the various evaluations are and what the evaluators' qualifications should be. It had come to the attention of the Subcommittee that some counties have evaluators who had been doing these home studies for a long period of time. The courts have a great deal of confidence in these individuals, but they would not otherwise meet the qualifications set out in the Rule. The drafters had considered this issue for a long time, because they felt strongly that there should be minimal qualifications. Now a "grandfather" clause has been included in

subsection (d)(3) to allow Anne Arundel and Frederick Counties to employ evaluators who have not obtained the necessary education, but in whom the court has developed a great deal of confidence. Ultimately, all of the people doing these assessments would have to have qualifications and training and then additional ongoing training required by the various licensing authorities.

The Chair said that he thought that the four people who needed to be "grandfathered" in were actually employees of the court. Subsection (d)(3) does not apply to just anyone. Judge Eyler agreed, noting that Anne Arundel County had three people, and Frederick had one. This is why the drafters chose the five-year period for the court employees who had performed custody evaluations on a regular basis to be "grandfathered" in. All of these employees had been doing this for at least five years. Judge Weatherly added that the two courts were very happy with the work that these particular evaluations had been doing.

Judge Weatherly pointed out that subsection (e)(2) of Rule 9-205.3 provides that the parties can still select their own psychologist, psychiatrist, or licensed social worker as long as the person meets the qualifications. In addition, subsection (e)(1) provides that the family support services coordinator for the court should maintain a list of qualified custody evaluators. Judge Weatherly said that in her county, there are some very experienced and highly sensitive custody evaluators. The drafters of Rule 9-205.3 did not want to require that the parties have to use the list of evaluators, regardless of the case.

Custody cases are too important for that.

Judge Eyler remarked that a recent minor change had been made to Rule 9-205.3 based on a comment from the Honorable Kathleen G. Cox, of the Circuit Court for Baltimore County. Some counties use only custody evaluators who are court employees, which is the situation in Baltimore County. Judge Cox did not want her county to be required to maintain a list. The Rule has been changed so that if judges appoint only their court employees as evaluators, they do not have to maintain a list of evaluators.

Mr. Patterson inquired whether the evaluations are done only in divorce cases. Judge Weatherly answered negatively, noting that in many families, the parents have never married. Rule 9-205.3 does not refer to evaluations in adoption cases, which are under a separate statute. Mr. Patterson asked how this impacts the counties that have active Court Appointed Special Volunteers ("CASA") programs. These volunteers are appointed to act as advocates for children in abuse and neglect cases. Judge Weatherly replied that the evaluators subject to Rule 9-205.3 would not be used in Child in Need of Assistance ("CINA") cases.

Mr. Patterson questioned whether the Rule provides that it does not apply in CINA cases. Judge Eyler responded that section (a) of Rule 9-205.3 states that it "applies to the appointment or approval by a court of a person to perform an assessment in an action under this Chapter...". The Chapter applies to divorce, annulment, alimony, child support, and child custody cases. Judge Weatherly commented that the other area where evaluation

might come up is if someone asks for one in a domestic violence case, but the timing of those cases is not appropriate for an evaluation. In domestic violence cases, it was not intended that there be a two-month delay to obtain a custody evaluation or home study.

Judge Weatherly noted that section (f) describes a custody evaluation. There are different types of home studies, which are driven by the need of the court and the number of employees. Not everyone can afford the fanciest home study. The drafters did not want to mandate how elaborate the study should be, because the funding is not there for an elaborate study in every case. The drafters did try to articulate what basically should be included in a custody evaluation. Some additional elements often get in. Sometimes there are custody evaluations and sometimes home studies, and the two can be different.

Judge Eyler pointed out another change that was recently made. One of the types of assessments is a mental health assessment. Subsection (i)(3) of Rule 9-205.3 had previously referred to a "mental health care provider." This term is not defined anywhere and is amorphous. This has been changed to refer to either a "psychiatrist" or a "psychologist," who are the only health care providers qualified to perform these kind of studies. They are under the optional portions of the custody evaluation. If the custody evaluator is going to perform these mental health assessments and there is going to be a charge for them, the parties must have an opportunity to object.

Mr. Marcus said that he had a question about subsection (d)(1)(D) of Rule 9-205.3, which read: "a social worker - clinical licensed in any State." Apparently, four different licenses apply to social workers in Maryland. He suggested that the word "certified" be included. Code, Health Occupations Article, §19-101 (d), which defines social work licenses, refers to "licensed bachelor social worker," "licensed certified social worker," "licensed certified social worker - clinical," and "licensed graduate social worker." The word "certified" appears in two of the categories of section (d) of Code, Health Occupations Article, §19-101. Adding the word "certified" to subsection (d)(1)(D) of Rule 9-205.3 would be consistent with the statute.

Judge Eyler asked whether subsection (d)(1)(D) would read: "social worker - clinical - certified." Would it read "certified and licensed?" Mr. Marcus said that he had been involved in a case which questioned whether a person was a licensed clinical social worker or had a masters degree in social work and what the differences were. Judge Eyler noted that the Rule refers to a "licensed certified social worker - clinical." It should read "a licensed certified social worker." Mr. Marcus agreed. He remarked that if Rule 9-205.3 was intended to track the definitions, it would be a good addition, so it could not be argued that any kind of social worker was intended.

The Chair asked whether those distinctions apply in other States, also. The language of subsection (d)(1)(D) is "clinical

licensed in any State." Mr. Marcus replied that as far as he knew, there are different designations that are given to social workers in Maryland. He believed that this nomenclature is recognized across the board. He did not know whether the different types of social workers in Code, Health Occupations Article, §19-101 are the same in other jurisdictions.

Judge Weatherly explained that the reason that the reference in subsection (d)(1)(D) was to a social worker "licensed in any State" was because it is not unusual to have a home study where one of the parties lives in another State. The study can be bifurcated. An evaluation is done in Maryland, while a person in Pennsylvania does the study there. The Chair suggested that the language in the Maryland statute, which is "licensed certified social worker - clinical" could be used, and the following language could be added: "or an equivalent license in any other State."

Judge Eyler noted that this language was in an earlier draft. Mr. Marcus' point was that the mental health care worker has to be equivalent to a certified licensed social worker in Maryland. It is not known if there is a certification requirement in other States. Ms. Libber, an Assistant Reporter, remarked that Pennsylvania has such a requirement. Judge Weatherly said that besides Maryland's neighboring States, the home study could be done in a State such as Texas. The umbrella should be wide enough to be able to accommodate other States, but there should be professional standards in licensing.

The Chair noted that he had seen the concept of "or an equivalent" license elsewhere. Two examples are Code, Health Occupations Article, §14-5F-01, referring to the licensing of naturopathic doctors, and Code, Health Occupations Article, §4-303, referring to the licensing of dentists. A decision can be made as to whether the license is equivalent or not. Judge Weatherly said that she did not have an objection to that, but where the home study cannot be controlled, one-half of a home study would not suffice. The Chair commented that the Style Subcommittee could figure out how to word this.

Mr. Marcus inquired whether the word "certified" would be added to subsection (d)(1)(D). Judge Eyler answered that the word would be added. She noted that the concept included in subsection (d)(1)(D) is that someone in another State, who has the equivalent licensing as a social worker and could qualify as a custody evaluator, would be included in the list of individuals eligible to be evaluators.

Judge Weatherly drew the Committee's attention to section (i), which pertained to the reports of the assessor. The reports are done in several ways. Many of the counties do a written report. In some counties, the assessor does an oral report that is tied to a settlement conference. The parties are able to come in and hear the oral report of the assessor. If the case does not settle, the parties can obtain a transcript of the on-the-record recording. Mr. Dunn asked if the settlement conference is on the record. Judge Weatherly answered that the settlement

conference is not, but the report of the assessor is.

Judge Eyler commented that in some jurisdictions, such as Montgomery and Harford Counties, there is usually a hearing where a magistrate presides. Judge Eaves added that a magistrate presides over that hearing, which is recorded, and then if anyone would like to file exceptions, he or she can order a transcript of the hearing. If the case does not settle at a settlement conference, it goes to the hearing before a magistrate. This is where the oral report is taped. There are rules for requesting a transcript.

The Chair said that an issue had been raised, which may have been suggested by one of the administrative judges. This was the fact that the counties do not have the funds to pay for this transcript. The parties should not have to pay for it. The Chair added that he had thought the resolution was that either the court would supply a transcript or direct the evaluator to prepare a written report. Judge Weatherly pointed out that this is variable. In Prince George's County, written reports are done. The evaluator does not come in. It is a question of cost. If the matter gets resolved, no transcript is needed, and it is less cost to the parties. The parties can get an advance report on what the findings were.

Judge Eyler noted that the way Rule 9-205.3 is written, it has to be one way or the other. There will be something in writing. Ms. Kratovil-Lavelle, the Director of the Department of Family Administration of the Administrative Office of the Courts,

had just informed Judge Eyler that there are grant funds that can pay for the transcripts. In the jurisdictions that have a hearing after the settlement conference, when the parties ask for a transcript, grant money will pay for them.

The Chair asked Ms. Kratovil-Lavelle if there was enough money to be able to do this. Once Rule 9-205.3 takes effect, there will be custody evaluations in many more cases than there are now. The evaluations are tied to settlement conferences, and there may be many more of them. Ms. Kratovil-Lavelle responded that grant funds are currently being used to pay for transcripts for people who cannot afford them. It is this way in Montgomery County. The funds for any county who is using them have not been exhausted. She said that she would anticipate that more people would apply for waivers. So far it has not been a problem. She and her colleagues are anticipating that funding will be available.

The Chair asked if this would only be for people who are indigent and cannot afford a transcript. He had thought that anyone could get a free transcript. People should not have to pay for a transcript when the evaluator is getting paid to do the work. Judge Eyler said that her understanding was that this is not based on indigency. Ms. Kratovil-Lavelle added that the jurisdictional grant money would cover the funding of the transcripts.

The Reporter commented that the way Rule 9-205.3 is written, the evaluator can always do the written report, and the

jurisdiction would not have to pay for the transcript. The Chair noted that this happens only if the case does not settle. He asked about the contents of the transcript. Would it just be a transcript of the remarks of the evaluator, or would it be a transcript of the entire conference? Judge Eyler replied that it is only the report of the evaluator, because the conference would take place later. The Chair remarked that he had thought that this was part of the settlement conference. Judge Weatherly said that it is this way in Frederick County. Ms. Day confirmed this, but she explained that if the case does not settle, the evaluator prepares the report. Transcripts are not used. Some jurisdictions handle this as Montgomery County does. Everyone else gets the written reports from the evaluators.

Judge Eyler pointed out that nothing in Rule 9-205.3 would prevent the evaluator from writing a report, even though the report had originally been made orally on the record. The Chair commented that it would be a fallback if the court is not going to provide a free transcript; the alternative is to direct the evaluator to prepare a written report. Judge Weatherly said that it can be done that way, or written reports can be done for everyone throughout the State.

Judge Pierson suggested that the last sentence of subsection (i)(1)(A) should expressly provide that the court may order a written report. It could read: "If custody and access have not been resolved at the conference and no written report has been provided, a transcript of the report shall be provided to the

parties by the court free of charge, or the court may order a written report." The Chair suggested that the sentence should read: "If custody and access have not been resolved at the conference, and no written report has been provided, either a transcript of the report shall be provided to the parties by the court free of charge, or the court shall direct the custody evaluator to prepare a written report." By consensus, the Committee approved the Chair's language.

Judge Weatherly commented that an issue in *Sumpter* was when the written report is going to be available. Subsection (i)(1)(B) of Rule 9-205.3 provides that the report shall be furnished to the parties at least 30 days before the scheduled trial date or hearing (some of these are modification hearings) at which the evaluation may be offered or considered. Her notes from the Subcommittee meetings indicated that it was also meant to be included at settlement conferences. The report needs to be available to the parties. It does not have to be ready 30 days before the settlement conference, but it needs to be available at some point before it. In Prince George's County, the settlement conference is about 45 days before the trial date. Under subsection (i)(1)(B), the parties would not have the report in time.

The Reporter pointed out that the court can shorten or extend the time. Judge Weatherly responded that in her county, this would be put in the scheduling orders. The Reporter remarked that it is difficult to put in the date of the

settlement conference, because it is not known when the various jurisdictions will be holding them. Judge Weatherly commented that the last sentence of subsection (i)(1)(B) indicates that the report needs to be available. In her county, it would be available at least five days before the trial or hearing.

The Reporter noted that in the order appointing the assessor, language can be added to the effect that the report is needed by a certain date. Ms. Harris asked about the 15-day time period before the scheduled trial or hearing that is referred to in the last sentence of subsection (i)(1)(B). Judge Weatherly answered that this is because the parties are given an opportunity to subpoena the assessor if a party would like the assessor to be at the trial or hearing.

The Chair said that after the Subcommittee meeting, Judge Cox had given him a report from the Domestic Law Committee that contained a number of recommendations. One of them involved a Rule that would set some uniform standards for emergency situations in domestic cases. It could be situations in which there is an immediate need for action. It could be that the emergency hearing is for a change in custody. Work on this issue has not yet been started. The Chair had just found about this recently. To the extent that custody is one of those issues, there would not be time for an evaluation.

Judge Eyler remarked that she was on that Committee. Some proposals had been made by the Honorable Cynthia Callahan, of the Circuit Court for Montgomery County, pertaining to expedited

emergency hearings. The Committee will be coming up with some recommendations. Judge Weatherly commented that the period of time set out in Rule 9-205.3 is not meant for that kind of emergency situation.

Judge Weatherly told the Committee that the written reports referred to in subsection (i)(1)(B) of Rule 9-205.3 will be available to the parties in advance. This applies to unrepresented parties as well. There are stories of people who disseminated the reports to many others. Often the reports contain information about various mental illnesses of the parents or of the child. This was a difficult hurdle for the drafters of Rule 9-205.3 to overcome. However, the parties need to see the report to plan their case strategy. They may wish to employ their own expert.

Judge Weatherly said that section (j) provides that the reports are not to be disseminated beyond the purposes of the hearing. Everyone, whether represented or not, needs to be able to take the evaluator's report to an expert or to someone with whom the party can speak to counter allegations in the report. Getting the report 15 minutes before the trial would not be sufficient time to do this.

Judge Weatherly commented that the court's access to the written reports is also key. The court may want the expert to be present at the trial or hearing. The costs for experts can be huge. In drafting the Rule, it was important to balance the ability to cross-examine the expert with making the reports

available for the benefit of the court. Judge Eyler noted that the provisions relating to court access had been discussed at length at the Rules Committee meeting in October, 2014. The revisions in Rule 9-205.3 track the decisions made by the Committee.

Judge Weatherly pointed out that one of the main changes in the current revised Rule is that subsection (k)(1) provides that the report can be considered by the court without the assessor being present but only if the report is admitted into evidence at a hearing or a trial. The parties may agree that the court may receive and read the report in advance of the hearing or trial. The reports can be made a part of the court proceeding. The judge may do this early in the court proceeding and then tell the parties they can stipulate to them being admitted. If the case does not settle, it might be something that can be put on the list to address. It can be helpful to the court. Otherwise, the court could call the case but would have to take time out to read the report. This is an important part of Rule 9-205.3.

Ms. Harris referred to subsection (k)(3) of Rule 9-205.3 and asked why this provision refers only to a judge conducting a settlement conference. Judge Eyler said that the language of subsection (k)(3) could be: "A judge or magistrate conducting a settlement conference ...". Judge Weatherly added that magistrates around the State are conducting settlement conferences, so this is a good addition. By consensus, the Committee approved the addition of this language to subsection

(k)(3) of Rule 9-205.3.

Judge Weatherly said that discovery is available pursuant to section (l) of Rule 9-205.3, but some limits have been placed on it. Depositions of assessors who are court employees or who are working for the court under contract are to be held at the courthouse and may not exceed two hours. This minimizes the amount of time the court employees have to spend on the case. Fees are addressed in section (n). The private assessors will set their own charges. Subsection (n)(1) provides that the county administrative judge of each circuit court shall develop and adopt maximum fee schedules. It will be known in advance what the assessors on the court's list will charge. In Prince George's County, the court pays the fees for those parties who are indigent. Subsection (n)(2) addresses the allocation of fees and expenses.

Judge Pierson asked whether there are some counties in which the court uses only a court employee as an assessor. Judge Weatherly replied affirmatively. Judge Pierson inquired whether, in those counties, the administrative judge should not be required to promulgate the fee schedules. This exception is similar to the one in subsection (e)(1) of Rule 9-205.3. That provision has the language: "If the circuit court for a county appoints custody evaluators who are not court employees...". The same structure could be used for subsection (n)(1). The Chair said that language similar to that in subsection (e)(1) could be added, or the following language could be added to the

first sentence of subsection (n)(1) after the word "evaluations": "to be performed other than by court employees." Judge Pierson explained that his point was that if a county is never going to have evaluators who are not court employees, a fee schedule does not need to be promulgated.

Judge Weatherly commented that Prince George's County has some in-house employees who charge a certain amount for evaluations. Subsection (n)(1) cannot simply apply to non-employees. The issue is that if the evaluator does not charge for the evaluation, no fee schedule is necessary. By consensus, the Committee agreed that language would be added to subsection (n)(1) to the effect that it would apply to custody evaluations to be performed by court employees other than those performed free of charge.

Judge Weatherly noted that with the additional changes suggested at today's meeting, Rule 9-205.3 is the recommendation of the Family and Domestic Subcommittee. Judge Eyler commented that she would be happy to answer any questions. The Chair told the Committee that since the Rule is the recommendation of the Subcommittee, no motion was necessary to approve it. It would take a motion to disapprove the Rule or to amend it. The Rule needs some restyling. No motions were forthcoming, so the Chair stated that the Rule was approved, including the amendments made today and subject to restyling.

Judge Weatherly said that she wanted to thank the Chair, the Reporter, the staff at the Rules Committee, and all of the people

that she had had the pleasure of serving with on the Committee. She remarked that she had done a great amount of work with bar associations, boards, and committees, and she had never done anything that was as interesting as the work at the Rules Committee. Working with the Committee is so important to the practice of law. Judge Weatherly added that she was very impressed by what is accomplished by the Committee, and she was particularly impressed by the Chair, who is so well-versed. The Chair told Judge Weatherly that she would be missed.

Agenda Item 2. Reconsideration of proposed amendments to Rule 1-501 (Magistrate) and conforming amendments to other Rules

The Chair presented Rules 1-501, Magistrate; 1-325, Filing Fees and Costs - Indigency; 2-504.1, Scheduling Conference; 2-510, Subpoenas; 2-541, Magistrates; 2-603, Costs; 9-208, Referral of Matters to Magistrates; 9-209, Testimony; 11-110, Hearings - Generally; 11-111, Magistrates; 11-114, Adjudicatory Hearing; 11-115, Disposition Hearing; 14-207.1, Court Screening; 15-206, Constructive Civil Contempt; 15-207, Constructive Contempt; Further Proceedings; 16-202, Assignment of Actions for Trial. 16-306, Filing and Removal of Papers; 16-814, Maryland Code of Conduct for Judicial Appointees; 16-816, Financial Disclosure Statement - Judicial Appointees; and 17-206, Qualifications of Court-designated ADR Practitioners other than Mediators, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 500 - FAMILY MAGISTRATES

AMEND Rule 1-501 to change the title of the Rule and to conform it to Chapter ___, Laws of 2015 (HB 346), as follows:

Rule 1-501. ~~FAMILY~~ MAGISTRATE

(a) Designation

~~The Administrative Judge of a county shall designate as "family magistrates" for that county the masters for juvenile causes and masters in chancery assigned to hear actions and matters in the categories listed in Rule 16-204 (b). An order designating a family magistrate shall state whether the individual is to perform the functions of a master in chancery, a master for juvenile causes, or both.~~

An individual who, as of September 30, 2015, was serving as a master or family magistrate shall be designated a magistrate on October 1, 2015. The powers, duties, salary, benefits, and pension of the individual are not affected by the individual's designation as a magistrate. In the discretion of the appointing court, a magistrate assigned to hear juvenile or family law matters may be referred to as a family magistrate.

Committee note: A descriptive title, such as family magistrate, may be used to indicate the subject matter area to which the magistrate is assigned.

~~(b) Effect of Designation~~

~~The powers, duties, salary, benefits, and pension of a master are not affected by the individual's designation as a family magistrate. A master serving as a family magistrate shall comply with Rule 16-814,~~

~~Maryland Code of Conduct for Judicial Appointees, and is required to file a financial disclosure statement in accordance with Rule 16-816.~~

~~(c)~~ (b) Rules of Construction

Rules and statutes in effect as of September 30, 2015 that refer to a master in chancery, master for juvenile causes, family magistrate, or master apply to a ~~family~~ magistrate, as appropriate. Statutes and provisions in the Constitution of Maryland in effect as of September 30, 2015 that refer to a magistrate shall not be construed as referring to a ~~family~~ magistrate within the meaning of this Rule.

~~Cross reference: For references to "master" see Code, Business, Occupations & Professions Article, §10-603; Code, Courts Article, §§2-102, 2-501, 3-8A-04, 3-807, 3-1802; Code, Family Law Article, §1-203; Code, Land Use Article, §4-402; Code, State Government Article, §19-102; Code, State Personnel and Pensions Article, §§21-307, 21-309, 23-201, 27-201, 27-304, and 27-402; and Rules 1-325, 2-504.1, 2-510, 2-541, 2-603, 9-208, 9-209, 11-110, 11-111, 11-114, 11-115, 14-207.1, 15-206, 15-207, 16-202, 16-306, 16-814, 16-816, and 17-206. For references to "magistrate," see Maryland Constitution, §41-I; Code, Courts Article, §2-607; Code, Criminal Procedure Article, §9-103, Code, Health-General Article, §§10-1301 and 10-1303; Code, Natural Resources Article, §10-1201; and Code, State Government Article, §§16-104 and 16-105.~~

Source: This Rule is new.

Rule 1-501 was accompanied by the following Reporter's note.

At the request of the Judicial Cabinet, Rule 1-501 was adopted by Rules Order of March 2, 2015, effective March 15, 2015. The Rule retitled certain masters as family magistrates but, in accordance with the intent of the Cabinet, left undisturbed the remaining masters who did not handle family

matters. Chapter ___ (HB 346) of the 2015 session of the General Assembly was enacted to "alter[ ]" all references from master to magistrate for circuit court and juvenile court masters.
Proposed amendments to Rule 1-501 are intended to conform the Rule to Chapter ___.

The Rules Committee also proposes amendments to Rules 1-325, 2-504.1, 2-510, 2-541, 2-603, 9-208, 9-209, 11-110, 11-111, 11-114, 11-115, 14-207.1, 15-206, 15-207, 16-202, 16-306, 16-814, 16-816, and 17-206 to conform them to Chapter ____.

The amendments to Rule 1-501 and other Rules are not intended to change the law recognizing the limited authority of masters through altering the references to them to "magistrates." A substantial body law governing masters in the Judiciary has developed under the Constitution of Maryland, common law, statutes, and Rules. A "master is a ministerial officer, and not a judicial officer.... [U]nder the Maryland Constitution a master is entrusted with no part of the judicial power of this State."). *Matter of Anderson,* 272 Md. 85, 106 (1974). A master's recommendations are not binding on the parties unless and until the trial judge adopts them. *In re Kaela C.*, 394 Md. 432, 473 (2006). A "master's status as an 'officer of the court' does not confer judicial powers upon the master, such as the authority to hold someone in contempt, to sign a warrant, or to order a police officer to make an arrest." *State v. Wiegmann*, 350 Md. 585, 594-95 (1998). Accordingly, "[b]ecause a master is not a judicial officer, and performs only ministerial functions, a construction of the rules that recognizes an implied power to order an arrest would run afoul of constitutional precepts." *Id.* at 595 (1998). Furthermore, masters should not wear robes or sit on the bench in a judge's courtroom, lest there be confusion on the limited authority of the master. *Id.* at 599-600. A master is an "officer of the court," but not a "judicial officer." *Id.* at 594-95.

The term "magistrate" has several different uses in other judicial systems across the country. As the term "magistrate" is used in the Maryland Rules, however, those foreign examples are not instructive.

References to "Master" in the Maryland Rules
(April 2015)

Rule 1-325. Filing fees and costs - Indigency. [including amendments effective July 1, 2015]

...

Committee note: "Prepaid costs" may include a fee to file an initial complaint or a motion to reopen a case, a fee for entry of the appearance of an attorney, and any prepaid compensation, fee, or expense of a **~~master~~** **magistrate or** examiner**~~, or family magistrate~~**. See Rules 1-501, 2-541, 2-542, 2-603, and 9-208.

Rule 2-504.1. Scheduling Conference.

. . .

Committee note: Examples of matters that may be considered at a scheduling conference when discovery of electronically stored information is expected, include:

(1) its identification and retention;

(2) the form of production, such as PDF, TIFF, or JPEG files, or native form, for example, Microsoft Word, Excel, etc.;

(3) the manner of production, such as CD-ROM;

(4) any production of indices;

(5) any electronic numbering of documents and information;

(6) apportionment of costs for production of electronically stored information not reasonably accessible because of undue burden or cost;

(7) a process by which the parties may assert claims of privilege or of protection

after production; and

(8) whether the parties agree to refer discovery disputes to a ~~**master**~~ **magistrate** or Special ~~**Master**~~ **Magistrate**.

Rule 2-510. Subpoenas.

(a) Required, Permissive, and Non-permissive Use

(1) A subpoena is required:

(A) to compel the person to whom it is directed to attend, give testimony, and produce designated documents, electronically stored information, or tangible things at a court proceeding, including proceedings before a ~~**master**~~ **magistrate**, auditor, or examiner; and

(B) to compel a nonparty to attend, give testimony, and produce and permit inspection, copying, testing, or sampling of designated documents, electronically stored information, or tangible things at a deposition.

. . .

(e) Objection to subpoena for court proceedings.- On motion of a person served with a subpoena to attend a court proceeding (including a proceeding before a ~~**master**~~ **magistrate**, auditor, or examiner) or a person named or depicted in an item specified in the subpoena filed promptly and, whenever practicable, at or before the time specified in the subpoena for compliance, the court may enter an order that justice requires to protect the person from annoyance, embarrassment, oppression, or undue burden or cost, including one or more of the following:

. . .

Rule 2-541. ~~Masters~~ Magistrates.

(a) Appointment - Compensation.-

(1) Standing ~~**master**~~ **magistrate**.- A majority of the judges of the circuit court of a county may appoint a full time or part time standing master and shall prescribe the compensation, fees, and costs of the ~~**master**~~ **magistrate**. ~~**[No person may serve as a**~~

~~**standing master upon reaching the age of 70 years.**]~~

(2) Special ~~**master**~~ **magistrate**.- The court may appoint a special ~~**master**~~ **magistrate** for a particular action and shall prescribe the compensation, fees, and costs of the special ~~**master**~~ **magistrate** and assess them among the parties. The order of appointment may specify or limit the powers of a special ~~**master**~~ **magistrate** and may contain special directions.

(3) Officer of the court.- A ~~**master**~~ **magistrate** serves at the pleasure of the appointing court and is an officer of the court in which the referred matter is pending.

(b) Referral of cases.-

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

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

(c) Powers.- Subject to the provisions of any order of reference, a ~~**master**~~ **magistrate** has the power to regulate all proceedings in the hearing, including the powers to:

. . .

(d) Hearing.-

(1) Notice.- The ~~**master**~~ **magistrate** shall fix the time and place for the hearing and shall send written notice to all parties.

. . .

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

(e) Report.-

(1) When filed.- The ~~**master**~~ **magistrate** shall notify each party of the proposed recommendation, either orally at the conclusion of the hearing or thereafter by written notice served pursuant to Rule 1-321.

Within five days from an oral notice or from service of a written notice, a party intending to file exceptions shall file a notice of intent to do so and within that time shall deliver a copy to the master. If the court has directed the ~~**master**~~ **magistrate** to file a report or if a notice of intent to file exceptions is filed, the ~~**master**~~ **magistrate** shall file a written report with the recommendation. Otherwise, only the recommendation need be filed. The report shall be filed within 30 days after the notice of intent to file exceptions is filed or within such other time as the court directs. The failure to file and deliver a timely notice is a waiver of the right to file exceptions.

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

(3) Service.- The ~~**master**~~ **magistrate** shall serve a copy of the recommendation and any written report on each party pursuant to Rule 1-321.

(f) Entry of order.-

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

(2) If exceptions are not timely filed, the court may direct the entry of the order or judgment as recommended by the ~~**master**~~ **magistrate**.

(g) Exceptions.-

(1) How taken.- Within ten days after the filing of the ~~**master's**~~ **magistrate's** written report, a party may file exceptions with the clerk. Within that period or within three days after service of the first exceptions, whichever is later, any other party may file exceptions. Exceptions shall be in writing

and shall set forth the asserted error with particularity. Any matter not specifically set forth in the exceptions is waived unless the court finds that justice requires otherwise.

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

(h) Hearing on exceptions.- The court may decide exceptions without a hearing, unless a hearing is requested with the exceptions or by an opposing party within five days after service of the exceptions. The exceptions shall be decided on the evidence presented to the ~~**master**~~ **magistrate** unless: (1) the excepting party sets forth with particularity the additional evidence to be offered and the reasons why the evidence was not offered before the ~~**master**~~ **magistrate**, and (2) the court determines that the additional evidence should be considered. If additional evidence is to be considered, the court may remand the matter to the ~~**master**~~ **magistrate** to hear the additional evidence and to make appropriate findings or conclusions, or the court may hear and consider the additional evidence or conduct a de novo hearing.

(i) Costs.- Payment of the compensation, fees, and costs of a ~~**master**~~ **magistrate** may be compelled by order of court. The costs of any transcript may be included in the costs of the action and assessed among the parties as

the court may direct.

Rule 2-603. Costs.

. . .

(e) Waiver of Costs in Domestic Relations Cases - Indigency

In an action under Title 9, Chapter 200 of these Rules, the court shall grant a final waiver of open costs, including any compensation, fees, and costs of a ~~**master**~~ **magistrate** or examiner if the court finds that the party against whom the costs are assessed is unable to pay them by reason of poverty. The party may seek the waiver at the conclusion of the case by filing a request for a final waiver of open costs, together with (1) an affidavit substantially in the form prescribed by Rule 1-325 (e)(1)(A), or (2) if the party was granted a waiver of prepayment of prepaid costs by court order pursuant to Rule 1-325 (e) and remains unable to pay the costs, an affidavit that recites the existence of the prior waiver and the party's continued inability to pay.

. . .

Rule 9-208. Referral of matters to ~~masters~~ magistrates.

(a) Referral.-

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

. . .

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

Committee note: Examples of matters that a court may include in its case management plan for referral to a ~~**master**~~ **magistrate** under subsection (a) (1) (J) of this Rule include

scheduling conferences, settlement conferences, uncontested matters in addition to the matters listed in subsection (a) (1) (A) of this Rule, and the application of methods of alternative dispute resolution.

(2) By order on agreement of the parties.- By agreement of the parties, any other matter or issue arising under this Chapter may be referred to the ~~**master**~~ **magistrate** by order of the court.

(b) Powers.- Subject to the provisions of an order referring a matter or issue to a ~~**master**~~ **magistrate**, the ~~**master**~~ **magistrate** has the power to regulate all proceedings in the hearing, including the power to:

. . .

(c) Hearing.-

. . .

(3) Record.- All proceedings before a ~~**master**~~ **magistrate** shall be recorded either stenographically or electronically, unless the making of the record is waived in writing by all parties. A waiver of the making of a record is also a waiver of the right to file exceptions that would require review of the record for their determination.

(d) Contempt proceedings; referral for de novo hearing.- If, at any time during a hearing on a party's alleged constructive civil contempt, the ~~**master**~~ **magistrate** concludes that there are reasonable grounds to believe that the party is in contempt and that incarceration may be an appropriate sanction, the ~~**master**~~ **magistrate** shall (1) set a de novo hearing before a judge of the circuit court, (2) cause the alleged contemnor to be served with a summons to that hearing, and (3) terminate the ~~**master's**~~ **magistrate's** hearing without making a recommendation. If the alleged contemnor is not represented by an attorney, the date of the hearing before the judge shall be at least 20 days after the date of the ~~**master's**~~ **magistrate's** hearing and, before the **master magistrate** terminates the ~~**master's**~~ **magistrate's** hearing, the ~~**master**~~ **magistrate** shall advise the alleged contemnor on the record of the contents of the notice set forth in Rule 15-206 (c) (2).

(e) Findings and recommendations.-

(1) Generally.- Except as otherwise provided in section (d) of this Rule, the **~~master~~ magistrate** shall prepare written recommendations, which shall include a brief statement of the **~~master's~~ magistrate's** findings and shall be accompanied by a proposed order. The **~~master~~ magistrate** shall notify each party of the recommendations, either on the record at the conclusion of the hearing or by written notice served pursuant to Rule 1-321. In a matter referred pursuant to subsection (a) (1) of this Rule, the written notice shall be given within ten days after the conclusion of the hearing. In a matter referred pursuant to subsection (a) (2) of this Rule, the written notice shall be given within 30 days after the conclusion of the hearing. Promptly after notifying the parties, the **~~master~~ magistrate** shall file the recommendations and proposed order with the court.

(2) Supplementary report.- The **~~master~~ magistrate** may issue a supplementary report and recommendations on the **~~master's~~ magistrate's** own initiative before the court enters an order or judgment. A party may file exceptions to new matters contained in the supplementary report and recommendations in accordance with section (f) of this Rule.

(g) Requirements for excepting party.- At the time the exceptions are filed, the excepting party shall do one of the following: (1) order a transcript of so much of the testimony as is necessary to rule on the exceptions, make an agreement for payment to ensure preparation of the transcript, and file a certificate of compliance stating that the transcript has been ordered and the agreement has been made; (2) file a certification that no transcript is necessary to rule on the exceptions; (3) file an agreed statement of facts in lieu of the transcript; or (4) file an affidavit of indigency and motion requesting that the court accept an electronic recording of the proceedings as the transcript. Within ten days after the entry of an order denying a motion under subsection (g) (4) of this section, the excepting party shall comply with subsection (g) (1). The transcript shall be filed

within 30 days after compliance with subsection (g) (1) or within such longer time, not exceeding 60 days after the exceptions are filed, as the **~~master~~ magistrate** may allow. For good cause shown, the court may shorten or extend the time for the filing of the transcript. The excepting party shall serve a copy of the transcript on the other party. The court may dismiss the exceptions of a party who has not complied with this section.

(h) Entry of orders.-

(1) In general.- Except as provided in subsections (2) and (3) of this section,

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

(B) if exceptions are not timely filed, the court may direct the entry of the order or judgment as recommended by the **~~master~~ magistrate**.

(2) Immediate orders.- This subsection does not apply to the entry of orders in contempt proceedings. If a **~~master~~ magistrate** finds that extraordinary circumstances exist and recommends that an order be entered immediately, the court shall review the file and any exhibits and the **~~master's~~ magistrate's** findings and recommendations and shall afford the parties an opportunity for oral argument. The court may accept, reject, or modify the **~~master's~~ magistrate's** recommendations and issue an immediate order. An order entered under this subsection remains subject to a later determination by the court on exceptions.

(3) Contempt orders.-

(A) On recommendation by the **~~master~~ magistrate**.- On the recommendation by the **~~master~~ magistrate** that an individual be found in contempt, the court may hold a hearing and direct the entry of an order at any time. The order may not include a sanction of incarceration.

(B) Following a de novo hearing.- Upon a referral from the **~~master~~ magistrate** pursuant to section (d) of this Rule, the court shall

hold a de novo hearing and enter any appropriate order.

(i) Hearing on exceptions.-

(1) Generally.- The court may decide exceptions without a hearing, unless a request for a hearing is filed with the exceptions or by an opposing party within ten days after service of the exceptions. The exceptions shall be decided on the evidence presented to the master unless: (A) the excepting party sets forth with particularity the additional evidence to be offered and the reasons why the evidence was not offered before the ~~**master**~~ **magistrate**, and (B) the court determines that the additional evidence should be considered. If additional evidence is to be considered, the court may remand the matter to the ~~**master**~~ **magistrate** to hear and consider the additional evidence or conduct a de novo hearing.

. . .

(j) Costs.- The court, by order, may assess among the parties the compensation, fees, and costs of the ~~**master**~~ **magistrate** and of any transcript.

Committee note: Compensation of a ~~**master**~~ **magistrate** paid by the State or a county is not assessed as costs.

. . .

Rule 9-209. Testimony.

A judgment granting a divorce, an annulment, or alimony may be entered only upon testimony in person before an examiner or ~~**master**~~ **magistrate** or in open court. In an uncontested case, testimony shall be taken before an examiner or ~~**master**~~ **magistrate** unless the court directs otherwise. Testimony of a corroborating witness shall be oral unless otherwise ordered by the court for good cause.

Rule 11-110. Hearings - Generally.

a. Before ~~**master**~~ **magistrate** or judge -

Proceedings recorded.- Hearings shall be conducted before a ~~**master**~~ **magistrate** or a judge without a jury. Proceedings shall be recorded by stenographic notes or by electronic, mechanical or other appropriate means.

Rule 11-111. ~~Masters~~ Magistrates.

a. Authority.-

1. Detention or shelter care.- A ~~**master**~~ **magistrate** is authorized to order detention or shelter care in accordance with Rule 11-112 (Detention or Shelter Care) subject to an immediate review by a judge if requested by any party.

2. Other matters.- A ~~**master**~~ **magistrate** is authorized to hear any cases and matters assigned to him by the court, except a hearing on a waiver petition. The findings, conclusions and recommendations of a master do not constitute orders or final action of the court.

b. Report to the court.- Within ten days following the conclusion of a disposition hearing by a ~~**master**~~ **magistrate**, he shall transmit to the judge the entire file in the case, together with a written report of his proposed findings of fact, conclusions of law, recommendations and proposed orders with respect to adjudication and disposition. A copy of his report and proposed order shall be served upon each party as provided by Rule 1-321.

. . .

d. Review by court in absence of exceptions.- In the absence of timely and proper exceptions, the ~~**master's**~~ **magistrate's** proposed findings of fact, conclusions of law and recommendations may be adopted by the court and the proposed or other appropriate orders may be entered based on them. The court may remand the case to the master for further hearing, or may, on its own motion, schedule and conduct a further hearing supplemented by such additional evidence as the court considers relevant and to which the parties raise no objection. Action by the

court under this section shall be taken within two days after the expiration of the time for filing exceptions.

Rule 11-114. Adjudicatory hearing.

. . .

f. Adjudication - Finding - Adjudicatory order.- If the hearing is conducted by a judge, at its conclusion, he shall announce and dictate to the court stenographer or reporter, or prepare and file with the clerk, an adjudicatory order stating the grounds upon which he bases his adjudication. If the hearing is conducted by a ~~**master**~~ **magistrate**, the procedures set forth in Rule 11-111 (~~**Masters**~~ **Magistrates**) shall be followed.

Rule 11-115. Disposition hearing.

. . .

b. Disposition - Judge or ~~**master**~~ **magistrate**.- The disposition made by the court shall be in accordance with Section 3-820 (b) of the Courts Article. If the disposition hearing is conducted by a judge, and his order includes placement of the child outside the home, the judge shall announce in open court and shall prepare and file with the clerk, a statement of the reasons for the placement. If the hearing is conducted by a ~~**master**~~ **magistrate**, the procedures of Rule 11-111 shall be followed. In the interest of justice, the judge or ~~**master**~~ **magistrate** may decline to require strict application of the rules in Title 5, except those relating to the competency of witnesses. A commitment recommended by a ~~**master**~~ **magistrate** is subject to approval by the court in accordance with Rule 11-111, but may be implemented in advance of court approval.

. . .

d. Commitment to Department of Social Services.- In cases in which a child is committed to a local department of social services for placement outside the child's

home, the court, within 18 months after the original placement and periodically thereafter at intervals not greater than 18 months, shall conduct a review hearing to determine whether and under what circumstances the child's commitment to the local department of social services should continue. Considerations pertinent to the determination include whether the child should (1) be returned home, (2) be continued in foster care for a specified period, (3) be placed for adoption, or (4) because of the child's special needs or circumstances, be continued in foster care on a permanent or long-term basis. The hearing shall be conducted as prescribed in Rule 11-110 or, if conducted by a ~~**master**~~ **magistrate**, as prescribed in Rule 11-111, except that the child's presence shall not be required if presence at the hearing is likely to cause serious physical, mental, or emotional harm to the child. . . .

Rule 14-207.1. Court screening.

. . .

(c) Special ~~**masters**~~ **magistrates** or examiners.- The court may designate one or more qualified Maryland lawyers to serve as a part-time special ~~**master**~~ **magistrate** or examiner to screen pleadings and papers under section (a) of this Rule, conduct proceedings under section (b) of this Rule, and make appropriate recommendations to the court. Subject to section (d) of this Rule, the costs and expenses of the special **master magistrate** or examiner may be assessed against one or more of the parties pursuant to Code, Courts Article, § 2-102 (c), Rule 2-541 (i), or Rule 2-542 (i). With his or her consent, the special ~~**master**~~ **magistrate** or examiner may serve on a pro bono basis.

(d) Assessment of costs, expenses, and attorney's fees.- The costs, expenses, and attorney's fees of any proceeding under this Rule, including any costs or expense of a special ~~**master**~~ **magistrate** or examiner under section (c) of this Rule, shall not be

assessed against the borrower or record owner either directly or as an expense of sale, unless the affidavit in question was filed by or on behalf of the borrower or record owner.

Rule 15-206. Constructive civil contempt.

. . .

(c) Content of order or petition.-

. . .

(2) Unless the court finds that a petition for contempt is frivolous on its face, the court shall enter an order providing for (i) a prehearing conference, or (ii) a hearing, or (iii) both. The scheduled hearing date shall allow a reasonable time for the preparation of a defense and may not be less than 20 days after the prehearing conference. An order issued on a petition or on the court's own initiative shall state:

. . .

(B) the time and place at which the alleged contemnor shall appear in person for (i) a prehearing conference, or (ii) a hearing, or (iii) both and, if a hearing is scheduled, whether it is before a ~~**master**~~ **magistrate** pursuant to Rule 9-208 (a) (1) (G) or before a judge; and

Rule 15-207. Constructive contempt; further proceedings.

. . .

(c) Hearing.-

(1) Contempt of appellate court.- Where the alleged contemnor is charged with contempt of an appellate court, that court, in lieu of conducting the hearing itself, may designate a trial judge as a special ~~**master**~~ **magistrate** to take evidence and make recommended findings of fact and conclusions of law, subject to exception by any party and approval of the appellate court.

Rule 16-202. Assignment of actions for trial.

a. Generally.- The County Administrative Judge in each county shall supervise the assignment of actions for trial to achieve the efficient use of available judicial personnel and to bring pending actions to trial and dispose of them as expeditiously as feasible. Procedures instituted in this regard shall be designed to:

. . .

(4) provide for the prompt disposition of uncontested and ex parte matters, including references to an examiner-~~**master**~~ **magistrate**, when appropriate;

Rule 16-306. Filing and removal of papers.

. . .

d. Removal of papers and exhibits.-

1. Court papers and exhibits filed with pleadings.- No paper or exhibit filed with a pleading in any case pending in or decided by the court shall be removed from the clerk's office, except by direction of a judge of the court, and except as authorized by rule or law; provided, however, that an attorney of record, upon signing a receipt, may withdraw any such paper or exhibit for presentation to the court, an auditor, or examiner-~~**master**~~ **magistrate**, and an auditor or examiner-~~**master**~~ **magistrate**, upon signing a receipt, may withdraw such paper or exhibit in connection with the performance of his official duties.

Rule 16-814. Maryland Code of Conduct for Judicial Appointees

(a) Judicial Appointee.- "Judicial appointee" means:

(1) an auditor, examiner, or ~~**master**~~ **magistrate** appointed by a court of this State; and

Committee note: District Court Commissioners, despite the number of hours they may actually be on duty, are regarded as

full-time judicial appointees. Auditors, examiners, and ~~**masters**~~ **magistrates** may fall into several categories.

Under Code, Courts Article, § 2-102, all courts may appoint a ~~**master**~~ **magistrate**, examiner, or auditor in "a specific proceeding." Under Code, Courts Article, § 2-501, the judges of the circuit courts have more general authority to employ ~~**masters**~~ **magistrates**, examiners, and auditors. That authority is extended and made more specific in Rules 2-541 (masters), 2-542 (examiners), and 2-543 (auditors).

Rules 2-541, 2-542, and 2-543 create two categories of ~~**masters**~~ **magistrates**, examiners, and auditors - standing and special. Standing ~~**masters**~~ **magistrates**, examiners, and auditors are employed to deal with whatever cases are referred to them on an on-going basis, but their employment by the court may be full-time or part-time. Special ~~**masters**~~ **magistrates**, examiners, and auditors are appointed "for a particular action," and thus, like appointments made under Courts Article, § 2-102, their service is limited to the particular action or proceeding. During that period of service, however, it is possible that they may work full-time or part-time, as necessary or as directed by the court. A ~~**master**~~ **magistrate**, examiner, or auditor may therefore be standing full-time, standing part-time, special full-time, or special part-time.

Rule 16-816. Financial disclosure statement - Judicial appointees.

a. For purposes of this Rule, judicial appointee means (1) a full- or part-time ~~**master**~~ **magistrate**, (2) a commissioner appointed by a District Administrative Judge with the approval of the Chief Judge of the District Court of Maryland, and (3) an auditor or examiner who is full-time or who earns in any calendar year, by reason of the

judicial appointee's official position, compensation at least equal to the pay provided for the base step of State Pay Grade 16, as in effect on July 1 of that calendar year. If an auditor or examiner has served as such for only a portion of a calendar year, a pro rata determination of compensation shall be applied.

. . .

(b) Exceptions.- Except as otherwise provided by Rule, the Rules in this Title do not apply to:

. . .

(4) a matter referred to a ~~**master**~~ **magistrate**, examiner, auditor, or parenting coordinator pursuant to Rule 2-541, 2-542, 2-543, or 9-205.2.

Rule 17-206. Qualifications of court-designated ADR practitioners other than mediators.

. . .

(b) Judges and ~~**masters**~~ **Magistrates**.- An active or retired judge or a ~~**master**~~ **magistrate** of the court may chair a non-fee-for-service settlement conference.

The Chair told the Committee that they needed to address three items pertaining to Rule 1-501. The Committee had worked on the Rule previously and then sent it to the Court of Appeals, before the 2015 legislature went into session. The former Judicial Council had approved changing the term "master" to the term "magistrate." Some of the Rules had to be changed to implement this officially, although Prince George's County was already using the new terminology. The decision was to amend Rule 1-501 to provide that the fact that "masters" had become "magistrates" made no substantive change.

The Chair noted that the former Judicial Council had limited the change in terminology to those masters who were actually conducting hearings. This did not include a small number of general equity masters who existed in some areas, particularly in Baltimore City. These masters had not been holding hearings. This type of master had been in Baltimore City for about 100 years. Judges would refer matters to the master to act as a kind of super law clerk. These masters had not been included in the name change. Rule 1-501 had excepted them out.

The Chair said that House Bill 346 was introduced at the 2015 legislative session. It provided for the change of terminology from the term "master" to the term "magistrate." It applied to all masters and provided some other changes as well. The bill had passed the House of Delegates, and the Senate Judicial Proceedings Committee had heard it, but nothing had happened with it as of yesterday. There had not been any opposition to it, and the assumption was that it would pass. Many people seemed interested in making this change. The thought was that if it did pass, then the Rules ought to conform to it, so that there would be no inconsistency. The Chair and the Reporter had gone through the Rules, amending those that refer to "masters" by changing the term to the word "magistrates." This is the first issue before the Committee today, and it is the main issue. The purpose of the change is to conform the Rules to House Bill 346.

The Chair remarked that about two weeks ago, the Honorable

Daniel Long, who is the only circuit court judge in Somerset County and also the County Administrative Judge and the Circuit Administrative Judge, had requested a change. There are masters in the First and Second Circuits, who are being paid by the State and who are not attached to any one court. Judge Long was concerned that subsection d. 2, of current Rule 16-101, Administrative Responsibility, provides that the County Administrative Judge controls what the masters do. Judge Long's request was that in those two circuits, wherever there are masters who are appointed not to a court but to a circuit, the Circuit Administrative Judge should be the one to govern their assignment. The Circuit Administrative Judge should be able to move the masters around in the circuit as judicial business requires. Judge Long had requested the change just for those masters who are circuitwide and not attached to any one court. This is the second matter before the Committee. This proposed change did not go through the General Court Administration Subcommittee, so it would take a motion to approve it.

The Chair noted that the third item is substantive. It arises only with respect to the first prong of changing all the rules that contain the word "master." It would require an amendment to Rule 2-541, which is the main rule on masters in the circuit court. Subsection (a)(1) of Rule 2-541 provides an age limit of 70 for someone to serve as a master. Once the master reaches the age of 70, he or she can no longer serve. Rule 2-541 was adopted by the Court of Appeals in 1980. At that time, the

Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 et seq., applied only to people between the ages of 40 and 70. Under the ADEA, States could put an age limit on employment for people who reached the age of 70.

The Chair pointed out that in 1986, Congress amended the ADEA and repealed the cap of 70 years. Under the current federal law with limited exception, no one of any age can be discriminated against on the basis of age. Rule 2-541 seems to be invalid. An opinion of the Attorney General (76 Md. Op. Atty. Gen 81 (1991), a formal opinion signed by then-Attorney General J. Joseph Curran, Jr., states that Rule 2-541 is unenforceable under the 1986 amendments to the ADEA. The general consensus is that the Attorney General opinion is correct. The limit of 70 years of age currently in Rule 2-541 is therefore probably in violation of federal law.

The problem is that some circuit court judges would like to see that limit remain, because it is easier to terminate an aging master/magistrate who is not as capable as he or she once was based on the age limit then to document the real reason for the termination. On the other hand, the Rule is invalid. This needs to be addressed.

The Chair said that because Rule 2-541 would be amended to change the term "master" to the term "magistrate," if the Court adopts that amendment, it would be re-adopting the Rule and thuse ignoring the obvious conflict with ADEA. The thinking is that this is not a good idea. The recommendation is the version of

Rule 2-541 that is in the meeting materials. The sentence in subsection (a)(1) which reads: "No person may serve as a standing master upon reaching the age of 70 years." has been stricken from the Rule. The Chair commented that he had called this to the Committee's attention, because it is not simply an issue of changing the name of masters.

The Chair explained that what was before the Committee was the Subcommittee recommendation to change Rule 1-501 and the conforming amendments to all of the Rules that have the word "master" in them. Rule 2-541 would also be changed to repeal the provision not allowing masters to serve after they become 70 years of age. Since this is the recommendation of the Subcommittee, it would take a motion to amend these Rules.

Judge Pierson inquired whether there would be a separate sentence in Rule 2-541 that addresses the situation in the First and Second Circuits. The Chair answered affirmatively, pointing out that the additional language would state that in any circuit in which there are magistrates not assigned to a particular court, the Circuit Administrative Judge would determine the assignment of those masters. This is a separate item.

The Chair asked for the Committee to consider what the Subcommittee had recommended, which is to change the name of "master" to "magistrate" and to delete the cap of 70 years of age for masters to serve. Mr. Zarbin inquired whether the Judiciary has an opinion on either one of these issues. He noted that Worker's Compensation Commission officials can sit past the age

of 70.

The Chair responded that this matter will have to be decided by the Court of Appeals. The ADEA handles masters and judges differently. The U.S. Supreme Court in *Gregory v. Ashcroft*, 501 U.S. 452, 111 S. Court 2395 (1991) decided that the ADEA does not apply to judges. The opinion of the Attorney General addresses this. The ADEA does not apply to State officials who are elected or appointed to policy-making positions. The Supreme Court held that judges are among that group, so the ADEA does not apply to governors, legislators, judges, or anyone in that kind of position. The Attorney General's opinion analyzed this and said that this age-limiting policy does not apply to masters, because they are not policy-makers but only make recommendations. They are not judicial officers. Whatever happens to the judges as far as the age limit has no effect on the masters.

Mr. Zarbin remarked that he was curious as to whether the Judicial Conference had a view on eliminating the age limit for masters. The Chair inquired whether he meant the Conference of Circuit Judges or the Judicial Conference. Mr. Zarbin answered that either one would suffice. The Chair said that the Judicial Conference had not met in a while, but the reality is that the 70-year limit for masters to serve is unenforceable and invalid under federal law. It has not yet been presented to the Conference of Circuit Judges. The Court of Appeals will weigh in on this issue.

Judge Pierson commented that the memorandum from the

Reporter in the meeting materials stated that the proposed changes to Rule 1-501 are contingent upon the enactment of House Bill 346. The Chair explained that the changes were proposed under the assumption that the bill would pass. The 70-year age limit is a separate issue. The Chair said that he did not know whether the bill had passed. He knew that it had passed the House of Delegates and had gone to the Senate Judicial Proceedings Committee. Ms. Harris commented that it had passed the Senate that morning, but they had amendments to the bill, so it had to go back to the House. The Chair noted that the amendment may have been that the House had forgotten to change one statute.

Judge Pierson remarked that as Rule 1-501 appeared the last time the Judicial Council had looked at it, the change from the term "master" to the term "magistrate" was to be made for family and juvenile masters, but not for masters designated as "civil." The revised Rule covers all masters in accordance with the statute.

The Chair said that if the statute passes, that would be the reason to change the Rules. If the statute does not pass, no conforming amendments to the Rules would have to be made. The question would be whether it is a good idea to make the change. The Reporter pointed out that if the statute does not pass, there is a problem. The way Rule 1-501 was drafted originally to make the change to the term "family magistrate," it tracked through and allowed masters and magistrates to be subject to the Maryland

Rules of Professional Conduct, pensions, etc. If the statute does not pass, and the Committee or others would like to change the term "master" to "magistrate" for all masters, notwithstanding the statute, the terminology could be changed in the Rules, but it is important that this change not interfere with masters' ethical obligations, pensions, etc. Rule 1-501 as originally drafted covers all of these issues, so that pensions, ethics, etc. are folded in and remain unchanged.

Judge Pierson pointed out that the changes to Rule 1-501 are contingent upon the passage of House Bill 346. The Reporter agreed that the way Rule 1-501 appears in the meeting materials is contingent on the passage of the bill. Judge Pierson remarked that if House Bill 346 does not pass, Rule 1-501 would have to be reconsidered. The Reporter agreed, reiterating that she would like to make sure that changing the terminology does not interfere with ethical obligations, pensions, etc.

Judge Pierson noted that there is also the issue that, for whatever reason, the Judicial Council could decide to change the terminology only for family masters and not for the others. At the time that Rule 1-501 was adopted, a committee of the Conference of Circuit Judges pertaining to masters proposed that all masters should be termed "magistrates," but then when the proposal went through the hierarchy of the Judiciary (it may have been the Judicial Council), the suggestion was to change the family and the juvenile master's name to "magistrate" but not to change the name of the other type of master. The Chair responded

that this had been the decision of the former Judicial Council, but it no longer exists.

Ms. Harris added that the idea for the change in terminology had come from the Conference of Circuit Judges and had been considered by the Judicial Cabinet and then by the Judicial Council. Many years ago, the Legislature gave the Judiciary the pin numbers for the masters' positions at that time. As they left, the new masters would come under the Judiciary. Pin numbers were not given to the other general equity masters. The Council and the Cabinet also did not want anyone to think that those masters were the same if the names were all changed to "magistrate," since the general equity masters did not have pin numbers. Some of them were not even termed "master."

The Chair noted that those masters fell into two categories. One category was general equity masters who had been in Baltimore City for many years. When the mortgage foreclosure cases arose, some of the circuit judges were appointing masters to review the documents in those cases to make sure that they were proper. It was never clear whether all of those masters were performing the same duties and what those duties were. The Chair was not sure that any of them had held hearings, but the Chair had been told that some of these masters were calling in the person filing the foreclosure to explain certain aspects of the foreclosure and to produce certain documents. Judge Pierson noted that this was a special master. The Chair remarked that at the beginning, the

only masters who were actually conducting hearings were the juvenile and the family law masters. Now the statute covers them all.

The Chair asked Judge Pierson whether he wanted to make a motion approving the changes to Rule 1-501 and the other Rules which had conforming amendments, subject to the passage of House Bill 346. Judge Pierson replied that this was his understanding of what the Subcommittee's proposal had been. He had just wanted to clarify that this is what the Committee was voting on. If the bill does not pass, the changes to the Rules are not effective. He assumed that someone would then look over the changes to see if they are still appropriate.

Mr. Zarbin told the Committee that he had first researched the amendments to House Bill 346 and had them before him online. The Chair asked what the amendments were. Mr. Zarbin responded that the amendments address special masters and land use. The Senate would like to add in zoning masters. The changes to the bill do not look like they would affect the way the Rules had been drafted. The Reporter noted that these amendments would change the terminology used for a special master, who will be termed a "special magistrate." This would apply in a land use matter where someone is appointed to be a special magistrate.

The Chair commented that when the bill was in the House of Delegates, the Judiciary had picked up the fact that the House had missed the land-use type of master. Apparently, this had been added by the Senate. The Reporter noted that she and

Suzanne Pelz, Esq., Deputy Director of Government Relations for the Administrative Office of the Courts, had gone through all of the materials related to the bill, and Ms. Pelz brought this omission to the attention of the Legislature. Mr. Zarbin asked if this would affect a circuit court judge assigning a special master for an asbestos case. The Reporter answered that the master would be termed a "special magistrate." The point is to eliminate the term "master" altogether.

The Chair asked if anyone had a motion on the main agenda item to change the terminology in Rule 1-501 and in the other Rules in the meeting materials that contained conforming amendments. No motion was forthcoming. The Chair stated that the changes to the Rules were approved, because it was a Subcommittee recommendation, and no motion to approve was necessary.

The Chair said that the amendment suggested by Judge Long that would allow the Circuit Administrative Judges to assign cases to masters who are not attached to a specific court in the First and Second Circuits would require a motion, because it had not gone through the Subcommittee. Judge Price moved to approve the amendment to Rule 16-101 d. suggested by Judge Long. The motion was seconded. Judge Pierson inquired whether Rule 2-541 would be affected. The majority of the judges in the county can appoint masters. The Chair responded that this is where the masters are appointed for a circuit not to a specific court. It is only for the First and Second Circuits currently. The Circuit

Administrative Judge has to move the masters around as needed.

The Chair called for a vote on the motion, which passed by a majority vote.

Agenda Item 3. Continued consideration of proposed of proposed amendments to Rule 7.4 (Communication of Fields of Practice) of the Maryland Lawyers' Rules of Professional Conduct and proposed new Rules: Rule 16-408 (Commission on Certification of Attorneys as Specialists), Rule 16-409 (Recognition of Specialties), and Rule 16-410 (Accreditation of Certifying Entities)

Mr. Frederick presented Rule 7.4, Communication of Fields of Practice, and new Rules 16-408, Commission on Certification of Attorneys as Specialists; 16-409, Recognition of Specialties; and 16-410, Accreditation of Certifying Entities, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX: THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT

AMEND Rule 7.4, as follows:

Rule 7.4. COMMUNICATION OF FIELDS OF PRACTICE

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law, subject to the requirements of Rule 7.1. Except as otherwise provided in this Rule, ~~A~~ a lawyer shall not hold himself or herself out publicly as a specialist.

(b) A lawyer admitted to engage in patent

practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer who has been certified as a specialist in a particular field of law or law practice by an entity accredited pursuant to Rules 16-408 through 16-410 may advertise the certification during such time as the certification of the lawyer and the accreditation of the entity are in effect. A lawyer may not advertise that the certification or accreditation has been approved by the Court of Appeals or any other Maryland court but may advertise that the certifying entity was accredited by the Commission on Certification of Attorneys as Specialists.

COMMENT

[1] This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services; for example, in a telephone directory or other advertising. If a lawyer practices only in such fields, or will not accept matters except in such fields, the lawyer is permitted so to indicate.

[2] Paragraph (b) recognizes the long-established policy of the Patent and trademark Office for the designation of lawyers practicing before the Office.

[3] Paragraph (c) does not limit the right of a certified specialist to practice in any field of law or require an attorney to be certified as a specialist in order to practice in any field of law.

~~Model Rules Comparison~~. ~~This Rule substantially retains existing Maryland language and does not adopt Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, with the exception of: 1) adding ABA Rule 7.4 (c) (incorporated as Rule 7.4 (b) above); 2) the first sentence of ABA Comment [2] (included as Comment [2] above).~~

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 400 - ATTORNEYS, OFFICERS OF COURT, AND OTHER PERSONS

ADD new Rule 16-408, as follows:

Rule 16-408. COMMISSION ON CERTIFICATION OF ATTORNEYS AS SPECIALISTS

(a) Existence

There is a Commission on Certification of Attorneys as Specialists. The Commission is an independent unit within the Judicial Branch.

(b) Membership

The Commission shall consist of the following members appointed by the Court of Appeals:

(1) one incumbent Circuit Court judge;

(2) one incumbent District Court judge;

(3) a full-time faculty member of the University of Baltimore School of Law who (A) is a member of the Maryland Bar in good standing and (B) is chosen from a list of at least three full-time faculty members nominated by the Dean of the University of Baltimore School of Law;

(4) a full-time faculty member of the University of Maryland School of Law who (A)

is a member of the Maryland Bar in good standing and (B) is chosen from a list of at least three full-time faculty members nominated by the Dean of the University of Maryland School of Law;

(5) one member of the Maryland Bar in good standing from each of the eight judicial circuits of the State, each member to be appointed from a list of at least three nominees, who need not be members of the Maryland State Bar Association, submitted by the Board of Governors of the Maryland State Bar Association; and

(6) one additional member of the Maryland Bar in good standing, chosen from the State at large.

(c) Terms

(1) Generally

Subject to subsection (c)(3) of this Rule:

(A) the term of a judge is five years, but the judge shall be deemed to have resigned upon ceasing to be an incumbent judge of the court upon which the judge was serving at the time of appointment;

(B) the term of a law school faculty member is five years, but the faculty member shall be deemed to have resigned upon creasing to be a full-time faculty member of the law school where the faculty member was employed at the time of appointment; and

(C) the term of each of the other members is five years.

(2) Reappointment

A member who serves for a full term or the unexpired term of a former member may be reappointed for one additional term of five years.

(3) Removal

The Court of Appeals may remove a member of the Commission at any time.

(4) Commencement of Full Terms

The full terms shall commence on July 1.

(d) Chair; Vice Chair; Reporter

The Court of Appeals shall designate one member of the Commission as Chair and one member as Vice Chair. The Chair shall preside at meetings of the Commission and, with the assistance of the Reporter, generally supervise the work of the Commission. The Vice Chair shall perform the duties of the Chair in the absence of the Chair. The Court shall also appoint a Reporter to the Commission to serve at the pleasure of the Court. The Reporter shall be a member in good standing of the Maryland Bar.

(e) Staff; Consultants

The Commission may employ such professional and clerical staff as are authorized in the annual budget for the Judiciary. All personnel decisions with respect to the staff shall be in accordance with the judicial personnel policy approved by the State Court Administrator. The Commission also may consult with other persons to assist it in performing its duties under Rules 16-409 and 16-410.

(f) Meetings; Quorum

(1) Meetings

All meetings of the Commission shall be open to the public except as otherwise expressly allowed under the State Open Meetings Law (Code, General Provisions Article, §3-305). Subject to reasonable time limits established by the Chair, persons in attendance shall be allowed to address the Commission on matters relevant to items on its agenda.

(2) Quorum

A majority of the incumbent members shall constitute a quorum for the transaction of business.

(g) Compensation; Expenses

Members shall serve without compensation but shall be reimbursed for necessary and reasonable expenses incurred in the performance of official duties for the Commission.

(h) Budget

The Commission shall prepare and submit to the Chief Judge of the Court of Appeals an annual budget as directed by the Chief Judge.

Source: This Rule is new.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 400 - ATTORNEYS, OFFICERS OF COURT, AND OTHER PERSONS

ADD new Rule 16-409, as follows:

Rule 16-409. RECOGNITION OF SPECIALTIES

(a) In General

After investigating and considering conclusions reached by the supreme courts or other appropriate authorities in other States, by the American Bar Association, and by other national or international organizations that have considered the

matter, and after soliciting and considering the views of the Maryland State Bar Association and attorneys and judges in Maryland, the Commission shall:

(1) develop objective criteria for determining which fields of law or law practice should be recognized as specialties for purposes of Rule 7.4 of the Maryland Lawyers' Rules of Professional Conduct, and

(2) applying those criteria, recommend to the Court of Appeals, from time to time, which fields of law or law practice should be recognized as specialties for those purposes.

(b) Development of Criteria

In developing its criteria, the Commission shall consider:

(1) whether and how the public interest would be served by a proposed criterion;

(2) whether there is sufficient interest manifested among members of the Maryland Bar to warrant designation of a particular field of law or law practice as a specialty;

(3) whether appropriate standards of proficiency can be established for the specialty field; and

(4) whether there exists or feasibly could be created one or more entities with sufficient ability and credibility to administer effectively and efficiently a program of certifying attorneys as competent to hold themselves out as specialists in the particular field of law or law practice in accordance with the appropriate standards of proficiency.

(c) Review by Court of Appeals

(1) Report; Comments

The Commission's recommendations shall be in the form of a written Report to the Court. Upon receipt, the Court shall post the Report on the Judiciary website,

along with a Notice requesting written comment within a period and in a manner designated by the Court. Comments shall be sent to the Reporter of the Commission and, at the conclusion of the comment period, forwarded by the Reporter to the Clerk of the Court of Appeals.

(2) Hearing

At the conclusion of the comment period, the Court shall hold a public hearing on the Report and any timely filed written comments. Persons desiring to be heard shall notify the Clerk of the Court at least two days before the hearing. The Court may limit the time for oral presentations.

(3) Action by Court

The Court, by Administrative Order, may approve, reject, or amend and approve as amended the recommendations of the Commission. The Administrative Order shall be posted and maintained on the Judiciary website. On its own initiative or on written recommendation of the Commission, the Court may amend or rescind an Administrative Order.

Source: This Rule is new.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 400 - ATTORNEYS, OFFICERS OF COURT, AND OTHER PERSONS

ADD new Rule 16-410, as follows:

Rule 16-410. ACCREDITATION OF CERTIFYING ENTITIES

(a) Generally

Upon or in anticipation of the approval of specialties by the Court of Appeals pursuant to Rule 16-409, and in conformance with the requirements and procedures in this Rule, the Commission may accredit entities the Commission finds qualified to certify attorneys as specialists in the specialties approved by the Court.

(b) Standards for Accreditation

In determining whether to accredit an entity as a certifying entity, the Commission shall be guided by the following:

(1) the nature, structure, governance, and financial integrity of the entity, including:

(A) whether the entity is a for-profit or not-for-profit organization; and

(B) the composition of the governing board and the principal officers of the entity, including whether and to what extent the board and the officers consist of attorneys who themselves have demonstrated expertise or extensive practice in the specialty;

(2) whether the entity is accredited as a certifying entity in the particular speciality by the supreme court or other judicial authority of any State, by the American Bar Association, or by any other national or international organization that the Commission finds credible and knowledgeable in the relevant field of law or law practice;

(3) whether the entity has applied for accreditation by any authority or organization mentioned in subsection (b)(2) of this Rule and been denied accreditation;

(4) any evaluations of the entity by or on behalf of any authority that has accredited the entity as a certifying entity.

(5) the procedures, criteria, and requirements used by the entity in processing and deciding upon applications by attorneys for certification and the approximate cost of processing applications, with a view to assuring that (A) only attorneys who are truly proficient and have demonstrated expertise in the particular specialty will be certified by the entity, and (B) the process will not be so rigorous or expensive as to preclude attorneys who are truly qualified from being certified;

(6) whether the criteria for initial and renewed certification will include a requirement and process for assuring that the attorney is not merely knowledgeable generally in the specialty but is and will remain knowledgeable in all aspects of Maryland law and procedure applicable to the specialty;

Committee note: The Commission may consider an attorney's participation in continuing education in the field of specialty offered by sections or committees of the Maryland State Bar Association, the University of Maryland School of Law School, the University of Baltimore Law School, and other organizations of attorneys found credible by the Commission as satisfying this requirement.

(7) whether a certification by the entity is for a fixed period and, if so (A) the length of that period, (B) the procedures, criteria, requirements, and cost for renewing the certification, and (C) whether a certification can be terminated by the entity for good cause and, if so, what the entity considers to be good cause;

(8) the number of attorneys that have been certified by the entity and the number of applications for certification that have been rejected by the entity in the past five years; and

(9) any other criteria that the Commission finds relevant.

(c) Procedure

(1) Report

The Commission's determination to accredit an entity as a certifying entity in a specialty approved by the Court of Appeals shall be in the form of a written Report to the Court of Appeals. Upon receipt, the Court shall post the Report on the Judiciary website, along with a Notice requesting written comment within a period designated by the Court. Comments shall be sent to the Reporter of the Commission and, at the conclusion of the comment period, forwarded by the Reporter to the Clerk of the Court of Appeals.

(2) Hearing

At the conclusion of the comment period, the Court shall hold a public hearing on the Report. Persons desiring to be heard shall notify the Clerk of the Court at least two days before the hearing. The Court may limit the time for oral presentations.

(3) Action by Court

Proposed accreditations submitted by the Commission are not subject to approval by the Court, but the Court may reject a proposed accreditation or direct that the Commission give further consideration to it. If the Court does not reject or direct further consideration of a proposed accreditation, the accreditation shall become effective as determined by the Commission. Failure to reject or direct further consideration may not be deemed to be an approval by the Court.

(4) Monitoring of Performance; Withdrawal of Accreditation

The Commission shall monitor the performance of an accredited entity with respect to (A) its continued reliability and credibility as a certifying entity in the particular specialty, and (B) how well it serves the needs of the members of the

> Maryland Bar and the public at large. The Commission, after public notice and conducting a public hearing, may withdraw an accreditation for good cause.
>
> Source: This Rule is new.

Mr. Frederick explained that the Attorneys and Judges Subcommittee met several times, and members of the Maryland State Bar Association ("MSBA") attended the meetings. Thomas J. Dolina, Esq., the chair of an MSBA committee which had been looking at Rule 7.4, had attended some of the meetings as did the current MSBA President, Debra G. Schubert, Esq. and the President-elect, the Honorable Pamila J. Brown. Glenn Grossman, Esq., Bar Counsel, also attended the meetings. With the help of the Chair of the Rules Committee, the Subcommittee had drafted a proposal that Mr. Frederick urged the Committee to accept. It is a proposed change to Rule 7.4 as it pertains to an attorney using the term "specialist."

Mr. Frederick said that as Rule 7.4 is currently drafted, an attorney who calls himself or herself a "specialist" is prevented from doing so by the Rule and can be punished. The prohibition is probably unconstitutional. The proposed changes to Rule 7.4 and proposed new Rules 16-408, 16-409, and 16-410 allow for certain areas of the practice of law to be deemed as a specialty. A committee would be created, including sitting judges, people from academia, and attorneys to make this decision. The attorneys comprise a majority of that committee, nine attorneys out of 13 members. The Subcommittee and the bar had reached a

reasonable compromise, and the Subcommittee was unanimous as to approving the proposal.

The Chair noted that this matter had been before the Rules Committee in November of 2014. At that time, the Subcommittee recommendation had been to amend Rule 7.4 of the Maryland Lawyers' Rules of Professional Conduct and do nothing more. It would have been amended in a way that would have permitted attorneys to advertise that they are certified as a specialist by an entity that had been accredited by the American Bar Association ("ABA"). This proposal had been tabled, because the Subcommittee had been unaware that the MSBA was involved in this matter. Members of the MSBA had pointed out that a special committee was working on this. The Rules Committee had agreed to send the matter back to the Subcommittee and hear from the MSBA.

The Chair commented that around the country, there are two approaches to attorney specialization. One is similar to the way that the Subcommittee had amended Rule 7.4 the first time, allowing an attorney to advertise certification as a specialist if he or she has been certified by an entity accredited by the ABA. A number of States have done this. In probably a majority of other States, a different approach has been used, which is to create some sort of a State authority, usually appointed by the State Supreme Court. This group is the one that accredits other entities to certify.

The Chair said that in Pennsylvania, the approach is that the Pennsylvania State Bar Association does all of this. Rule

7.4, Communication of Fields of Practice and Specialization, has been in effect in Pennsylvania for 23 years. In that time, they have certified one specialty, workers' compensation. This is not an approach for Maryland to emulate. The MSBA was interested in something more along the lines of a State authority.

Mr. Sullivan asked whether there have been any court decisions suggesting that setting up a commission makes it more palatable with the Constitution. The Chair responded that the constitutionality issue of the current flat prohibition on attorneys advertising as specialists arises from a U.S. Supreme Court case, *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990). This raises a serious question as to whether a State can issue a flat prohibition of a truthful fact that is not misleading. The conclusion from reading the case is that this cannot be done. That is the constitutional issue.

The Chair noted that another issue had just surfaced in *North Carolina Board of Dental Examiners v. Federal Trade Commission*, 135 S.Ct. 1101 (2015), which raised a serious question as to whether turning over an issue, such as attorney specialization, to a private organization, such as the MSBA, violates federal antitrust laws. Under this decision, if the specialization is controlled by a body such as the Maryland Court of Appeals, which is what the procedure set out in Rule 7.4 and proposed new Rules 16-408, 16-409, and 16-410 does, then it is

legal either under *Peel* or *North Carolina Board of Dental Examiners*.

Mr. Frederick remarked that decisions in Florida indicate that it is a target place for this issue, because that State does not allow an attorney to advertise on a billboard. In several of the advertising cases, the courts there have suggested that as long as the advertising is truthful and is not misleading to the public, it is allowed, e.g. (*Florida Bar v. Fetterman*, 439 So. 2nd 835 (1983), *Florida Bar v. Pape*, 918 So. 2nd 240 (2005)). It is always somewhat odd in Maryland, because while the Rule prohibits an attorney from holding himself or herself out as a specialist, the attorney is allowed to say that he or she concentrates, no matter how narrow the practice of law that the concentration is in.

The Chair explained that the Court of Appeals had adopted this prohibition in its initial approval of the Rules on attorney advertising. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the U.S. Supreme Court struck down the flat prohibition against attorney advertising. The only advertising that had been allowed was in attorneys' directories. In *Bates*, the Court had said that while the States can control some of the advertising to make sure that it is not misleading, it cannot be totally prohibited. The ABA and the MSBA got involved as well as bar associations all over the country, trying to figure out how far an attorney could go to advertise.

The Chair commented that the Court of Appeals had concluded at that time that attorneys would be permitted to advertise that they concentrate in certain areas of the practice of law, but they would not be permitted to advertise that they were a specialist in an area of the law, because that implied a kind of expertise. The Court felt that, unlike the medical profession, which has boards accredited by the American Medical Association that certify medical specialists, no similar accrediting body existed for attorneys, and advertising that one is a specialist could be misleading in that it suggested that the attorney had an expertise that he or she really did not have.

The Chair said that Rule 7.4 had been adopted by the Court of Appeals in 1977, and the Court has never had the opportunity to revisit it. In 2004, a committee studied possible revisions to the Code of Professional Responsibility for attorneys, and this issue arose in that committee. By a majority vote, the committee voted to not recommend a change to the prohibition against attorney advertising him or herself as a specialist, so the issue never got to the Court of Appeals. If this had been referred to the Court, they could have addressed it 11 years ago. This is the first opportunity that the Court will have to reconsider this.

Mr. Patterson remarked that it seemed that because of the Court of Appeals opinion, an attorney cannot hold himself or herself out as a specialist, such as in defending Driving While Intoxicated ("DWI") cases. Mr. Frederick had indicated that the

attorney could say that he or she concentrated in these cases. If the new Rules are adopted, and the attorney is certified by an entity accredited by the Commission on Certification of Attorneys as Specialists, the attorney can state that he or she is so certified. An attorney who does not get the certification still cannot use the word "specialist" but could continue to state that he or she "concentrates" in DWI defense, assuming that is true. Is this conceptual, or is it just using that one word "specialist" that is causing the trouble? The Chair replied that it is the word "specialist," because it implies an expertise.

The Chair noted that this whole issue is somewhat of a "tempest in a teapot." In October of 2014, the MSBA and the Maryland Professionalism Center, an agency of the Maryland Judiciary, put on a professionalism symposium that lasted all day. One of the segments of that symposium pertained to the issue of specialization of attorneys. The session was very informative. The attendees learned that Maryland and possibly West Virginia are the only States that have this prohibition against advertising as a specialist. West Virginia just modified its rule, Rule 7.4, Communication of Fields of Practice and Specialization, to state that West Virginia does not recognize specialties. Maryland is the only State with the total prohibition. The rest of the States handle specialization in various ways, but the average percentage of attorneys nationwide that have become certified in some specialty is 3%. California has the highest percentage of specialists, which is 10%, and

Florida has 7%.

The Chair said that he had spoken with the woman who runs the Indiana certification program. She reported that Indiana has 14,000 attorneys, and 300 have become certified. This is not a major issue nationwide, but some of the MSBA members believe that it will be bigger than that in Maryland.

Mr. Patterson commented that he had served on the Board of Governors for the MSBA, which had been adamant about staying away from mandatory Continuing Legal Education ("CLE"). He asked whether there is a mandatory CLE component waiting in the wings. The Chair answered negatively, adding that this issue had been raised. It is clear that if an attorney is going to become certified by one of the accredited certifying agencies, part of that certification is going to be mandatory CLE. It would not be mandated by the Court of Appeals or any State authority. The decision to become certified is entirely voluntary, but the attorney will have to comply with any certification requirements. This will involve CLE. This has nothing to do with mandatory CLE required by the State or the Court.

The Chair told the Committee that the Rules before them were the Subcommittee's recommendation. He had received a letter from Mr. Dolina, which stated that a special committee of the MSBA had unanimously approved the proposed Rules. The Chair had gotten another letter today, which stated that the Executive Committee of the Board of Governors of the MSBA also had approved the proposed Rules.

The Chair asked if anyone had a motion to change the Rules. No motion was forthcoming. The Chair said that Rule 7.4, and proposed new Rules 16-408, 16-409, and 16-410 were approved as presented, since it was a Subcommittee recommendation, and no motion to adopt was necessary.

Agenda Item 4. Consideration of proposed amendments to Rule 16-602 (Definitions)

Mr. Frederick presented Rule 16-602, Definitions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 600 - ATTORNEY TRUST ACCOUNTS

AMEND Rule 16-602 to add "credit union" to the definition of "financial institution," as follows:

Rule 16-602. DEFINITIONS

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

a. Approved Financial Institution

"Approved financial institution" means a financial institution approved by the Commission in accordance with these Rules.

b. Attorney

"Attorney" means any person admitted by the Court of Appeals to practice law.

c. Attorney Trust Account

"Attorney trust account" means an account, including an escrow account, maintained in a financial institution for the deposit of funds received or held by an attorney or law firm on behalf of a client or third person.

d. Bar Counsel

"Bar Counsel" means the person appointed by the Commission as the principal executive officer of the disciplinary system affecting attorneys. All duties of Bar Counsel prescribed by these Rules shall be subject to the supervision and procedural guidelines of the Commission.

e. Client

"Client" includes any individual, firm, or entity for which an attorney performs any legal service, including acting as an escrow agent or as a legal representative of a fiduciary. The term does not include a public or private entity of which an attorney is a full-time employee.

f. Commission

"Commission" means the Attorney Grievance Commission of Maryland, as authorized and created by Rule 16-711 (Attorney Grievance Commission).

g. Financial Institution

"Financial institution" means a bank, credit union, trust company, savings bank, or savings and loan association authorized by law to do business in this State, in the District of Columbia, or in a state contiguous to this State, the accounts of which are insured by an agency or instrumentality of the United States.

h. IOLTA

"IOLTA" (Interest on Lawyer Trust Accounts) means interest on attorney trust accounts payable to the Maryland Legal Services Corporation Fund under Code,

Business Occupations and Professions Article, §10-303.

i. Law Firm

"Law firm" includes a partnership of attorneys, a professional or nonprofit corporation of attorneys, and a combination thereof engaged in the practice of law. In the case of a law firm with offices in this State and in other jurisdictions, the Rules in this Chapter apply only to the offices in this State.

Source: This Rule is derived from former Rule BU2.

Mr. Frederick explained that the Attorneys and Judges Subcommittee had proposed amendments to Rule 16-602. Currently, attorneys are not able to utilize the services of a credit union for attorneys' trust accounts. The reason is the federal government had not insured accounts with credit unions previously, but this has been changed so that they are insured in the manner of bank accounts. The Subcommittee's view was to give attorneys all of the options available. The more money that can be generated by Interest on Lawyers' Trust Accounts (IOLTA), the better is it is for the people in Maryland. Glenn Grossman, Esq., Bar Counsel, had also been present at the Subcommittee meeting.

Mr. Frederick said that one of the issues that often arises particularly pertains to younger attorneys, who do not have the benefit of experience. Many of the banks are not familiar with the Maryland Rules of Procedure that apply to IOLTA. As an example, Rule 16-606, Name and Designation of Account, provides

that only three names can be put on an attorney's trust account. This is not to be considered as a field for creative endeavor on the part of attorneys.

Mr. Frederick commented that in many decisions, the Court of Appeals has sanctioned attorneys because the name on their trust account was wrong. Some of these decisions include: *Attorney Grievance Commission v. Brown*, 380 Md. 661 (2004); *Attorney Grievance Commission v. Cherry-Mahoi*, 388 Md. 124 (2005); and *Attorney Grievance Commission v. Ross*, 428 Md. 50 (2012). The attorneys' invariable response to the fact that their trust account is wrongly named is that the bank had told them to title the account a certain way. The hope of the Subcommittee is that the credit unions and the banks who have these accounts will provide the young attorneys with some guidance. This is the rationale for the proposal from the Subcommittee.

Kathleen Murphy told the Committee that she was the President of the Maryland Bankers Association. The members of her organization represent the large national institutions, including 121 banks in Maryland. The Maryland Bankers Association is not opposing the proposed change to Rule 16-602. Banks are chartered differently from credit unions, which are nonprofit. They do not pay income tax. The challenge is that this is without regard to holding State deposits, and the legislature has rejected requiring the credit unions to pay tax on them. She and her colleagues understand the change that was made at the federal level that allows credit unions to be covered

by the Federal Deposit Insurance Corporation ("FDIC") for trust accounts. Because of that federal change, Ms. Murphy and her colleagues understand why the change is being proposed for Rule 16-602, and they do not oppose it. The banking industry is happy to work with Maryland attorneys and get information out to them.

The Chair inquired if anyone had a comment about the proposed change. There being none, the Chair stated that the change to Rule 16-602 was approved, because it was a Subcommittee recommendation, and no motion to approve was necessary.

Agenda Item 5. Consideration of proposed amendments to Rule 1-104 (Unreported Opinions)

The Chair said that consideration of Rule 1-104 was deferred until a meeting at a later time.

Agenda Item 6. Consideration of proposed amendments to Rules 8-412 (Record - Time for Transmitting) and 8-502 (Filing of Briefs)

The Vice Chair presented Rules 8-412, Record - Time for Transmitting, and 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 400 - PRELIMINARY PROCEDURES

AMEND Rule 8-412 (c) to require the clerk of the appellate court to send a certain notice, as follows:

Rule 8-412. RECORD - TIME FOR TRANSMITTING

(a) To the Court of Special Appeals

Unless a different time is fixed by order entered pursuant to section (d) of this Rule, the clerk of the lower court shall transmit the record to the Court of Special Appeals within sixty days or thirty days in child in need of assistance cases and guardianships terminating parental rights cases, or other cases proceeding under Rule 8-207 (a)(1) after:

(1) the date of an order entered pursuant to Rule 8-206 (a)(1) that the appeal proceed without a prehearing conference, or an order entered pursuant to Rule 8-206 (d) following a prehearing conference, unless a different time is fixed by that order, in all civil actions specified in Rule 8-205 (a); or

(2) the date the first notice of appeal is filed, in all other actions.

Cross reference: Rule 8-207 (a).

(b) To the Court of Appeals

Unless a different time is fixed by order entered pursuant to section (d) of this Rule, the clerk of the court having possession of the record shall transmit it to the Court of Appeals within 15 days after entry of a writ of certiorari directed to the Court of Special Appeals, or within sixty days after entry of a writ of certiorari directed to a lower court other than the Court of Special Appeals.

(c) When Record is Transmitted; Notice

For purposes of this Rule the record is transmitted when it is delivered to the Clerk of the appellate court or when it is sent by certified mail by the clerk of the lower court, addressed to the Clerk of the appellate court. Upon receipt and docketing of the record by the Clerk of the appellate

court, the Clerk shall send a notice to the parties stating (1) the date the record was received and docketed and (2) the date by which an appellant other than a cross-appellant shall file a brief conforming with Rule 8-503. Unless otherwise ordered by the appellate court, the date by which the appellant's brief must be filed shall be no earlier than 40 days after the date the Clerk sends the notice.

(d) Shortening or Extending the Time

On motion or on its own initiative, the appellate court having jurisdiction of the appeal may shorten or extend the time for transmittal of the record. If the motion is filed after the prescribed time for transmitting the record has expired, the Court will not extend the time 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 reporter, or the appellee.

Source: This Rule is derived from former Rules 1025 and 825.

Rule 8-412 was accompanied by the following Reporter's note.

Proposed amendments to Rules 8-412 and 8-502 conform the Rules to the existing practice of the Clerk providing a notice to the parties that contains a date certain by which the brief of an appellant other than a cross-appellant must be filed.

AMEND Rule 8-502 to conform to a proposed amendment to Rule 8-412, 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 clerk sends notice of the filing of the record, an~~ No later than the date specified in the notice sent by the appellate clerk pursuant to Rule 8-412 (c), 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 not later than the earlier of 20 days after the filing of the appellee's brief or ten days before the date of scheduled argument.

Cross reference: The meaning of subsection (a)(3) is in accordance with *Heit v. Stansbury*, 199 Md. App. 155 (2011).

(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 10 copies of each record extract shall be filed, unless otherwise ordered by the court.

> Incarcerated or institutionalized parties who are self-represented shall file nine copies of each brief and nine copies of each record extract. 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.

> See the Reporter's note to Rule 8-412.

The Vice Chair said that the change to Rule 8-412 had been proposed by Mr. Sullivan. It pertains to the time for filing a brief. The way the practice works is that when the record comes up to the appellate court, the clerk receives it and then sends a notice to the parties telling them when their briefs are due. The date in the notice governs when the brief is due. Mr. Sullivan had pointed out that Rule 8-412 indicated that it was the date that the clerk receives the record that governs when the briefs are due. That is not the way practice has evolved, and the change to the Rule is so that it reads as practice dictates.

Mr. Carbine remarked that the change to Rule 8-412 answers a question that he had. He had to file a brief in the Court of Special Appeals. He counted 40 days from the time that the docket was created when the record arrived, and he had come up with the date of April 7. He got a notice from the Court of Special Appeals that the brief was not due until April 14.

The Vice Chair noted that the proposed change to Rule 8-502 conformed to the change to Rule 8-412.

By consensus, the Committee approved the changes to Rules 8-412 and 8-502.

Agenda Item 7. Consideration of proposed amendments to Rule 8-414 (Correction of Record)

The Vice Chair presented Rule 8-414, Correction of Record, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 400 - PRELIMINARY PROCEDURES

AMEND Rule 8-414 by adding to section (a) clarifying language to limit when an appellate court may correct an error or omission in the record to material errors or omissions; by adding to section (a) language indicating that a court ordinarily may not order an addition to the record of information, etc., that had not been submitted to the lower court; by adding a cross reference to follow section (a) that reflects case authority that has considered this issue; by adding a Committee note explaining that this Rule does not preclude

an appellate court from its authority to take judicial notice of facts in certain instances; by dividing section (b)into two subsections, with new subsection (b)(1) adding a requirement that a motion to correct the record must include a stipulation of the parties regarding the alleged error and new subsection (b)(2) adding a requirement that the motion must specify the area of disagreement between the parties as to whether the record accurately discloses what occurred in the lower court; by adding language indicating that if the appellate court does not resolve the dispute, the appellate court may direct the lower court to determine what actually occurred and conform the record; by adding that the appellate court may set a deadline for the lower court to make its determination and return the record; and by adding a new section (b)(3) to reflect the residual authority to the appellate court to answer all other questions as to the form and content of the record, as follows:

Rule 8-414. CORRECTION OF RECORD

(a) Authority of Appellate Court

On motion or on its own initiative, the appellate court may order that ~~an~~ a material error or omission in the record be corrected. The court ordinarily may not order an addition to the record of new facts, documents, information, or evidence that had not been submitted to the lower court.
Cross reference: See *Beyond v. Realtime*, 388 Md. 1, 10-11, n.9 (2005); *Mesbahi v. Board of Physicians*, 201 Md. App. 315, 340, n. 21 (2011); and *Shih Ping Li v. Tzu Lee*, 210 Md. App. 73, 95 (2013), *aff'd Li v. Lee*, 437 Md. 47 (2014).

Committee note: This Rule does not preclude the appellate court from considering facts of which the appellate court may take judicial notice, including facts bearing on mootness.

(b) Motion; Determination

(1) Generally

~~The motion shall specify~~ A party seeking correction of the record shall file a motion that specifies the parts of the record or proceedings that are alleged to be omitted or erroneous. A motion that is based on facts not contained in the record or papers on file in or under the custody and jurisdiction of the appellate court and not admitted by all the other parties shall be supported by affidavit. The motion shall be accompanied by (A) any stipulation of the parties regarding the alleged error or omission and (B) a proposed order ~~which shall specify~~ specifying the requested corrections or additions.

(2) Correction or Modification of the Record

If the parties disagree about whether the record accurately discloses what occurred in the lower court, the motion shall specify what the difference is. If the appellate court does not resolve the dispute over what occurred in the lower court, the appellate court may direct the lower court to determine whether the record differs from what actually occurred and, if appropriate, conform the record accordingly. The appellate court may set a deadline for the lower court to make its determination and return the record.

(3) Other Questions

All other questions as to the form and content of the record shall be determined by the appellate court.

(c) Order to Correct Record

The order of the appellate court to correct the record constitutes the correction. The Court may also direct the clerk to take any additional action to implement the correction. An order to supplement the record shall be sent to the clerk of the lower court who promptly shall transmit the additional parts of the record specified in the order.

(d) Effect on Oral Argument

Oral argument generally will not be postponed because of an error or omission in the record. If a permitted correction or addition cannot be made to the record in time for the scheduled oral argument, the appellate court may (1) postpone the argument or (2) direct the argument to proceed as if the correction or addition had been made and permit it to be filed after argument.

Source: This Rule is in part derived from former Rule 1027 and Rule 826 f through h and in part new.

Rule 8-414 was accompanied by the following Reporter's note.

The Court of Appeals requested the Rules Committee to consider proposing amendments to Rule 8-414 that would tailor the reach of the Rule with respect to supplementing the record with new adjudicative facts or information to reflect existing case authority, so that supplementing the record is limited to exceptional circumstances.

The Appellate Subcommittee considered Fed. R. Civ. Proc. 10 (e) as a possible model. That Rule provides a procedure for (1) allowing the parties to stipulate to correction of the record and (2) sending to the lower court any question about differences between the parties over whether the record truly discloses what occurred in the lower court for that court to determine whether a difference exists and to correct the record. The appellate court also retains authority to correct any misstatement or omission. Several states have a different procedure.

The Appellate Subcommittee recommends adding procedures to Rule 8-414 that are similar to the Federal Rule, but retaining the motion procedure currently in the Maryland Rule. Language has been added to section (a), based on Maryland case law, and a cross-reference has been created to selected Maryland cases, clarifying that an

> appellate court may not ordinarily order a correction or an addition to the record before the lower court, and that the error or omission must be material.

The Vice Chair explained that the Court of Appeals had suggested that Rule 8-414 address correcting errors in the appellate court record or putting in additional material. The change to the Rule puts in a prohibition that the court may not order an addition to the record of new facts, documents, information, or evidence that had not been submitted to the lower court. The word "ordinarily" has been added in section (a) indicating that this may be different in an unusual case. In effect, it is a prohibition.

The Vice Chair noted that the new language also indicates that when an error is to be corrected, only a material error is to be corrected, but not an error of no great significance. Rule 8-414 sets forth a mechanism providing that the parties can stipulate as to what ought to be in the record. If the parties disagree, a mechanism has been added so that the appellate court can send the record back to the lower court for a determination as to whether the record differs from what actually occurred.

Judge Pierson commented that there is a limited power in the circuit court under Rule 8-413, Record - Contents and Form, to correct the record. Section (a) states: "The lower court, by order, shall resolve any dispute whether the record accurately discloses what occurred in the lower court, and shall cause the record to conform to its decision." Judge Pierson noted that it

appears that the two rules are similar. The Chair said that the objective of Rule 8-414 is that if this problem surfaces when the case is on appeal, so that the record is now in the Court of Special Appeals, and someone brings to the court's attention that the record is wrong in some way and needs correction, then the clerk can send the record back to the lower court if there is a dispute about this.

Judge Pierson asked whether Rule 8-413 should make the same change if there is a concern that Rule 8-414 did not previously provide that no new facts, documents, information, or evidence can be added. The Chair commented that the suggestion to change Rule 8-414 came from the Court of Appeals, which has had more than one case in which someone asked to either supplement or correct the record with something that had never been presented to the circuit court. The issue is what can be corrected or supplemented under current Rule 8-414. Basically, the idea is that if the additional information was not before the circuit court, in most cases, the record cannot be corrected or supplemented. There are a few exceptions to this. The most obvious one is mootness. If something has happened since the circuit court acted that makes the case moot, that will not be in the circuit court record.

Judge Pierson said that his question was whether the same cautionary language needs to be in Rule 8-413. The Vice Chair responded that this may be a good idea, but it needs to be discussed by the Appellate Subcommittee. The Reporter remarked

that there is a distinction between Rules 8-413 and 8-414. The lower court should not be changing what happened, but the appellate court can order more facts or information to be added to the record. The lower court has a duty to identify what happened. Judge Pierson commented that he had considered a motion to supplement the record in the circuit court that theoretically might fall within his power as a circuit court judge under Rule 8-413. It transgressed that principle of not adding to the record. He had been asked to add to the record facts, documents, information, or evidence that had not been before him at the time he rendered his decision. The Chair pointed out that this was not allowed, and Judge Pierson responded that he had not done it.

The Chair said that some of the missing information or evidence could be picked up when an appeal is noted. The appellant goes through the record that the clerk has assembled and sees that something is not there. Judge Pierson added that this what Rule 8-413 addresses. The Chair noted that Rule 8-414 applies when the record is already up in the appellate court. Judge Pierson observed that if the Rule is being abused in the appellate court, it is being abused in the circuit court, also. The Vice Chair said that the Subcommittee will discuss making a similar change to Rule 8-413.

By consensus, the Committee approved Rule 8-414 as presented.

Agenda Item 8. Consideration of proposed amendments to Rule 8-431 (Motions)

The Vice Chair presented Rule 8-431, Motions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 400 - PRELIMINARY PROCEDURES

AMEND Rule 8-431 (c) by adding certain language clarifying that the records or papers on file are in the appellate court and by adding a cross reference, as follows:

Rule 8-431. MOTIONS

(a) Generally

An application to the Court for an order shall be by motion. The motion shall state briefly and clearly the facts upon which it is based, and if other parties to the appeal have agreed not to oppose the motion, it shall so state. The motion shall be accompanied by a proposed order.

(b) Response

Except as provided in Rule 8-605 (a), any party may file a response to the motion. Unless a different time is fixed by order of the Court, the response shall be filed within five days after service of the motion.

(c) Affidavit

A motion or a response to a motion that is based on facts not contained in the record or papers on file <u>in or in the custody and jurisdiction of the appellate court</u> in the proceeding shall be supported by affidavit and accompanied by any papers on

which it is based.

Cross reference: See Rule 20-402 concerning the transmittal of the record under MDEC.

(d) Statement of Grounds and Authorities

A motion and any response shall state with particularity the grounds and the authorities in support of each ground.

(e) Filing; Copies

The original of a motion and any response shall be filed with the Clerk. It shall be accompanied by (1) seven copies when filed in the Court of Appeals and (2) four copies when filed in the Court of Special Appeals, except as otherwise provided in these rules.

(f) Emergency Order

In an emergency, the Court may rule on a party's motion before expiration of the time for a response. The party requesting emergency relief shall file the certification required by Rule 1-351.

(g) Hearing

Except as otherwise provided in these rules, a motion may be acted on without a hearing or may be set for hearing at the time and place and on the notice the Court prescribes.

Source: This Rule is derived from former Rules 1055 and 855.

Rule 8-431 was accompanied by the following Reporter's note.

Section (c) of Rule 8-431 requires that a motion or response to a motion that is based on facts not contained in the record or papers on file in a proceeding shall be supported by affidavit and accompanied by any papers on which it is based. In response to a request by the Clerk of the Court of Special Appeals, the Appellate Subcommittee

> recommends adding the language "in or in the custody and jurisdiction of the appellate court" to clarify that it is the record or papers on file in that court that are being referred to.

The Vice Chair told the Committee that language is proposed to be added to Rule 8-431 that clarifies that a motion "based on facts not contained in the record or papers on file," which is language in section (c), refers to the record or papers not just on file in the appellate court but also those in the custody and jurisdiction of the appellate court. The request to make this change came from the Clerk of the Court of Special Appeals.

The Chair explained that this is also a problem because of the Maryland Electronic Courts project ("MDEC"). What goes into the record in a county already connected to MDEC is not really filed with the appellate court, because MDEC is not able to do this yet. It remains a circuit court record to which the appellate court has full access. It is technically not on file in the appellate court, but the record is in the legal custody of the appellate court. There may be physical exhibits that do not come up with the record, such as guns or drugs.

The Reporter asked whether Rule 20-402, Transmittal of Record, should be changed rather than someone trying to figure out which Title 8 Rules should be changed. The Chair pointed out that a Rule in Title 8 on this is necessary.

By consensus, the Committee approved Rule 8-431 as presented.

Agenda Item 9. Consideration of proposed amendments to Rule 8-511 (Amicus Curiae)

The Vice Chair presented Rule 8-511, Amicus Curiae, 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 8-511 to revise the time by which the appellee may file a reply brief under certain circumstances, as follows:

Rule 8-511. AMICUS CURIAE

(a) Authorization to File Amicus Curiae Brief

An amicus curiae brief may be filed only:

(1) upon written consent of all parties to the appeal;

(2) by the Attorney General in any appeal in which the State of Maryland may have an interest;

(3) upon request by the Court; or

(4) upon the Court's grant of a motion filed under section (b) of this Rule.

(b) Motion and Brief

(1) Content of Motion

A motion requesting permission to

file an amicus curiae brief shall:

(A) identify the interest of the movant;

(B) state the reasons why the amicus curiae brief is desirable;

(C) state whether the movant requested of the parties their consent to the filing of the amicus curiae brief and, if not, why not;

(D) state the issues that the movant intends to raise;

(E) identify every person, other than the movant, its members, or its attorneys, who made a monetary or other contribution to the preparation or submission of the brief, and identify the nature of the contribution; and

(F) if filed in the Court of Appeals to seek leave to file an amicus curiae brief supporting or opposing a petition for writ of certiorari or other extraordinary writ, state whether, if the writ is issued, the movant intends to seek consent of the parties or move for permission to file an amicus curiae brief on the issues before the Court.

(2) Attachment of Brief

Copies of the proposed amicus curiae brief shall be attached to two of the copies of the motion filed with the Court.

Cross reference: See Rule 8-431 (e) for the total number of copies of a motion required when the motion is filed in an appellate court.

(3) Service

The movant shall serve a copy of the motion and proposed brief on each party.

(4) If Motion Granted

If the motion is granted, the brief shall be regarded as having been filed when

the motion was filed. Within ten days after the order granting the motion is filed, the amicus curiae shall file the additional number of briefs required by Rule 8-502 (c).

(c) Time for Filing

(1) Generally

Except as required by subsection (c)(2) of this Rule and unless the Court orders otherwise, an amicus curiae brief shall be filed at or before the time specified for the filing of the principal brief of the appellee.

(2) Time for Filing in Court of Appeals

(A) An amicus curiae brief may be filed pursuant to section (a) of this Rule in the Court of Appeals on the question of whether the Court should issue a writ of certiorari or other extraordinary writ to hear the appeal as well as, if such a writ is issued, on the issues before the Court.

(B) An amicus curiae brief or a motion for leave to file an amicus curiae brief supporting or opposing a petition for writ of certiorari or other extraordinary writ shall be filed at or before the time any answer to the petition is due.

(C) Unless the Court orders otherwise, an amicus curiae brief on the issues before the Court if the writ is granted shall be filed at the applicable time specified in subsection (c)(1) of this Rule.

(d) Compliance with Rules 8-503 and 8-504

An amicus curiae brief shall comply with the applicable provisions of Rules 8-503 and 8-504.

(e) Reply Brief; Oral Argument; Brief Supporting or Opposing Motion for Reconsideration

Without permission of the Court, an amicus curiae may not (1) file a reply brief,

(2) participate in oral argument, or (3) file a brief in support of, or in opposition to, a motion for reconsideration. Permission may be granted only for extraordinary reasons.

(f) Appellee's Reply Brief

Within ten days after the later of (1) the filing of an amicus curiae brief that is not substantially in support of the position of the appellee or (2) the entry of an order granting a motion under section (b) that permits the filing of a brief not substantially in support of the position of the appellee, the appellee may file a reply brief limited to the issues in the amicus curiae brief that are not substantially in support of the appellee's position and are not fairly covered in the appellant's principal brief. Any such reply brief shall not exceed [15 pages] [3,900 words].

Source: This Rule is derived in part from Fed.R.App.P. 29 and Sup.Ct.R. 37 and is in part new.

Rule 8-511 was accompanied by the following Reporter's note.

An appellate clerk pointed out that when the authorization to file an amicus curiae brief is based on subsection (a)(4) of Rule 8-511, it is possible that, because of the "relation back" provision of subsection (b)(4) of the Rule, an appellee who is entitled to file a reply brief pursuant to section (f) would have no time to do so. The appellee's reply brief would have been due before the motion requesting permission to file an amicus curiae brief had been determined by the appellate Court. To address this timing issue, a proposed amendment to section (f) permits the appellant to file a reply brief within 10 days after the later of (1) the filing of an amicus curiae brief that is not substantially in support of the position of the appellee or (2) the entry of an order granting a motion under section (b) that permits the filing of a brief not substantially in support of the position of the appellee.

The Vice Chair said that Rule 8-511 addresses amicus curiae briefs. The proposed change pertains to giving the appellee a chance to respond to the brief. The current Rule has a timing issue. Subsection (b)(4) provides that if a motion requesting permission to file an amicus curiae brief is granted, the brief shall be regarded as having been filed when the motion was filed. The appellee's reply brief would have been due before the motion requesting permission to file an amicus curiae brief had been determined by the appellate court. The proposed amendment to section (f) allows the appellee to file a reply brief within ten days after the later of (1) the filing of an amicus curiae brief that is not substantially in support of the position of the appellee or (2) the entry of an order granting a motion under section (b) that permits the filing of an amicus curiae brief not substantially in support of the position of the appellee.

By consensus, the Committee approved Rule 8-511 as presented.

Agenda Item 10. Consideration of proposed amendments to Rule 8-522 (Oral Argument)

The Vice Chair presented Rule 8-522, Oral Argument, 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 8-522 to reduce the time allotted for oral argument in the Court of Special Appeals to 20 minutes for each side, except with permission of the Court; to delete the second sentence of section (a); and to correct a stylistic error, as follows:

Rule 8-522. ORAL ARGUMENT

(a) Time Limit

Except with permission of the Court, oral argument is limited to 20 minutes for each side in the Court of Special Appeals and 30 minutes for each side in the Court of Appeals. ~~The Court of Special Appeals may prescribe a shorter period when it grants a request for oral argument pursuant to Rule 8-523 (b) (2), or upon the direction of the Chief Judge, when necessary to enable the Court to dispose of the cases scheduled for oral argument.~~ A party who believes that additional time is necessary for the adequate presentation of oral argument, may request, by letter addressed to the Court, the ~~addition~~ additional time deemed necessary. The request shall be made no later than ten days after the filing of the appellee's brief.

(b) Rebuttal

The appellant may reserve a portion of the time allowed for rebuttal, but in opening argument shall present the case fairly and completely and shall not reserve points of substance for presentation during rebuttal.

(c) Number of Counsel

Except with permission of the Court, not more than two attorneys may argue for a side. In granting a request for oral argument pursuant to Rule 8-523 (b)(2), the Court of Special Appeals may direct that only one attorney may argue for a side. When more than one attorney will argue for a side, the

time allowed for the side may be divided as they desire.

(d) More than One Appeal in Same Action - Order of Argument

When there is more than one appeal in the same action, the order of argument may be determined by the Court. If the Court does not determine the order and unless otherwise agreed by parties, the appellant first in order on the docket will open and close.

(e) Failure to Appear

If a party fails to appear when the case is reached for argument, the adverse party may present oral argument or, with permission of the Court, may waive it.

(f) Restriction on Oral Argument

The Court may decline to hear oral argument on any matter not presented in the briefs.

Source: This Rule is derived from former Rules 1046 and 846.

Rule 8-522 was accompanied by the following Reporter's note.

It has been the practice of the Court of Special Appeals over at least the past decade, to restrict the time available for oral arguments, as reflected in Administrative Orders issued every month by the Chief Judge of the Court of Special Appeals. The Administrative Orders have been necessitated by a high volume of cases. The Administrative Orders have provided:

Pursuant to Maryland Rule 8-522 (a), I hereby direct that oral argument in the month of _____ be limited to 20 minutes per side, subject to the discretion of the hearing panel to allow additional argument, not exceeding a total of 30 minutes per side.

Under Rule 8-522 (a), the prescribed norm for the length of oral argument is 30

> minutes. The second sentence of Rule 8-522 (a) provides a means by which the Chief Judge of the Court of Special Appeals may shorten the time allotted for oral argument "when necessary to enable the Court to dispose of cases scheduled for oral argument" and permits the Court, under the unusual circumstances to which Rule 8-523 (b)(2) applies, to set a shortened time period for oral arguments requested by the Court pursuant to that Rule.
>
> The proposed amendment to Rule 8-522 (a) deletes the second sentence in its entirety and changes the norm prescribed in the Rule to reflect what has been the administrative practice for at least the past decade, dispensing with the need for the Chief Judge of the Court of Special Appeals to issue monthly administrative orders shortening the time allotted for oral argument.

The Vice Chair told the Committee that Rule 8-522 pertains to the time limit for oral argument. For the last 10 years, each month an order would come down from the Chief Judge of the Court of Special Appeals specifying that oral argument was only for 20 minutes. Rather than handle it that way, the Rule is proposed to be changed to specify the 20-minute time limit. The party still has the ability to ask for more time. The change to the Rule locks in the 20-minute time period as the general rule. The Chair added that the Rule takes away the authority to reduce that time period. The Rule had previously provided for a 30-minute time period, and a reduction would take it down to 20 minutes.

By consensus, the Committee approved Rule 8-522 as presented.

Agenda Item 11. Reconsideration of proposed amendments to Rule

The Vice Chair presented Rule 8-605, Reconsideration, 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 8-605 to add a new section (b) providing the content of a motion for reconsideration or a response to it and to make stylistic changes, as follows:

Rule 8-605. RECONSIDERATION

(a) Motion; Response; No Oral Argument

Except as otherwise provided in Rule 8-602 (c), a party may file pursuant to this Rule a motion for reconsideration of a decision by the Court that disposes of the appeal. The motion shall be filed (1) before issuance of the mandate or (2) within 30 days after the filing of the opinion of the Court, whichever is earlier. A response to a motion for reconsideration may not be filed unless requested on behalf of the Court by at least one judge who concurred in the opinion or order. Except to make changes in the opinion that do not change the decision in the case, the Court ordinarily will not grant a motion for reconsideration unless it has requested a response. There shall be no oral argument on the motion.

(b) Content

A motion or response ordinarily shall

be limited to addressing one or more of the following:

(1) whether the Court's opinion or order did not address a material factual or legal matter raised in the lower court and argued by a party in its submission to the Court, and if not raised or argued, a brief statement as to why it was not raised or argued;

(2) whether a material change in the law relevant to the appeal occurred after the case was submitted and was not addressed in the Court's opinion or order;

(3) whether there is a significant consequence of the decision that was not addressed in the opinion;

(4) if the motion or response is filed in the Court of Appeals, whether and how the Court's opinion or order is in material conflict with a decision of the United States Supreme Court or a decision of the Court of Appeals; or

(5) if the motion or response is filed in the Court of Special Appeals, whether and how the Court's opinion or order is in material conflict with a decision of the United States Supreme Court or the Court of Appeals or a reported opinion of the Court of Special Appeals.

~~(b)~~ (c) Length

A motion or response filed pursuant to this Rule shall not exceed [15 pages] [3,900 words].

Note to Rules Committee: The Rules Committee has approved a proposed amendment changing "15 pages" to "3,900 words," which will be in the 187th Report.

~~(c)~~ (d) Copies - Filing

(1) In Court of Special Appeals

In the Court of Special Appeals, the original of the motion and any response shall be filed together with four copies if the opinion of the Court was unreported or 13 copies if reported.

(2) In Court of Appeals

In the Court of Appeals, the original and seven copies of the motion and any response shall be filed.

~~(d)~~ (e) Mandate to be Delayed

A motion for reconsideration shall delay issuance of a mandate, unless otherwise ordered by the Court.

~~(e)~~ (f) Disposition of Motion

A motion for reconsideration shall be granted only with the consent of at least half the judges who concurred in the opinion. If a motion for reconsideration is granted, the Court may make a final disposition of the appeal without reargument, restore the appeal to the calendar for argument, or make other orders, including modification or clarification of its opinion, as the Court finds appropriate.

Source: This Rule is in part derived from former Rules 1050 and 850 and in part new.

Rule 8-605 was accompanied by the following Reporter's note.

An attorney pointed out that in contrast with the federal rules, Rule 8-605 offers practitioners no guidance concerning the contents of a motion for reconsideration.

The Rules Committee proposes the addition of a new section to Rule 8-605, which provides some bases for a motion for reconsideration, derived from the bases in the federal rules. However, since the federal rules do not address filing a motion for reconsideration when the opinion went in an unanticipated direction, the Committee recommends adding language to subsection

> (b)(1) stating that if a motion raises a factual or legal matter not raised in the lower court and argued by the party in its submission to the appellate court, the person filing the motion shall include in the motion a brief statement why the factual or legal matter had not been raised or argued. The Committee also recommends a new subsection (b)(3), which adds as one of the bases for a motion for reconsideration whether there is a significant consequence of the decision that was not addressed in the opinion.

The Vice Chair said that Andrew Baida, Esq., had pointed out that Rule 8-605 contained no standards for practitioners filing a motion for reconsideration. No criteria are set out in the Rule for an attorney to use to argue the motion. Fed. R. Civ. Proc. 60, Relief from a Judgment or Motion, has some criteria for filing a motion to reconsider a decision made in the U.S. District Courts, and Fed. R. App. Proc. 35, En Banc Determination, also has criteria for seeking a hearing or rehearing en banc. Local Rule 40 (b) of the U.S. Court of Appeals, Petition for Panel Rehearing, also contains criteria for filing a similar motion. Rule 8-605 picks up some of the criteria in the federal Rules, and it adds two other criteria. A new addition is whether there is a significant consequence of the appellate decision that the court simply did not understand. The criteria for a motion for reconsideration are set out in section (b) of Rule 8-605.

Mr. Zarbin remarked that he had seen opinions which had been written in a way that both sides needed some clarification. The Vice Chair responded that it would not be necessary to file a

motion for clarification. Mr. Zarbin commented that he wanted to make sure that this situation would not be excluded from the scope of the Rule. The Vice Chair said that it would be included as it had always been.

By consensus, the Committee approved Rule 8-605 as presented.

The Chair noted that Agenda Item 12 had been withdrawn. There being no further business before the Committee, the Chair adjourned the meeting.