THE SUPREME COURT STANDING COMMITTEE

ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Rooms 132-133 of the Maryland Judicial Center, 187 Harry S. Truman Parkway, Annapolis, Maryland on Friday, March 15, 2024.

Members present:

Hon. Alan M. Wilner, Chair

Hon. Tiffany Anderson
Hon. Vicki Ballou-Watts
Hon. Pamila J. Brown
Hon. Yvette M. Bryant
Hon. Catherine Chen
Julia Doyle, Esq.
Arthur J. Horne, Jr., Esq.
Brian Kane, Esq.
Victor H. Laws, III, Esq.
Dawne D. Lindsey, Clerk
Bruce Marcus, Esq.
Stephen S. McCloskey, Esq.
Judy Rupp, State Court Administrator
Scott D. Shellenberger, Esq.
Gregory K. Wells, Esq.
Brian L. Zavin, Esq.
Thurman W. Zollicoffer, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Colby L. Schmidt, Esq., Deputy Reporter
Heather Cobun, Esq., Assistant Reporter
Meredith Drummond, Esq., Assistant Reporter

Hon. Anne Albright, Appellate Court
Hon. Kendra Ausby, Circuit Court for Baltimore City
Derek Bayne, Esq., Commission on Judicial Disabilities
Tanya Bernstein, Esq., Commission on Judicial Disabilities
Nancy Cruz Guevara, Commission on Judicial Disabilities
Tom DeGonia, Esq., Bar Counsel
Tamara Dowd, Esq., Commission on Judicial Disabilities
Kendra Jolivet, Esq., Commission on Judicial Disabilities
Marianne Lee, Esq., Attorney Grievance Commission
Hon. John Morrissey, Chief Judge, District Court of Maryland
Jeff Shipley, Esq., State Board of Law Examiners
Stacy Smith, Civil and Criminal Case Administrator, Circuit Court for Anne Arundel County

The Chair convened the meeting. The Reporter advised that the meeting was being recorded for the purposes of assisting with the preparation of meeting minutes and that speaking will be treated as consent to being recorded. She reminded the Committee members that the April meeting has been cancelled; the next meeting will be May 17, 2024. She also informed the Committee that the historical lists of Rules Committee members no longer are being printed in the Rule books published by Michie. The Judiciary now will maintain those lists online on the Rules Committee page.

The Chair said that the minutes from the February 9, 2024 meeting were circulated for review. He called for any amendments or discussion regarding those minutes. Hearing none, he called for a motion to approve the minutes. A motion to approve the minutes was made, seconded, and approved by majority vote.

The Chair announced that Agenda Item 4 would be considered first to accommodate Jeffrey Shipley, Director of the State Board of Law Examiners, who was present to provide background and answer questions regarding that Item.

Agenda Item 4. Consideration of proposed amendments requested by the State Board of Law Examiners

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Mr. Marcus presented Rule 19-102, State Board of Law Examiners, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

CHAPTER 100 – STATE BOARD OF LAW EXAMINERS AND CHARACTER COMMITTEES

AMEND Rule 19-102 by deleting a provision from subsection (c)(2) linking Board Rules to Title 19, Chapter 200 of these Rules; by adding a provision to subsection (c)(2) concerning the location of Board Rules; and by adding a clarifying provision to section (d) concerning the location of amendments to Board Rules, as follows:

Rule 19-102. STATE BOARD OF LAW EXAMINERS

(a) Appointment

There is a State Board of Law Examiners. The Board shall consist of seven members appointed by the Court. Each member shall be an attorney admitted and in good standing to practice law in Maryland. The terms of members shall be as provided in Code, Business Occupations and Professions Article, § 10-202 (c).

(b) Quorum

A majority of the authorized membership of the Board is a quorum.

(c) Authority

(1) Generally

The Board shall exercise the authority and perform the duties assigned to it by the Rules in this Chapter and Chapter 200 of this Title, including general supervision over the character and fitness requirements and procedures set forth in those Rules and the operations of the character committees.

(2) Adoption of Rules

The Board may adopt rules to carry out the requirements of this Chapter and Chapter 200 of this Title. The Rules of the Board shall ~~follow Chapter 200 of Title 19~~ be conspicuously posted on the Board's page of the Judiciary website.

(d) Amendment of Board Rules—Posting

Any amendment of the Board's rules shall be posted on the Board's page of the Judiciary website at least 45 days before the amendment is to become effective.

(e) Professional Assistants

The Board may appoint the professional assistants necessary for the proper conduct of its business. Each professional assistant shall be an attorney admitted and in good standing to practice law in Maryland and shall serve at the pleasure of the Board.

Committee note: Professional assistants primarily assist grading the bar examination. Section (e) does not apply to the secretary and director or to administrative staff.

(f) Compensation of Board Members and Assistants

The members of the Board and assistants shall receive the compensation fixed by the Court.

(g) Secretary and Director to the Board

The Court may appoint an individual to serve as the secretary and director to the Board. The individual shall hold office at the pleasure of the Court. The secretary and director shall be a member of a Bar of a state. The secretary and director shall have the administrative powers and duties prescribed by the

Board and shall serve as the administrative director of the Office of the State Board of Law Examiners.

(h) Fees

The Board shall prescribe the fees, subject to approval by the Court, to be paid by applicants under Rules 19-205, 19-206, 19-207, and 19-210 and by petitioners under Rule 19-216.

Cross reference: See Code, Business Occupations and Professions Article, § 10-208 (b) for maximum examination fee allowed by law.

Source: This Rule is derived as follows:
Section (a) is new.
Section (b) is new.
Sections (c) through (g) are derived from former Rule 20 of the Rules Governing Admission to the Bar of Maryland (2016). Section (h) is derived from former Rule 18 of the Rules Governing Admission to the Bar of Maryland (2016).

Rule 19-102 was accompanied by the following Reporter's note:

Rule 19-102 (d) currently requires the State Board of Law Examiners to post notice of changes to the Board Rules on the Board's page of the Judiciary website for at least 45 days before the effective date of the changes. The Board has requested proposed revisions to this Rule to address the often significant and problematic delay between posting of a Board Rule revision on the Board's website pursuant to Rule 19-102 (d), the effective date of the revised Board Rule, and the appearance of the revised Board Rule in official online Reporters and printed Rules volumes. Moving the location of the official publication of the Board's Rules from official online Reporters and printed Rules volumes to the Board's website will increase applicant accessibility to the Board Rules and decrease the likelihood of confusion over the version of a Board Rule that is currently in effect.

Mr. Marcus informed the Committee that the two Rules changes in Agenda Item 4 were requested by the State Board of Law Examiners ("the SBLE" or "the Board"). He said that Mr. Shipley explained the proposals to the Attorneys & Judges Subcommittee, and he would defer to him to provide background to the Committee.

Mr. Shipley addressed the Committee. He explained that Rule 19-102 establishes the SBLE and its authority to adopt its own rules of procedure. The Board's rules had been published in the Rule books immediately following Title 19, Chapter 200, but most Bar applicants are not going to look there for guidance. Much of the information explaining the Bar application process is located on the Board's website. He added that the Board can amend its rules with 45 days' notice and posting to the SBLE website. Once a rule change is in effect, he said that it can take some time before the official Maryland Rules publishers pick up the change. He said that the proposed amendments make the SBLE page of the Judiciary website the official repository of the Board's rules. He explained that he hopes this will increase transparency and make the Board's rules easier to access.

Mr. Marcus said that the amendments to subsection (c)(2) require the Board's rules to "be conspicuously posted on the

Board's page of the Judiciary website." Section (d) is amended to clarify that amendments to the Board's rules are posted to the Board's page.

There being no motion to amend or reject the proposed amendments to Rule 19-102, they were approved as presented.

Mr. Marcus presented Rule 19-206, Notice of Intent to Take the UBE in Maryland, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

CHAPTER 200 – ADMISSION TO THE BAR

GENERAL ADMISSION

AMEND Rule 19-206, by making a stylistic change to subsection (a)(3), by revising the deadline in section (b) so that it is established by the Board and not fixed by Rule, by revising the filing deadlines in section (c), by adding a Committee note following section (c), and by revising section (d) so that the filing deadline is established by the Board instead of fixed in this Rule, as follows:

Rule 19-206. NOTICE OF INTENT TO TAKE THE UBE IN MARYLAND

(a) Filing

An applicant may file a Notice of Intent to Take the UBE in Maryland if the applicant:

(1) meets the pre-legal educational requirements of Rule 19-201 (a) (1);

(2) unless the requirements of Rule 19-201 (a)(2) have been waived pursuant to Rule 19-201 (b), meets the legal education requirements of Rule 19-201 (a)(2), or will meet those requirements before the first day of taking the UBE in Maryland; and

(3) contemporaneously files, or has previously filed, a completed ~~character questionnaire~~ Character Questionnaire pursuant to Rule 19-205 that has not been withdrawn pursuant to Rule 19-205 (f), and the applicant has not withdrawn or been denied admission pursuant to Rule 19-204.

The Notice of Intent shall be under oath, filed on the form prescribed by the Board, and accompanied by the prescribed fee.

(b) Request for Test Accommodation

An applicant who seeks a test accommodation under the ADA for the bar examination shall indicate that request on the Notice of Intent to Take the UBE in Maryland, and shall file with the Board an "Accommodation Request" ~~on~~ in a form prescribed by the Board, together with the supporting documentation that the Board requires. The form and documentation shall be filed no later than the deadline ~~stated in section (d) of this Rule~~ established by the Board for filing the Notice of Intent to Take the UBE in Maryland. The Board may reject an accommodation request that is (1) substantially incomplete or (2) filed untimely. The Board shall notify the applicant in writing of the basis of the rejection and shall provide the applicant an opportunity to correct any deficiencies in the accommodation request before the filing deadline for the current examination or, if the current deadline has passed, before the filing deadline for the next administration of the examination.

Committee note: An applicant who may need a test accommodation is encouraged to file an Accommodation Request as early as possible.

Cross reference: See Rule 19-208 for the procedure to appeal a denial of a request for a test accommodation.

(c) Verification of Legal Education

Unless the requirements of Rule 19-201 (a)(2) have been waived pursuant to Rule 19-201 (b), the applicant shall aver under oath that the applicant has met, will meet, or will be unqualifiedly eligible to meet those requirements prior to the first day of the applicant taking the UBE in Maryland. No later than the ~~first day of September following~~ first day of July preceding an examination taken in July or the ~~fifteenth day of March following~~ first day of February preceding an examination taken in February, the applicant shall cause the Board to receive an official transcript or other satisfactory evidence that reflects the date of the award to the applicant of a qualifying law degree under Rule 19-201, unless the official transcript already is on file with the Board's administrative office.

Committee note: Other satisfactory evidence normally consists of a letter from the law school dean or other authorized law school official certifying the date of graduation or unqualified eligibility where the law school transcript is unavailable, such as a late graduation or a financial hold on the transcript.

(d) Time for Filing

~~An applicant who intends to take the examination in July shall file the Notice of Intent to Take the UBE in Maryland no later than the preceding May 20. An applicant who intends to take the examination in February shall file the Notice of Intent to Take the UBE in Maryland no later than the preceding December 20.~~ An applicant who intends to take the UBE in Maryland shall file the Notice of Intent to take the UBE by the appropriate deadline established by the Board through its rule-making authority pursuant to Rule 19-102 (c)(2). Upon written request of an applicant and for good cause shown, the Board may accept a Notice of Intent to Take the UBE in Maryland filed after that deadline. If the Board rejects the Notice of Intent to Take the UBE in Maryland for lack of good cause for the untimeliness, the Board shall transmit written notice of the rejection to the applicant. The applicant may file an exception with the Court within five business days after notice of the rejection is transmitted.

(e) Withdrawal of Notice of Intent to Take the UBE in Maryland or Absence from Examination

If an applicant withdraws the Notice of Intent to Take the UBE in Maryland or fails to attend and take the examination, the examination fee shall not be refunded. The Board may apply the examination fee to a subsequent examination if the applicant establishes good cause for the withdrawal or failure to attend.

Source: This Rule is derived from former Rule 19-204 (2018).

Rule 19-206 was accompanied by the following Reporter's note:

Proposed changes to Rule 19-206 (c) reflect the fact that most official law school transcripts are delivered electronically and can be obtained prior to the bar exam. Advancing the due date for transcripts increases the incidence of definitive confirmation of eligibility prior to the bar exam and reduces the possibility of having ineligible applicants sit for the bar exam. "Other satisfactory evidence" normally consists of a letter from the law school dean or other authorized law school official certifying the date of graduation or unqualified eligibility where the law school transcript is unavailable, such as a late graduation or a financial hold on the transcript.

In recent exam sessions, the State Board of Law Examiners (SBLE) has experienced a significant increase in the number of requests for ADA testing accommodations sought by applicants pursuant to Rule 19-206 (b). The current filing deadlines in Rule 19-206 (d) compress the period between the filing deadline and the date of the bar exam in which the SBLE must perform its required tasks related to review and determination of ADA test accommodations and for the Accommodations Review Committee to conduct its reviews pursuant to Rule 19-208. The suggested revision to Rule 19-206 (d) allows the SBLE to adjust the filing deadline as needed, pursuant to Rule 19-102, and would greatly assist the SBLE in managing

the additional workload created by the increase in number of accommodation requests.

Mr. Shipley informed the Committee that Rule 19-206 alters the timing provisions related to a Notice of Intent to Take the UBE in Maryland ("Notice of Intent"). He explained that the SBLE has seen an increased number of requests for test accommodations under section (b). These requests currently are required to be submitted at the same time as the Notice of Intent, but accommodations requests take time to investigate and process. He said that the proposed amendments to section (b) would permit the Board to establish the deadline to file a request pursuant to that section by its own rules.

Mr. Shipley said that the proposed amendment to section (c) alters the deadline for submitting an official transcript. He explained that transcripts used to be prepared by law schools and sent to the Board in the mail; they rarely were submitted before the applicant sat for the bar exam. He said that now, most transcripts are available electronically and ready before the exam. The amendment to section (c) advances the deadline to submit a transcript to the day before the exam. He noted that approximately once per year the SBLE identifies someone who sat for the bar exam without graduating from law school, usually due to an innocent mistake. Advancing the deadline will help the Board prevent these mistakes from occurring.

Mr. Shipley said that the most significant change proposed to Rule 19-206 is in section (d). Currently, the time to file a Notice of Intent is May 20th prior to the July Bar Exam and December 20th prior to the February Bar Exam. Similar to the amendment proposed in section (b), the amendment in section (d) changes this deadline to be one set by the Board's rules. Mr. Shipley explained that because of the previously mentioned rise in requests for test accommodations, the Board's rules would move the deadline forward to May 1st and December 1st for the July and February exams, respectively. He said that this change gives the Board almost three additional weeks to investigate requests and determine how to implement accommodations that are granted. He added that permitting this change to be made by the Board in its rules also gives flexibility as the bar exam evolves.

Ms. Doyle asked whether advancing the deadline will disqualify the individuals who are not able to obtain an electronic transcript. She pointed out that Mr. Shipley said that most applicants can submit an electronic transcript, not all. Mr. Shipley responded that the phrase "or other satisfactory evidence" added to section (c) would apply to those individuals and permit them to provide a letter from the registrar of their school or some other official proof of graduation.

Judge Bryant remarked that, as a style matter, "Other satisfactory evidence" should be in quotes as a term of art in the Committee note following section (c). By consensus, the Committee approved this amendment.

There being no further motion to amend or reject the proposed amendments to Rule 19-206, they were approved as amended. The Chair thanked Mr. Shipley for his assistance.

Agenda Item 1. Consideration of proposed amendments to Rule 19-752 (Reinstatement—Other Suspension; Disbarment; Disability Inactive Status; Resignation)

Mr. Marcus presented Rule 19-752, Reinstatement—Other Suspension; Disbarment; Disability Inactive Status; Resignation, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

CHAPTER 700 – DISCIPLINE, INACTIVE STATUS, RESIGNATION REINSTATEMENT

AMEND Rule 19-752 by adding new subsection (i)(2) pertaining to petitions withdrawn by the petitioner prior to disposition, and by making stylistic changes to section (i), as follows:

Rule 19-752. REINSTATEMENT--OTHER SUSPENSION; DISBARMENT; DISABILITY INACTIVE STATUS; RESIGNATION

(a) Scope of Rule

This Rule applies to an attorney who has been disbarred, suspended indefinitely, suspended for a fixed period longer than six months, or transferred to disability inactive status or who has resigned from the practice of law.

(b) Reinstatement Not Automatic

An attorney subject to this Rule is not automatically reinstated upon expiration of the period of suspension. An attorney is not reinstated until the Supreme Court enters an Order of Reinstatement.

(c) Petition for Reinstatement

(1) Requirement

An attorney who seeks reinstatement under this Rule shall file a verified petition for reinstatement with the Clerk of the Supreme Court and serve a copy on Bar Counsel. The attorney shall be the petitioner. Bar Counsel shall be the respondent.

(2) Timing Following Order of Suspension or Disbarment

(A) If the attorney was suspended for a fixed period, the petition may not be filed earlier than 30 days prior to the end of the period of suspension.

(B) If the attorney was suspended for an indefinite period or disbarred, the petition may not be filed earlier than ~~(i)~~ the time specified in the order of suspension or disbarment.

(3) Content

The petition shall be captioned "In the Matter of the Petition for Reinstatement of XXXXX to the Bar of Maryland" and state or be accompanied by the following:

(A) docket references to all prior disciplinary or remedial actions, including all actions pending as of the date of the attorney's disbarment or suspension, to which the attorney was a party;

(B) a copy of the order that disbarred or suspended the attorney, placed the attorney on inactive status, or accepted the resignation of the attorney and any opinion of the Court that accompanied the order;

(C) that the attorney has complied in all respects with the provisions of Rule 19-741 or, if applicable, Rule 19-743, and with any terms or conditions stated in the disciplinary or remedial order;

(D) that the attorney has paid all assessments and applicable late fees owed to the Client Protection Fund pursuant to Rule 19-605 and the Disciplinary Fund pursuant to Rule 19-705 as of the effective date of the attorney's suspension, disbarment, transfer to disability inactive status, or resignation;

(E) a description of the conduct or circumstances leading to the order of disbarment, suspension, placement on inactive status, or acceptance of resignation;

(F) facts establishing the attorney's subsequent conduct and reformation, present character, present qualifications and competence to practice law, and ability to satisfy the criteria set forth in section (h) of this Rule; and

(G) a statement that, to the best of the attorney's knowledge, information, and belief, no complaints or disciplinary proceedings are currently pending against the attorney.

(d) Information for Bar Counsel

(1) Generally

Upon the filing of the petition, the attorney shall separately supply to Bar Counsel, in writing, the following information:

(A) the attorney's current address, e-mail address, if any, and telephone number;

(B) the information specified in subsection (c)(2) or (c)(3) of this Rule, as applicable;

(C) evidence establishing compliance with all applicable requirements set forth in section (h) of this Rule;

(D) a statement of whether the attorney has applied for reinstatement in any other jurisdiction and the current status of each such application; and

(E) any other information that the attorney believes is relevant to determining whether the attorney possesses the character and fitness necessary for reinstatement; and

(2) If Disbarred or Suspended

If the attorney has been disbarred or suspended, the information supplied to Bar Counsel shall include:

(A) the address of each residence of the attorney during the period of discipline, with inclusive dates of each residence;

(B) the name, address, e-mail address, if any, and telephone number of each employer, associate, and partner of the attorney during the period of discipline, together with (i) the inclusive dates of each employment, association, and partnership, (ii) the positions held, (iii) the names of all immediate supervisors, and (iv) if applicable, the reasons for termination of the employment, association, or partnership;

(C) the case caption, general nature, and disposition of each civil and criminal action pending during the period of discipline to which the attorney was a party or in which the attorney claimed an interest;

(D) a statement of monthly earnings and all other income during the period of discipline, including the source;

(E) copies of the attorney's state and federal income tax returns for the three years preceding the effective date of the order of disbarment or suspension and each year thereafter;

(F) a statement of the attorney's assets and financial obligations;

(G) the names and addresses of all creditors;

(H) a statement identifying all other business or occupational licenses or certificates applied for or held

during the period of discipline and the current status of each application; and

(I) the name and address of each financial institution at which the attorney maintained or was signatory on any account, safe deposit box, deposit, or loan during the period of discipline and written authorization for Bar Counsel to obtain financial records pertaining to such accounts, safe deposit boxes, deposits, or loans.

(3) If Transferred to Disability Inactive Status

If the attorney was transferred to disability inactive status, the information supplied to Bar Counsel shall include:

(A) the name, address, and telephone number of each health care provider or addiction care provider and institution that examined or treated the attorney for incapacity during the period of inactive status; and

(B) a written waiver of any physician-patient privilege with respect to each psychiatrist, psychologist, or psychiatric-mental health nursing specialist named in subsection (d)(3)(A) of this Rule.

(e) Response to Petition

(1) Generally

Within 30 days after service of the petition, Bar Counsel shall file and serve on the attorney a response. Except as provided in subsection (d)(2) of this Rule, the response shall admit or deny the averments in the petition in accordance with Rule 2-323 (c). The response may include Bar Counsel's recommendations in support of or opposition to the petition and with respect to any conditions to reinstatement.

(2) Consent

If Bar Counsel is satisfied that the attorney has complied fully with the provisions of Rule 19-741 and any requirements or conditions in the order of suspension or disbarment, and there are no known complaints or disciplinary proceedings pending against the attorney, the response may be in the form of a consent to the reinstatement.

(f) Disposition

(1) Consent by Bar Counsel

If, pursuant to subsection (e)(2) of this Rule, Bar Counsel has filed a consent to reinstatement, and if the attorney has complied with subsection (h)(2)(H) of this Rule, the Clerk shall proceed in accordance with Rule 19-751 (e)(1).

(2) Other Cases

In other cases, upon review of the petition and Bar Counsel's response, the Court may (A) without a hearing, dismiss the petition or grant the petition and enter an order of reinstatement with such conditions as the Court deems appropriate, or (B) order further proceedings in accordance with section (g) of this Rule.

(g) Further Proceedings

(1) Order Designating Judge

If the Court orders further proceedings pursuant to subsection (f)(2)(B) of this Rule, it shall enter an order designating a judge of any circuit court to hold a hearing.

(2) Discovery

The judge shall allow reasonable time for Bar Counsel to investigate the petition and, subject to Rule 19-726, to take depositions and complete discovery.

(3) Hearing

The applicable provisions of Rule 19-727 shall govern the hearing and the findings and conclusions of the judge, except that the attorney shall have the burden of proving the averments of the petition by clear and convincing evidence.

(4) Proceedings in Supreme Court

The applicable provisions of Rules 19-728 and 19-740 (a), (b), and (d) shall govern subsequent proceedings in the Supreme Court. The Court may (A) dismiss the petition, (B) order reinstatement, with such conditions as the Court deems appropriate, or (C) remand for further proceedings.

(h) Criteria for Reinstatement

(1) Generally

In determining whether to grant a petition for reinstatement, the Supreme Court shall consider the nature and circumstances of the attorney's conduct that led to the disciplinary or remedial order and the attorney's (A) subsequent conduct, (B) current character, and (C) current qualifications and competence to practice law.

(2) Specific Criteria

The Court may order reinstatement if the attorney meets each of the following criteria or presents sufficient reasons why reinstatement should be ordered in the absence of satisfaction of one or more of those criteria:

(A) the attorney has complied in all respects with the provisions of Rule 19-741 or, if applicable, 19-743 and with the terms and conditions of prior disciplinary or remedial orders;

(B) the attorney has not engaged in or attempted or offered to engage in the unauthorized practice of law during the period of disbarment, suspension, or inactive status;

(C) if the attorney was transferred to disability inactive status, the incapacity or infirmity, including alcohol or drug abuse, no longer exists and is not likely to recur in the future;

(D) if the attorney was disbarred or suspended, the petitioner recognizes the wrongfulness and seriousness of the professional misconduct for which discipline was imposed;

(E) the attorney has not engaged in any professional misconduct or, other than minor traffic or municipal infractions, any unlawful activity since the imposition of discipline;

(F) the attorney currently has the requisite honesty and integrity to practice law;

(G) the attorney has kept informed about recent developments in the law and is competent to practice law; and

(H) the attorney has complied with all financial obligations required by these Rules or by court order, including (i) payment of all outstanding assessments, including late fees, if any, owed to the Client Protection Fund pursuant to Rule 19-605 and the Disciplinary Fund pursuant to Rule 19-705 that accrued prior to the attorney's suspension, disbarment, transfer to disability inactive status, or resignation, (ii) reimbursement of all amounts due to the attorney's former clients, (iii) payment of restitution which, by court order, is due to the attorney's former clients or any other person, (iv) reimbursement of the Client Protection Fund for all claims that arose out of the attorney's practice of law and satisfaction of all judgments arising out of such claims, and (v) payment of all costs assessed by court order or otherwise required by law.

(i) Subsequent Petitions

(1) Petitions Limited to Three

Except upon order of the Supreme Court, an attorney may not file a petition for reinstatement sooner than one year after the Court denied a prior petition for reinstatement. Absent leave of Court or the consent of Bar Counsel, an attorney may not file more than three petitions for reinstatement.

(2) Withdrawn Petitions

A petition for reinstatement that is withdrawn by the petitioner no laters than ten days prior to the time Bar Counsel's response is due does not count toward the limit set forth in subsection (i)(1) of this Rule.

(j) Conditions to Reinstatement

An order that reinstates an attorney may include, as a condition precedent to reinstatement or as a condition of probation after reinstatement that the attorney:

(1) take the oath of attorneys required by Code, Business Occupations and Professions Article, § 10-212;

(2) pass the Uniform Bar Examination;

(3) successfully complete the Maryland Law Component required for admission to the Maryland Bar;

(4) take the Multistate Professional Responsibility Examination and earn a score that meets or exceeds the passing score in Maryland established by the Board of Law Examiners;

(5) attend a bar review course approved by Bar Counsel and submit to Bar Counsel satisfactory evidence of attendance;

(6) submit to Bar Counsel evidence of successful completion of a professional ethics course at an accredited law school;

(7) engage an attorney satisfactory to Bar Counsel to monitor the attorney's legal practice for a period stated in the order of reinstatement;

(8) limit the nature or extent of the attorney's future practice of law in the manner set forth in the order of reinstatement;

(9) participate in a program tailored to individual circumstances that provides the attorney with law office management assistance, attorney assistance or counseling, treatment for substance or gambling abuse, or psychological counseling;

(10) demonstrate, by a report of a health care professional or other evidence, that the attorney is mentally and physically competent to resume the practice of law;

(11) issue an apology to one or more persons; or

(12) take any other corrective action that the Court deems appropriate.

(k) Effective Date of Reinstatement Order

An order that reinstates the petitioner may provide that it shall become effective immediately or on a date stated in the order.

(l) Duties of Clerk

(1) Attorney Admitted to Practice

Promptly after the effective date of an order that reinstates a petitioner, the Clerk of the Supreme Court shall comply with Rule 19-761.

(2) Attorney Not Admitted to Practice

Upon receiving a reinstatement notice authorized by section (e) of this Rule, or on the effective date of an order or notice that reinstates a petitioner not admitted by the Supreme Court to practice law, the Clerk of the Supreme Court shall remove the petitioner's name from the list maintained in that Court of non-admitted attorneys who are ineligible to practice law in this State, and shall certify that fact to the Board of Law Examiners and the clerks of all courts in the State.

(m) Motion to Vacate Reinstatement

Bar Counsel may file a motion to vacate an order that reinstates the petitioner if (1) the petitioner has failed to demonstrate substantial compliance with the order, including any condition of reinstatement imposed under Rule 19-741 (e) or section (j) of this Rule or (2) the petition filed under section (a) of this Rule contains a false statement or omits a material fact, the petitioner knew the statement was false or the fact was omitted, and the true facts were not disclosed to Bar Counsel prior to entry of the order. The petitioner may file a verified response within 15 days after service of the motion, unless a different time is ordered. If there is a factual dispute to be resolved, the court may enter an order designating a judge in accordance with Rule 19-722 to hold a hearing. The judge shall allow reasonable time for the parties to prepare for the hearing and may authorize discovery pursuant to Rule 19-726. The applicable provisions of Rule 19-727 shall govern the hearing. The applicable provisions of Rules 19-728 and 19-740, except section (c) of Rule 19-740, shall govern any subsequent proceedings in the Supreme Court. The Court may reimpose the discipline that was in effect when the order was entered or may impose additional or different discipline.

Source: This Rule is derived from former Rule 16-781 (2016).

Rule 19-752 was accompanied by the following Reporter's note:

> The Supreme Court, in a letter to the Chair dated December 20, 2023, has asked the Rules Committee to consider whether section (i) of Rule 19-752 should be amended to establish that a petition withdrawn by a petitioner before it is acted on by the Court should not count toward the limit of three petitions contained in this section.
>
> In response to the Court's letter, stylistic changes are proposed in which section (i) is divided into two subsections. Subsection (i)(1) is comprised of existing section (i). Subsection (i)(2) is comprised of a new provision responsive to the Court's letter and indicates that a petition withdrawn before the Court acts upon it does not count toward the limit of three imposed in subsection (i)(1) provided that the withdrawal occurs no later than 10 days prior to the time Bar Counsel's response is due.

Mr. Marcus informed the Committee that several items on the agenda were prompted by two letters to the Committee from Chief Justice Fader (see Appendix 1). One of the issues identified by the Chief Justice was the Rule governing reinstatement of an attorney who was suspended, disbarred, or otherwise inactive. Mr. Marcus said that Bar Counsel Tom DeGonia was present to provide additional information.

Mr. DeGonia addressed the Committee. He said that the Chief Justice's December 20, 2023 letter discussed the procedure for petitions for reinstatement to the Bar. Mr. DeGonia

explained that the reinstatement process is lengthy and involved for his office. It requires a full investigation, review of records, and interviews with witnesses. He noted that an individual is permitted to petition for reinstatement three times without permission from the Supreme Court or consent of Bar Counsel and cannot file a petition without leave of Court less than one year after the Court denied a previous petition. The Rules allow the petitioner to withdraw the petition without it counting against the three opportunities to petition for reinstatement. Mr. DeGonia said that sometimes the withdrawal is noted on the eve of the Court's action on the petition, after Bar Counsel has expended significant time investigating and responding to the petition. He said that the proposed amendments to Rule 19-752 would require a petition to be withdrawn at least 10 days before Bar Counsel's response is due to prevent that petition from being counted as one of the three permitted by the Rule.

The Chair pointed out a typo in new subsection (i)(2): "later" should not have an "s" on the end. The Reporter said that this would be fixed. There being no motion to amend or reject the proposed amendments to Rule 19-752, they were approved as presented, subject to the correction noted by the Chair.

Agenda Item 2. Consideration of proposed amendments to Rule 19-218 (Special Authorization for Out-of-State Attorneys Affiliated with Programs Providing Legal Services to Low-Income Individuals)

Mr. Marcus presented Rule 19-218, Special Authorization for Out-of-State Attorneys Affiliated with Programs Providing Legal Services to Low-Income Individuals, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

CHAPTER 200 – ADMISSION TO THE BAR

SPECIAL AUTHORIZATION TO PRACTICE

AMEND Rule 19-218 by revising the provision in section (d) relating to the expiration of special authorization privileges; by deleting the cross reference following section (d) and relabeling it, with minor amendments, as a Committee note following subsection (d)(3)(A); and by making stylistic changes to section (d), as follows:

Rule 19-218. SPECIAL AUTHORIZATION FOR OUT-OF-STATE ATTORNEYS AFFILIATED WITH PROGRAMS PROVIDING LEGAL SERVICES TO LOW-INCOME INDIVIDUALS

(a) Definition

As used in this Rule, "legal services program" means a program operated by (1) an entity that provides civil legal services to low-income individuals in Maryland who meet the financial eligibility requirements of the Maryland Legal Services Corporation and is on a list of such programs provided

by the Corporation to the State Court Administrator and posted on the Judiciary website pursuant to Rule 19-505; (2) the Maryland Office of the Public Defender; (3) a clinic offering pro bono legal services and operating in a courthouse facility; or (4) a local pro bono committee or bar association affiliated project that provides pro bono legal services.

(b) Eligibility

Pursuant to this Rule, a member of the Bar of another state who is employed by or associated with a legal services program may practice in this State pursuant to that program if (1) the individual is a graduate of a law school meeting the requirements of Rule 19-201 (a)(2) and (2) the individual will practice under the supervision of a member of the Bar of this State.

Cross reference: For the definition of "State," see Rule 19-101 (l).

(c) Proof of Eligibility

To obtain authorization to practice under this Rule, the out-of-state attorney shall file with the Clerk of the Supreme Court a written request accompanied by (1) evidence of graduation from a law school as defined in Rule 19-201 (a)(2), (2) a certificate of the highest court of another state certifying that the attorney is a member in good standing of the Bar of that state, and (3) a statement signed by the Executive Director of the legal services program that includes (A) a certification that the attorney is currently employed by or associated with the program, (B) a statement as to whether the attorney is receiving any compensation other than reimbursement of reasonable and necessary expenses, and (C) an agreement that, within ten days after cessation of the attorney's employment or association, the Executive Director will file the Notice required by section (e) of this Rule.

(d) Certificate of Authorization to Practice

(1) Issuance of Certificate

Upon the filing of the proof of eligibility required by this Rule, the Clerk of the Supreme Court shall issue a certificate under the seal of the Court certifying

that the attorney is authorized to practice under this Rule, subject to the automatic termination provision of section (e) of this Rule.

(2) Contents of Certificate

The certificate shall state

~~(1)~~(A) the effective date,

~~(2)~~(B) whether the attorney ~~(A)~~(i) is authorized to receive compensation for the practice of law under this Rule or ~~(B)~~(ii) is authorized to practice exclusively as a pro bono attorney pursuant to Rule 19-504, and

~~(3)~~(C) pursuant to subsection (d)(3), any expiration date of the special authorization to practice.

(3) Expiration Date of Certificate

(A) If Attorney Is Paid

If the attorney is receiving compensation for the practice of law under this Rule, the expiration date shall be no later than ~~two~~ four years after the effective date. The Court may extend the expiration date of the certificate for good cause shown.

Committee note: An attorney who intends to practice law in Maryland for compensation for more than four years should apply for admission to the Maryland Bar.

(B) If Attorney is Not Paid

If the attorney is receiving no compensation other than reimbursement of reasonable and necessary expenses, no expiration date shall be stated.

~~Cross reference: An attorney who intends to practice law in Maryland for compensation for more than two years should apply for admission to the Maryland Bar.~~

(e) Automatic Termination

Authorization to practice under this Rule is automatically terminated if the attorney ceases to be employed by or associated with the legal services program. Within ten days after cessation of the attorney's employment or association, the Executive Director of the legal services program shall file with the Clerk of the Supreme Court notice of the termination of authorization.

(f) Disciplinary Proceedings in Another Jurisdiction

Promptly upon the filing of a disciplinary proceeding in another jurisdiction, an attorney authorized to practice under this Rule shall notify the Executive Director of the legal services program of the disciplinary matter. An attorney authorized to practice under this Rule who in another jurisdiction (1) is disbarred, suspended, or otherwise disciplined, (2) resigns from the bar while disciplinary or remedial action is threatened or pending in that jurisdiction, or (3) is placed on inactive status based on incapacity shall inform Bar Counsel and the Clerk of the Supreme Court promptly of the discipline, resignation, or inactive status.

(g) Revocation or Suspension

At any time, the Court, in its discretion, may revoke or suspend an attorney's authorization to practice under this Rule by written notice to the attorney. By amendment or deletion of this Rule, the Court may modify, suspend, or revoke the special authorizations of all out-of-state attorneys issued pursuant to this Rule.

(h) Special Authorization not Admission

Out-of-state attorneys authorized to practice under this Rule are not, and shall not represent themselves to be, members of the Bar of this State, except in connection with practice that is authorized under this Rule. They are required to make payments to the Client Protection Fund of the Bar of Maryland and the Disciplinary Fund, except that an attorney who is receiving no compensation other than reimbursement of reasonable and necessary expenses is not required to make the payments.

(i) Rules of Professional Conduct

An attorney authorized to practice under this Rule is subject to the Maryland Attorneys' Rules of Professional Conduct.

(j) Reports

Upon request by the Administrative Office of the Courts, an attorney authorized to practice under this

Rule shall timely file an IOLTA Compliance Report in accordance with Rule 19-409 and a Pro Bono Legal Service Report in accordance with Rule 19-503.

Source: This Rule is derived from former Rule 19-215 (2018).

Rule 19-218 was accompanied by the following Reporter's note:

The Supreme Court, in a letter to the Chair dated September 21, 2023, has asked the Rules Committee to consider whether Rule 19-218 should be amended to explicitly state that special authorization status may be extended past two years by the Court for good cause shown.

The original purpose behind the two-year timeframe in section (d) when it was adopted by the Supreme Court on August 23, 2018 was to serve as a sunset provision during Maryland's transition to the UBE and to help the Office of the Public Defender address a critical staffing shortage.

Mr. Marcus said that Rule 19-218 was designed to assist legal services programs such as Legal Aid with staffing and recruitment by permitting attorneys to work for those programs without being admitted to the Maryland Bar. He explained that special authorization is separate from *pro hac vice* admission; special authorization is given by certificate to individuals who meet the criteria. Special admission is not intended to be an alternative to taking the bar exam and going through the formal admission process.

Mr. Marcus said that the Chief Justice pointed out in his letter dated September 21, 2023 that the certificate permitting an attorney to work for a legal services program expires after two years. The Rules used to permit the Court to extend the expiration date "for good cause shown," but that permission had a sunset provision, which automatically deleted it at the end of 2019. Mr. Marcus said that the proposed amendments would reinstate the Court's ability to extend the expiration date of a certificate and make certificates provided under the Rule good for four years instead of two. He drew the Committee's attention to the Committee note added after subsection (d)(3)(A), which reminds attorneys that a special authorization certificate is not a replacement for applying to the Bar if the attorney intends to practice in Maryland long-term.

Mr. Zollicoffer asked why the Committee note was necessary if the Court can extend the expiration. He also questioned when an attorney can be deemed to "intend to practice law in Maryland for compensation for more than four years." Deputy Reporter Schmidt explained that the current two-year expiration is not enough time for an attorney to waive into the Maryland Bar using Rule 19-215, which requires three years of practice. The extension of certificates from two years to four years would permit an attorney working for a legal services corporation to obtain three years of practice, apply to the Maryland Bar, and,

if appropriate, be granted admission before the certificate expires, allowing the attorney to continuously practice while seeking permanent admission.

Ms. Doyle asked if the Supreme Court could extend the certificate beyond the new four-year period. Mr. Schmidt responded in the affirmative. Ms. Doyle suggested adding clarifying language to that provision because it was not clear. By consensus, the Committee agreed to add "beyond four years" after "The Court may extend the expiration date of the certificate" in the new language in subsection (d)(3)(A). By consensus, the Committee approved this amendment.

Judge Chen remarked that the Chief Justice's letter states that one practitioner had contacted the Court seeking to extend the expiration of a certificate. She asked if the Committee is considering doubling the duration of certificates based on one individual's request. She suggested that the Committee can add the "good cause shown" extension language back into the Rule without extending the expiration for all certificates. Mr. Schmidt responded that the Subcommittee did not want to create a situation where the Court begins to receive an unknown number of requests for extension if that language is put back into the Rule.

The Chair said that the Rule was created years ago when there was a staffing crisis for legal services programs. The

Reporter added that the programs had problems recruiting attorneys. Creating the special admission option helped with staffing because out-of-state attorneys could work for a legal services program and obtain the requisite experience to waive into the Maryland Bar.

Judge Chen responded that she has done legal service work in her career and understands the staffing problems, but she reiterated that the Chief Justice only suggested that the ability to extend a certificate for good cause be reinstated. Mr. Marcus commented that he sees the proposed amendments as providing a clear timeline for an out-of-state attorney: you may work for a legal services program for four years but should take steps to be admitted to the Bar after three years if you intend to practice in Maryland longer. Mr. Laws remarked that the Chief Justice suggested only reinstating the extension language, but it was appropriate for the Subcommittee to look at the issue and suggest a more holistic solution.

Judge Bryant asked what would happen if an attorney doing *pro bono* work pursuant to subsection (d)(3)(B) with a certificate that does not expire then transitions to a paid position at the legal services program, which would bring the attorney under subsection (d)(3)(A). The Reporter commented that section (e) requires the program to notify the Court if the attorney's affiliation with the organization terminates. Judge

Bryant responded that the individual could be working for the program in a *pro bono* capacity and then move to a paid position with the same program. She said that the Rule is not clear about what should happen. Ms. Doyle agreed. Mr. DeGonia responded that it is the responsibility of the program to notify the Court of the change. Judge Bryant moved to amend section (e) to require the program to notify the Court if the attorney ceases to be associated with the program "in a *pro bono* capacity." The motion was seconded and approved by consensus.

There being no further motion to amend or reject the proposed amendments to Rule 19-218, the Rule was approved as amended.

Agenda Item 3. Consideration of proposed amendments to Rule 19-217 (Special Admission of Out-of-State Attorneys Pro Hac Vice) and conforming amendments to Form 19-A.1 (Motion for Special Admission of Out-of-State Attorney Under Rule 19-217)

Mr. Marcus presented Rule 19-217, Special Admission of Out-of-State Attorneys Pro Hac Vice, and conforming amendments to Form 19-A.1, Motion for Special Admission of Out-of-State Attorney Under Rule 19-217, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

CHAPTER 200 – ADMISSION TO THE BAR

ADMISSION OF OUT-OF-STATE ATTORNEYS

AMEND Rule 19-217 by adding a provision to subsection (b)(1) requiring the attorney to provide the case number for every prior pro-hac vice admission, and by making stylistic changes to subsection (b)(1), as follows:

Rule 19-217. SPECIAL ADMISSION OF OUT-OF-STATE ATTORNEYS PRO HAC VICE

(a) Motion for Special Admission

(1) Generally

A member of the Bar of this State who (A) is an attorney of record in an action pending (i) in any court of this State, or (ii) before an administrative agency of this State or any of its political subdivisions, or (B) is representing a client in an arbitration taking place in this State that involves the application of Maryland law, may move that an attorney who is a member in good standing of the Bar of another state be admitted to practice in this State for the limited purpose of appearing and participating in the action as co-counsel with the movant.

Committee note: "Special admission" is a term equivalent to "admission pro hac vice." It should not be confused with "special authorization" permitted by Rules 19-218 and 19-219.

(2) Where Filed

(A) If the action is pending in a court, the motion shall be filed in that court.

(B) If the action is pending before an administrative agency, the motion shall be filed in the circuit court for the county in which the principal office of the agency is located or in any other circuit court in which an action for judicial review of the decision of the agency may be filed.

(C) If the matter is pending before an arbitrator or arbitration panel, the motion shall be filed in the circuit court for the county in which the arbitration hearing is to be held or in any other circuit court in which an action to review an arbitral award entered by the arbitrator or panel may be filed.

(3) Other Requirements

The motion shall be in writing and shall include the following:

(A) the full name, address, telephone number, and email address of the attorney to be specially admitted; and

(B) the movant's certification that copies of the motion have been served on the agency or the arbitrator or arbitration panel, and all parties of record.

(C) The motion shall be substantially in the form provided in Appendix 19-A, Form A.1.

Cross reference: See Appendix 19-A following Title 19, Chapter 200 of these Rules for Forms 19-A.1 and 19-A.2, providing the form of a motion and order for the Special Admission of an out-of-state attorney.

(b) Certification by Out-of-State Attorney

The attorney whose special admission is moved shall certify in writing:

(1) the number of times the attorney has been specially admitted during the five years immediately preceding the filing of the motion, ~~and~~ the courts that granted admission, and each case number in which the attorney was specially admitted, and

(2) each unique identifying number previously issued to the attorney by the Attorney Information System, Client Protection Fund, or Maryland Judicial Information Systems (JIS) for use with Maryland Electronic Courts (MDEC).

The certification shall be substantially in the form provided in Appendix 19-A, Form A.1 and may be filed as a separate paper or may be included in the motion under an appropriate heading.

(c) Order

The court by order may admit specially or deny the special admission of an attorney. In either case, the clerk shall forward a copy of the order to the State Court Administrator, who shall maintain a record of all attorneys granted or denied special admission in the Attorney Information System. When the order grants or denies the special admission of an attorney in an action pending before an administrative agency, the clerk also shall forward a copy of the order to the agency.

(d) Limitations on Out-of-State Attorney's Practice

An attorney specially admitted pursuant to this Rule may act only as co-counsel for a party represented by an attorney of record in the action who is admitted to practice in this State. The specially admitted attorney may participate in the court or administrative proceedings only when accompanied by the Maryland attorney, unless the latter's presence is waived by the judge or administrative hearing officer presiding over the action. An attorney specially admitted is subject to the Maryland Attorneys' Rules of Professional Conduct during the pendency of the action or arbitration.

Cross reference: See Code, Business Occupations and Professions Article, § 10-215.

Committee note: This Rule is not intended to permit extensive or systematic practice by attorneys not admitted in Maryland. Because specialized expertise or other special circumstances may be important in a particular case, however, the Committee has not recommended a numerical limitation on the number of special admissions to be allowed any out-of-state attorney.

Source: This Rule is derived from former Rule 19-214 (2018).

Rule 19-217 was accompanied by the following Reporter's note:

The Supreme Court, in a letter to the Chair dated December 20, 2023, has asked the Rules Committee to consider whether subsection (b)(1) of Rule 19-217 should be amended to require the attorney seeking pro-hac vice admission to list each of the case numbers in which the attorney was previously specially admitted.

In response to the Court's letter, subsection (b)(1) of this Rule is proposed to be amended to add this requirement to the list of requirements already in the subsection. Stylistic changes are also proposed and conforming amendments are proposed to Form A.1 in Appendix 19-A.

MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

CHAPTER 200 – ADMISSION TO THE BAR

APPENDIX 19-A: FORMS FOR SPECIAL ADMISSION OF OUT-OF-STATE ATTORNEY

AMEND Form 19-A.1 by adding lines to the "Certificate As to Special Admissions" section for the attorney to provide the case number for prior pro-hac vice admissions, as follows:

Form 19-A.1. MOTION FOR SPECIAL ADMISSION OF OUT-OF-STATE ATTORNEY UNDER RULE 19-217

(Caption)

MOTION FOR SPECIAL ADMISSION OF OUT-OF-STATE ATTORNEY UNDER

RULE 19-217

I, _____, attorney of record in this case, move that the court admit, _____ (name), an out-of-state attorney who is a member in good standing of the Bar of _____, for the limited purpose of appearing and participating in this case as co-counsel with me.

Out-of-State Attorney Information:

_____
(Full Name)

_____

_____
(Address)

_____
(Telephone)

_____
(Email Address)

Unless the court has granted a motion for reduction or waiver, the $100.00 fee required by Code, Courts and Judicial Proceedings Article, § 7-202 (f) is included with this motion.

I [ ] do [ ] do not request that my presence be waived under Rule 19-217 (d).

_____
Signature of Moving Attorney

_____
Name

_____

_____
Address

_____
Telephone

_____
Email Address

Attorney for _____

CERTIFICATE AS TO SPECIAL ADMISSIONS

I, _____, certify on this ____ day of _____, _____, that during the preceding five years, I have been specially admitted in the State of Maryland _____ times by the following courts:

Date	Court	Case Number
_____	_____	_____
_____	_____	_____
_____	_____	_____

I have previously been issued the following unique identifying numbers by the Maryland Judiciary:

Attorney Information System _____
Client Protection Fund _____
Maryland Electronic Courts (MDEC) _____

_____
Signature of Out-of-State Attorney

_____
Name

_____

_____
Address

_____
Telephone

_____
Email Address

(Certificate of Service)

Source: This Form is derived from former Form RGAB-14/M (2016).

Form 19-A.1 was accompanied by the following Reporter's note:

> The Supreme Court, in a letter to the Chair dated December 20, 2023, has asked the Rules Committee to consider whether subsection (b)(1) of Rule 19-217 should be amended to require the attorney seeking pro-hac vice admission to list each of the case numbers in which the attorney was previously specially admitted.
>
> In response to the Court's letter, subsection (b)(1) of Rule 19-217 is proposed to be amended to add this requirement to the list of requirements already in the subsection. In addition, conforming amendments are proposed to Form A.1 in Appendix 19-A.

Mr. Marcus said that another issue raised by the Chief Justice in his December 20, 2023 letter to the Committee was the information required to be provided by an attorney seeking admission *pro hac vice*. The proposed amendments to Rule 19-217 (b)(1) require the attorney to provide the case number for each action in which the attorney was previously specially admitted under the Rule. Mr. Marcus explained that this information will further assist the court in determining whether an out-of-state attorney is maintaining a de facto practice in Maryland without seeking admission. Conforming amendments to Form 19-A.1 are also proposed.

Judge Chen asked if it might be helpful to request the case name in addition to the case number. She pointed out that an attorney could make a typo or transpose a digit and the case

name can assist the court. Mr. Laws agreed. Judge Chen moved to add "name of the case" to the amended language in subsection (b)(1) and to make a conforming amendment to Form 19-A.1. The motion was seconded. By consensus, the Committee approved the amendment.

There being no further motion to amend or reject the proposed amendments to Rule 19-217 and Form 19-A.1, they were approved as amended.

Agenda Item 5. Consideration of proposed amendments to Rule 19-301.15 (1.15) (Safekeeping Property)

Mr. Marcus presented Rule 19-301.15 (1.15), Safekeeping Property, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

CHAPTER 300 – MARYLAND ATTORNEYS' RULES OF PROFESSIONAL CONDUCT

CLIENT-ATTORNEY RELATIONSHIP RULES

AMEND Rule 19-301.15 by replacing the provision in section (c) pertaining to informed consent with a provision specifying when an attorney may withdraw a fee from the attorney's escrow account, by making a stylistic change to Comment [1], by deleting Comment [3], by renumbering Comments [4], [5], and [6] as Comments [3], [4], and [5] respectively, and by

adding a cross reference following Comment [4], as follows:

RULE 19-301.15. SAFEKEEPING PROPERTY

(a) An attorney shall hold property of clients or third persons that is in an attorney's possession in connection with a representation separate from the attorney's own property. Funds shall be kept in a separate account maintained pursuant to Title 19, Chapter 400 of the Maryland Rules, and records shall be created and maintained in accordance with the Rules in that Chapter. Other property shall be identified specifically as such and appropriately safeguarded, and records of its receipt and distribution shall be created and maintained. Complete records of the account funds and of other property shall be kept by the attorney and shall be preserved for a period of at least five years after the date the record was created.

(b) An attorney may deposit the attorney's own funds in a client trust account only as permitted by Rule 19-408 (b).

(c) ~~Unless the client gives informed consent, confirmed in writing, to a different arrangement, an attorney shall deposit legal fees and expenses that have been paid in advance into a client trust account and may withdraw those funds for the attorney's own benefit only as fees are earned or expenses incurred.~~ An attorney shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the attorney only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, an attorney shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, an attorney shall deliver promptly to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or

third person, shall render promptly a full accounting regarding such property.

(e) When an attorney in the course of representing a client is in possession of property in which two or more persons (one of whom may be the attorney) claim interests, the property shall be kept separate by the attorney until the dispute is resolved. The attorney shall distribute promptly all portions of the property as to which the interests are not in dispute.

Cross reference: For the duties of an attorney with respect to attorney trust account funds that are presumed abandoned, see Rule 19-414.

COMMENT

[1] ~~A~~ An attorney should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property of clients or third persons, including prospective clients, must be kept separate from the attorney's business and personal property and, if money, in one or more trust accounts. Separate trust accounts may be warranted when administering estate money or acting in similar fiduciary capacities. An attorney should maintain on a current basis books and records in accordance with generally accepted accounting practice and the Rules in Title 19, Chapter 400 and comply with any other record-keeping rules established by law or court order.

[2] Normally it is impermissible to commingle the attorney's own funds with client funds, and section (b) of this Rule provides that it is permissible only as permitted by Rule 19-408 (b). Accurate records must be kept regarding which part of the funds are the attorney's.

~~[3] Section (c) of Rule 19-301.15 (1.15) permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the attorney. Unless the client gives informed consent, confirmed in writing, to a different arrangement, the Rule's default position is that such advances be treated as the property of the client,~~

~~subject to the restrictions provided in section (a) of this Rule. In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 19-301.16 (d) (1.16).~~

~~[4]~~[3] Attorneys often receive funds from which the attorney's fee will be paid. The attorney is not required to remit the client funds that the attorney reasonably believes represent fees owed. However, an attorney may not hold funds to coerce a client into accepting the attorney's contention. The disputed portion of the funds must be kept in a trust account and the attorney should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be distributed promptly.

Cross reference: see Rule 19-301.16 (d) for requirements concerning the requirement to refund any advance payment of fee or expense that has not been earned or incurred.

~~[5]~~[4] Section (e) of this Rule also recognizes that third parties may have lawful claims against specific funds or other property in a attorney's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. An attorney may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the attorney must refuse to surrender the funds or property to the client until the claims are resolved. An attorney should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the attorney may file an action to have a court resolve the dispute.

~~[6]~~[5] The obligations of an attorney under this Rule are independent of those arising from activity other than rendering legal services. For example, an attorney who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the attorney does not render legal services in the transaction and is not governed by this Rule.

> Model Rules Comparison: Rule 19-301.15 (1.15) is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, with the exception of changes to Rule 19-301.15 (c) (1.15), the addition of Comment [3], and the omission of ABA Comment [6].

Rule 19-301.15 (1.15) was accompanied by the following Reporter's note:

> In its Rules Order adopting the 211th Report, the Supreme Court repealed the common law "attorneys lien." In the wake of this change, the Rules Committee staff has received a request to revise Rule 19-301.15 to bring it into closer alignment with American Bar Association Model Rules of Professional Conduct Rule 1.15 (Model Rule 1.15).
>
> The Attorneys and Judges subcommittee proposes a revision to section (c) that replaces the provision establishing an exception to the general rule that an attorney may not withdraw fees from the attorney's escrow account until they are earned with a provision that merely contains the general rule. To conform to this revision, Comment [3] is proposed to be deleted and a new cross-reference to Rule 19-301.16 following Comment [3] is proposed.

Mr. Marcus explained that the proposed amendments to Rule 19-301.15 were suggested by Rules Committee member Irwin Kramer to update provisions pertaining to withdrawal of client fees from an attorney's escrow account prior to earning those fees. Some attorneys use a retainer engagement letter that states that the attorney's fee is deemed "earned" on execution of the agreement or that a percentage of the fee is earned at certain benchmark events. Mr. Marcus noted that an attorney executing

this type of agreement has an obligation to obtain the informed consent of the client pursuant to current Rule 19-301.15 (c), but also has an obligation to advise that client of what is in the client's best interest. If the attorney-client relationship sours, there can be a disagreement over how much of the fee has been earned.

Mr. Marcus said that the American Bar Association ("ABA") rule on safekeeping property prohibits commingling client funds and the attorney's earned fees; the attorney may only move funds from an escrow account to an operating account as the fee is earned. The proposed amendments delete Rule 19-301.15 (c) and replace it with the general rule that an attorney must deposit fees paid in advance into a client trust account and may only withdraw fees as they are earned. Mr. Marcus noted that there is still peril for lawyers who charge a flat fee regarding when that fee can be deemed "earned," but the amendment clarifies the Rule for cases where the attorney charges an hourly rate. He said that Comment 3 is deleted because it is no longer relevant to new section (c). A cross reference to Rule 19-301.16 follows renumbered Comment 3.

There being no motion to amend or reject the proposed amendments to Rule 19-301.15, they were approved as presented.

Agenda Item 6. Consideration of proposed amendments to Rule 19-301.16 (1.16) (Declining or Terminating Representation)

Mr. Marcus presented Rule 19-301.16 (1.16), Declining or Terminating Representation, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

CHAPTER 300 – MARYLAND ATTORNEYS' RULES OF PROFESSIONAL CONDUCT

AMEND Rule 19-301.16 to conform to ABA Model Rule 1.16 by adding a provision to section (a) pertaining to an attorney's responsibilities prior to accepting representation, by adding new subsection (a)(4) specifying situations in which an attorney is required to decline or terminate representation of a client, by adding a provision to Comment [1] providing clarification and examples of when an attorney may be required to decline or terminate a representation, by adding a provision to Comment [2] providing additional details an attorney must consider when declining or terminating representation of a client, by making a stylistic change to Comment [7], and by updating the Model Rules Comparison following this Rule, as follows:

Rule 19-301.16. DECLINING OR TERMINATING REPRESENTATION (1.16)

(a) <u>An attorney shall inquire into and assess the facts and circumstances of each representation to determine whether the attorney may accept or continue the representation.</u> Except as stated in section (c) of this Rule, an attorney shall not represent

a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Maryland Attorneys' Rules of Professional Conduct or other law;

(2) the attorney's physical or mental condition materially impairs the attorney's ability to represent the client; ~~or~~

(3) the attorney is discharged; or

(4) the client or prospective client seeks to use or persists in using the attorney's services to commit or further a crime or fraud, despite the attorney's discussion pursuant to 19-301.2 (d) and 19-301.4 (a)(4) regarding the limitations on the attorney assisting with the proposed conduct.

(b) Except as stated in section (c) of this Rule, an attorney may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the attorney's services that the attorney reasonably believes is criminal or fraudulent;

(3) the client has used the attorney's services to perpetrate a crime or fraud;

(4) the client insists upon action or inaction that the attorney considers repugnant or with which the attorney has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the attorney regarding the attorney's services and has been given reasonable warning that the attorney will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the attorney or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) An attorney must comply with applicable law requiring notice to or permission of a tribunal when

terminating representation. When ordered to do so by a tribunal, an attorney shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, an attorney shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of another attorney, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The attorney may retain papers relating to the client to the extent permitted by other law.

COMMENT

[1] Section (a) imposes an obligation on an attorney to inquire into and assess the facts and circumstances of the representation before accepting it. The obligation imposed by section (a) continues throughout the representation. A change in the facts and circumstances relating to the representation may trigger an attorney's need to make further inquiry and assessment. For example, a client traditionally uses an attorney to acquire local real estate through the use of domestic limited liability companies, with financing from a local bank. The same client then asks the attorney to create a multi-tier corporate structure, formed in another state to acquire property in a third jurisdiction, and requests to route the transaction's funding through the attorney's trust account. Another example is when, during the course of a representation, a new party is named or a new entity becomes involved. An attorney should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 19-301.2 (c) (1.2) and 19-306.5 (6.5). See also Rule 19-301.3 (1.3), Comment [4].

Mandatory Withdrawal--[2] An attorney ordinarily must decline or withdraw from representation if the client demands that the attorney

engage in conduct that is illegal or violates the Maryland Attorneys' Rules of Professional Conduct or other law. The attorney is not obligated to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that an attorney will not be constrained by a professional obligation. Under paragraph (a)(4), the attorney's inquiry into and assessment of the facts and circumstances will be informed by the risk that the client or prospective client seeks to use or persists in using the attorney's services to commit or further a crime or fraud. This analysis means that the required level of an attorney's inquiry and assessment will vary for each client or prospective client, depending on the nature of the risk posed by each situation. Factors to be considered in determining the level of risk may include: (i) the identity of the client, such as whether the client is a natural person or an entity and, if an entity, the beneficial owners of that entity, (ii) the attorney's experience and familiarity with the client, (iii) the nature of the requested legal services, (iv) the relevant jurisdictions involved in the representation (for example, whether a jurisdiction is considered at high risk for money laundering or terrorist financing), and (v) the identities of those depositing into or receiving funds from the attorney's client trust account, or any other accounts in which client funds are held.

[3] When an attorney has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 19-306.2 (6.2). Similarly, court approval or notice to the court is often required by applicable law before an attorney withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the attorney engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the attorney may be bound to keep confidential the facts that would constitute such an explanation. The attorney's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Attorneys should be mindful of their obligation to both clients and the court under Rules 19-301.6 (1.6) and 19-303.3 (3.3).

Discharge--[4] A client has a right to discharge an attorney at any time, with or without cause, subject to liability for payment for the attorney's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge an appointed attorney may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor attorney is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the attorney, and in any event the discharge may be seriously adverse to the client's interests. The attorney should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 19-301.14 (1.14).

Optional Withdrawal--[7] An attorney may withdraw from representation in some circumstances. The attorney has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the attorney reasonably believes is criminal or fraudulent, for ~~a~~ an attorney is not required to be associated with such conduct even if the attorney does not further it. Withdrawal is also permitted if the attorney's services were misused in the past even if that would materially prejudice the client. The attorney may also withdraw where the client insists on taking action or inaction that the attorney considers repugnant or with which the attorney has a fundamental disagreement.

[8] An attorney may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client Upon Withdrawal--[9] Even if the attorney has been unfairly discharged by the client, an attorney must take all reasonable steps to

mitigate the consequences to the client. The attorney may retain papers as security for a fee only to the extent permitted by law, subject to the limitations in section (d) of this Rule. See Rule 19-301.15 (1.15).

Model Rules Comparison: Rule 19-301.16 (1.16) is substantially similar to the language of the ~~Ethics 2000~~ Amendments to the ABA Model Rules of Professional Conduct approved as Resolution 23A100 in August of 2023, with the exception that the last sentence of Comment [2] is omitted and "attorney" is used instead of "lawyer" throughout this Rule. ~~of the addition of "or inaction" to Rule 19-301.16 (b)(4) (1.16) and Comment [7], and the addition of "subject to the limitations in section (d) of this Rule" to Comment [9].~~

Rule 19-301.16 (1.16) was accompanied by the following Reporter's note:

The American Bar Association (the "ABA") passed resolution 23A100 (the "Resolution") modifying Model Rule of Professional Conduct 1.16 and its comments [1] and [2] in August of 2023. The Attorneys and Judges Subcommittee recommends that Rule 19-301.16 be revised to incorporate the changes to ABA Model Rule 1.16 in the Resolution in section (a), new subsection (a)(4), and Comments [1] and [2] of this Rule. A stylistic change is also proposed in Comment [7].

Mr. Marcus informed the Committee that the proposed amendments to Rule 19-301.16 have the potential to generate discussion. He explained that the proposed amendments to section (a) impose a continuing obligation on an attorney to inquire into and assess whether the attorney's representation is being used to commit or perpetuate a crime or fraud. He said that new subsection (a)(4) requires the attorney to withdraw

from representing a client if the client's actions persist after being advised of the attorney's inability to assist with the prohibited activity. Comments 1 and 2 are amended to add language from the ABA Model Rule with guidance on the new provisions. Mr. Marcus acknowledged that the requirement is amorphous and will require attorneys to use their instincts to determine when the circumstances rise to the level that triggers the requirement to withdraw from representation.

Mr. Zollicoffer said that, as a criminal defense attorney, he may represent defendants who are accused of the same offense over and over and enlist his services each time. He asked if his representation, which aims to acquit the client in each instance, could be seen as assisting the client with committing the same crime again. Judge Bryant responded that showing that the State did not meet its burden of proof in a criminal case is not perpetuating a crime. Mr. Zollicoffer questioned what his analysis should be under the amended Rule. If a client is engaging in an ongoing criminal enterprise, and the attorney continues to obtain dismissals or acquittals, is there a point where the attorney is furthering the criminal enterprise? Judge Bryant said that she sees a difference between the situation described by Mr. Zollicoffer and actively assisting with a crime. She said that she does not think that the Rule can be

read to interfere with the defendant's constitutional right to counsel of the defendant's choice.

Ms. Doyle commented that she reads the proposed amendments to mean that an attorney cannot be willfully blind to a crime or fraud that the attorney's representation is being used to perpetuate. She said that there is a distinction between facilitating a crime and providing diligent representation. Mr. Zollicoffer said that he would agree as long as defendants are able to get the representation that they want and are entitled to receive and attorneys do not have to worry about someone looking over their shoulder and accusing them of committing a crime by providing that representation.

The Chair called for a motion to amend the Rule. Mr. Zollicoffer said that he did not have a motion but wanted to state his concerns.

There being no motion to amend or reject the proposed amendments to Rule 19-301.16, they were approved as presented.

Agenda Item 7. Consideration of proposed amendments to Rule 18-409.1 (Subpoenas)

Mr. Marcus presented Rule 18-409.1, Subpoenas, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 18 – JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 – JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 1 – GENERAL PROVISIONS

AMEND Rule 18-409.1 by adding new subsection (a)(5) concerning materials obtained by Investigative Counsel in response to a subpoena and by making stylistic changes to section (a), as follows:

Rule 18-409.1. SUBPOENAS

(a) Investigative Subpoenas

(1) Authorization; Issuance

(A) Upon application by Investigative Counsel, the Chair of the Board, on behalf of the Commission, may authorize Investigative Counsel to issue a subpoena to compel the attendance of witnesses and the production of designated documents or other tangible things at a time and place specified in the subpoena if the Chair finds that the subpoena is necessary to and in furtherance of an investigation being conducted by Investigative Counsel pursuant to Rule 18-422 or 18-424.

(B) Upon authorization, Investigative Counsel may issue the subpoena.

(2) Contents

A subpoena shall comply with the requirements of Rule 2-510(c), except that to the extent practicable, a subpoena shall not identify the judge under investigation. A subpoena to compel attendance of a witness shall include or be accompanied by a notice that the witness (A) has the right to consult with an attorney with respect to the assertion of a privilege or any other matter pertaining to the subpoena and (B) may file a motion for judicial relief under Rule 2-510.

(3) Service

A subpoena shall be served in accordance with Rule 2-510. Promptly after service of a subpoena on a person other than the judge under investigation and in addition to giving any notice required by law, Investigative Counsel shall serve a copy of the subpoena upon the judge under investigation pursuant to Rule 18-404.

Cross reference: For examples of other notice required by law, see Code, Financial Institutions Article, § 1-304, concerning notice to depositors of subpoenas for financial records; Code, Health General Article, § 4-306 concerning disclosure of medical records; and Code, Health General Article, § 4-307, concerning notice of a request for issuance of compulsory process seeking medical records related to mental health services.

(4) Motion for Protective Order

The judge, a person named in the subpoena, or a person named or depicted in an item specified in the subpoena may file a motion for protective order pursuant to Rule 2-510(e). The motion shall be filed in the circuit court for the county in which the subpoena was served or, if the judge under investigation serves on that court, another circuit court designated by the Commission. The court may enter any order permitted by Rule 2-510(e).

(5) Materials Produced in Response to Subpoena

No later than 5 days after Investigative Counsel receives a response for any subpoena issued under this Rule, Investigative Counsel shall provide the judge with all of the materials produced in response to the subpoena.

~~(5)~~(6) Failure to Comply

Upon a failure to comply with a subpoena pursuant to this Rule, the court, on motion of Investigative Counsel, may compel compliance with the subpoena as provided in Rule 18-411(g).

~~(6)~~(7) Confidentiality

(A) Court Files and Records

Files and records of the court pertaining to any motion filed with respect to the subpoena shall be sealed and shall be open to inspection only upon order of the Supreme Court.

(B) Hearings

A hearing before the circuit court on any motion filed with respect to a subpoena shall be on the record and shall be conducted out of the presence of all individuals except those whose presence is necessary.

Cross Reference: See Code, Courts Article, §§ 13-401-403.

~~(7)~~(8) Recording of Statements

All statements by the subpoenaed witness shall be under oath and shall be contemporaneously recorded stenographically or electronically.

(b) Subpoenas Issued Pursuant to Rule 18-433 or 18-434

The Chair of the Commission, on behalf of the Commission, may authorize the Executive Counsel to issue a subpoena to compel the attendance of witnesses and the production of documents or other tangible things at a time and place specified in the subpoena. To the extent otherwise relevant, the provisions of Rule 2-510 (c), (d), (e), (f), (g), (h), (i), (j), and (k) shall apply to subpoenas issued pursuant to this section. References to a court in those Rules shall mean the Chair of the Commission, on behalf of the Commission. Promptly after service of a subpoena on a person other than the subject judge, the party who requested the issuance of the subpoena shall serve a copy of it upon the other party electronically at an address furnished by the other party.

Committee note: The intent of section (b) is that the Executive Counsel issues an authorized subpoena and provides it to the party who requested it for service.

Source: This Rule is new and is derived, in part, from Rule 19-712 (2018).

Rule 18-409.1 was accompanied by the following Reporter's note:

> Currently in Judicial Disability matters, information obtained by Investigative Counsel during the initial non-public investigation prior to formal charges being filed is confidential. This confidentiality extends to information, documents, and tangible things produced in response to a subpoena. The judge receives timely notice of the request for a subpoena and has the right to seek a protective order, but the judge does not receive the materials produced in response to the subpoena. The judge may be required to sit for a deposition during an investigation and subjected to examination as to materials obtained in response to a subpoena but not subsequently shared with the judge. This can place the judge at a disadvantage during an investigative deposition. To address this issue, new subsection (a)(5) is proposed to be added to this Rule to require Investigative Counsel to provide copies of materials obtained in response to a subpoena to the judge within five days after receiving the materials.
>
> Stylistic changes are also proposed to section (a).

Mr. Marcus informed the Committee that in addition to the letters from Mr. Frederick and the Commission on Judicial Disabilities contained in the materials (see Appendix 2), the Committee should have received via email a comment received this week from Kevin Collins on behalf of the Maryland Circuit Judges Association and an additional comment from the Commission on Judicial Disabilities (see Appendix 3). He said that the Attorneys & Judges Subcommittee did not recommend the proposed

changes but wanted to bring the Rule to the Committee for discussion.

Judge Anne K. Albright, a member of the Commission on Judicial Disabilities, addressed the Committee. She said that the Commission opposes the proposed amendments to the Rule. Tanya Bernstein, Investigative Counsel for the Commission, said that the Attorneys & Judges Subcommittee had the same discussion about this issue in 2022. She explained that subpoenas in judicial disabilities investigations are given to the subject judge and inform the judge of the information being sought by the Commission and the source of the information. The materials turned over in response to the subpoena are not given to the judge at that time; they may be turned over later as a part of discovery. She said that the proposed amendments to Rule 18-409.1, which would require her to provide the judge with all materials produced in response to the subpoena, provide an advantage to judges by allowing access to the results of an investigation while it is still ongoing. She noted that Investigative Counsel attaches relevant materials to the report and recommendation provided to the judge before the Judicial Inquiry Board or Commission reviews them. If the judge is charged, the materials are provided again, and all relevant subpoenaed materials would be available in open-file discovery. She informed the Committee that the proposed amendments would

require her to provide potentially protected information from third parties, such as financial and medical information, to the judge.

Judge Chen asked whether a judge ever speaks with the Commission during the investigation without seeing materials that have been provided to investigators pursuant to a subpoena. She noted that these investigations differ from criminal ones where the defendant has a right against self-incrimination and can refuse to speak to investigators. She questioned whether a judge who declines to speak with the Commission is deemed uncooperative. Ms. Bernstein responded that a judge can speak to investigators and acknowledged that there is a provision in the ethical Rules that oblige the judge to cooperate with an investigation. Judge Chen asked if the responses to inquiries from investigators are written or oral. Ms. Bernstein responded that they can be either written or oral.

Judge Chen again inquired as to whether the judge could be asked to speak to investigators without knowing what materials were provided in response to subpoenas. Ms. Bernstein responded in the affirmative. Judge Chen asked if investigators could redact the confidential information that may be in those materials and then turn the redacted materials over to the judge. Ms. Bernstein explained that at the stage of the investigation where the judge might be asked to meet with

investigators, her office has not determined what is relevant, what supports the allegations, and what is confidential and may be subject to a protective order. She pointed out that investigators could ultimately recommend dismissing a complaint, but the proposed Rule change would have required turning over potentially sensitive information before the dismissal. She added that the five-day period to turn over the subpoenaed materials to the judge in the proposed Rule would not give her office enough time to review and redact that information.

Mr. Laws said that the meeting materials mention a deposition of the target judge. He asked if the judge is compelled to give a deposition as part of the duty to cooperate. Ms. Bernstein responded that investigators may compel a deposition of a judge but noted that she has only had to use that power once in 10 years to pursue an investigation against a very uncooperative and evasive judge. Judge Ballou-Watts asked if this means that a judge could be required to sit for a deposition without seeing subpoenaed materials. Ms. Bernstein acknowledged that this situation is possible, but reiterated that it has happened only once. Ms. Doyle asked if the described situation could happen again. Ms. Bernstein responded that, ordinarily, a judge is deposed after being charged, but she acknowledged that the Rules do allow for a deposition prior to the issuance of charges.

Judge Kendra Young Ausby, President of the Maryland Circuit Judges Association, addressed the Committee. She said that the situations described by the Committee members are all possible. She agreed with the remark that a Commission investigation cannot be compared to a criminal investigation because of the duty imposed on judges to cooperate with the investigation. She added that even though deposition of a judge prior to seeing subpoenaed material only happened once, it is still permitted under the current Rules. She pointed out that Rule 18-422 permits the Commission to refrain from notifying the judge of the existence of the investigation because it could compromise the investigation. She said that some of the concerns of Ms. Bernstein and the Commission can be addressed by the Rules to protect the investigation where necessary.

Judge Chen suggested carving out the deposition situation discussed by the Committee; the Rule could require Investigative Counsel to turn over subpoenaed documents prior to deposing the judge. Judge Ausby responded that she did not have much time to review the proposed amendments and did not want to commit to a position on behalf of the Circuit Judges Association. She asked that the interested parties have the opportunity to discuss options for the Rule.

Judge Brown moved to remand Rule 18-409.1 to the Attorneys and Judges Subcommittee for further consideration in light of

the discussion. The motion was seconded and approved by majority vote.

Agenda Item 8. Consideration of proposed amendments to Rule 4-349 (Release after Conviction)

Mr. Marcus presented Rule 4-349, Release after Conviction, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 – CRIMINAL CAUSES

CHAPTER 300 – TRIAL AND SENTENCING

AMEND Rule 4-349 by adding a provision to subsection (a)(1) to clarify that it applies to appeals in both District Court and circuit courts, and by revising the provision in subsection (a)(1) pertaining to conditions so that it is consistent with the provisions in subsection (a)(2), as follows:

Rule 4-349. RELEASE AFTER CONVICTION

(a) Authority

(1) Generally

After conviction <u>in the District Court or a circuit court,</u> the trial judge may release the defendant pending sentencing or exhaustion of any appellate review subject to ~~such conditions for further appearance as may be appropriate~~ <u>any appropriate terms and conditions of release</u>. Title 5 of these rules does not apply to proceedings conducted under this Rule.

Cross reference: For review of lower court action in the Appellate Court regarding a stay of enforcement of judgment after an appeal is filed, see Rule 8-422 (c).

(2) Pending De Novo Appeal

On the filing of a notice of appeal in the District Court in a case to be tried de novo, the circuit court, on motion or by consent of the parties, may stay a sentence of imprisonment imposed by the District Court and release the defendant pending trial in the circuit court, subject to any appropriate terms and conditions of release.

Cross reference: For action upon dismissal of a de novo appeal, see Rule 7-112 (f)(4).

(b) Factors Relevant to Conditions of Release

In determining whether a defendant should be released under this Rule, the court may consider the factors set forth in Rule 4-216.1 (f) and, in addition, whether any appellate review sought appears to be frivolous or taken for delay. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.

(c) Conditions of Release

The court may impose different or greater conditions for release under this Rule than had been imposed upon the defendant before trial pursuant to Rule 4-216, 4-216.1, 4-216.2, or 4-216.3. When the defendant is released pending sentencing, the condition of any bond required by the court shall be that the defendant appear for further proceedings as directed and surrender to serve any sentence imposed. When the defendant is released pending any appellate review, the condition of any bond required by the court shall be that the defendant prosecute the appellate review according to law and, upon termination of the release pending appeal pursuant to subsection (d)(1) of this Rule, surrender to serve any sentence required to be served or appear for further proceedings as directed. The bond shall continue until discharged by order of the court or until surrender of the defendant, whichever is earlier.

(d) Release Pending Appeal

(1) Duration of Release

An order releasing a defendant pending appellate review pursuant to this Rule shall continue until the earliest of the following: (A) the defendant exhausts appellate review by way of appeal, application for leave to appeal, or petition for writ of certiorari in the Supreme Court or the Supreme Court of the United States; (B) the defendant allows the deadline to pass for seeking further appellate review of an adverse disposition; (C) the defendant allows the deadline to pass for filing the statement required by subsection (d)(2) of this Rule, or indicates in such a statement that the defendant does not intend to seek further review; or (D) a court revokes the order of release in accordance with section (e) of this Rule.

(2) Writ of Certiorari in Supreme Court of the United States

Within 30 days after the Supreme Court denies review or issues its opinion affirming the judgment of conviction, a defendant who has been released pending appellate review shall file a statement indicating whether the defendant intends to petition for a writ of certiorari in the Supreme Court of the United States and, if so, providing a non-binding statement of the questions that the defendant intends to present for review in the petition. The statement shall be filed with the court that ordered release pursuant to this Rule.

Cross reference: See U.S. S. Ct. Rule 10 for considerations governing review on certiorari, U.S. S. Ct. Rule 13 for the time for petitioning, and U.S. S. Ct. Rule 14.1 for the required contents of a petition for a writ of certiorari.

(e) Amendment of Order of Release

The court that ordered the release, on motion of any party or on its own initiative and after notice and opportunity for hearing, may revoke an order of release or amend it to impose additional or different conditions of release. If its decision results in the detention of the defendant, the court shall state the reasons for its action in writing or on the record.

> Source: This Rule is derived as follows:
> Section (a) is derived from former Rule 776 a and M.D.R. 776 a.
> Section (b) is derived from former Rule 776 c and M.D.R. 776 c.
> Section (c) is derived from former Rules 776 b and 778 b and M.D.R. 776 b and M.D.R. 778 b.
> Sections (d) and (e) are new.

Rule 4-349 was accompanied by the following Reporter's note:

> Judge Hazlett has brought an issue to the Rules Committee staff's attention concerning a provision of subsection (a)(1) of Rule 4-349 that causes some confusion amongst District Court personnel and practitioners. The issue is whether subsection (a)(1) provides authority for the District Court to impose conditions of release consistent with ensuring attendance and public safety during the pendency of an appeal or whether it permits conditions of release only to ensure attendance.
>
> To address this concern and resolve any potential ambiguities between the provisions of subsection (a)(1) and subsection (a)(2), the Appellate Subcommittee proposes that subsection (a)(1) be revised to explicitly state that it applies to both the District Court and circuit courts. In addition, the provision in subsection (a)(1) pertaining to conditions of release is proposed to be amended to match the provisions contained in subsection (a)(2).

Mr. Marcus said that the proposed amendments to Rule 4-349 resolve questions that arose regarding conditions of release after an individual is criminally convicted in the District Court and awaiting a *de novo* trial in a circuit court. District Court Chief Judge Morrissey had relayed a question to the

Committee from a judge asking whether subsection (a)(1) permits a District Court judge to impose conditions on release in these circumstances. The proposed amendments resolve this ambiguity by clearly stating that the Rule applies to a conviction in either court. Ms. Rupp informed the Committee that Chief Judge Morrissey had to leave the meeting early but wished for her to convey his support for the amendment to the Committee.

There being no motion to amend or reject the proposed amendments to Rule 4-349, they were approved as presented.

Agenda Item 9. Consideration of proposed amendments to Rule 21-301 (Permissible Remote Electronic Participation in Criminal and Delinquency Proceedings)

Mr. Marcus presented Rule 21-301, Permissible Remote Electronic Participation in Criminal and Delinquency Proceedings, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 21 - REMOTE ELECTRONIC PARTICIPATION IN JUDICIAL PROCEEDINGS

CHAPTER 300 – CRIMINAL AND DELINQUENCY PROCEEDINGS

AMEND Rule 21-301 by moving the language of current section (b) to new subsection (d)(1); by re-lettering current section (c) as section (b); by adding new section (c) addressing the findings needed to

permit testimony by remote electronic means over objection; by adding new section (d), consisting of subsection (d)(1) with the language of current section (b) and subsection (d)(2) about the findings required in certain proceedings for testimony by remote electronic means; by re-lettering current section (d) as section (e); and by updating internal references throughout the Rule, as follows:

Rule 21-301. PERMISSIBLE REMOTE ELECTRONIC PARTICIPATION IN CRIMINAL AND DELINQUENCY PROCEEDINGS

(a) Proceedings Presumptively Appropriate for Remote Electronic Participation

Subject to the conditions in this Title, any other reasonable conditions the court may impose in a particular proceeding, and resolution of any objection made pursuant to ~~section (b)~~ subsection (d)(1) of this Rule, the court, on motion or on its own initiative, may permit or require one, some, or all participants to participate by means of remote electronic participation in all or any part of the following types of criminal and delinquency proceedings:

(1) appearances pursuant to bench warrants;

(2) bail reviews;

(3) expungement hearings;

(4) hearings concerning non-incarcerable traffic citations for which the law permits, but does not require, that the defendant appear;

Cross reference: See Code, Transportation Article, § 16-303(h).

(5) hearings concerning parking citations;

(6) initial appearances for detained defendants;

(7) juvenile detention hearings where the respondent already is detained;

(8) motions hearings not involving the presentation of evidence;

(9) pretrial hearings involving Rule 5-702 where the proposed expert witness is the sole participant to appear remotely;

~~*(9)*~~*(10)* proceedings in which remote electronic participation is authorized by specific law;

Cross reference: See Code, Criminal Procedure Article, § 11-303.

~~*(10)*~~*(11)* proceedings involving Rule 4-271 (a)(1) or the application of *State v. Hicks*, 285 Md. 310 (1979) or its progeny, other than a motion to dismiss that involves the presentation of evidence; and

~~*(11)*~~*(12)* with the knowing and voluntary consent of the defendant pursuant to subsection ~~(c)(2)~~(b)(2) of this Rule:

(A) discharge-of-counsel hearings;

(B) plea agreements not likely to result in incarceration or where the defendant already is incarcerated;

(C) sentencings; and

(D) three-judge panel sentencing reviews.

~~(b) Objection by a Party~~

~~Upon objection by a party in writing or on the record, the court, before requiring remote electronic participation in any proceeding, shall make findings in writing or on the record that (1) remote electronic participation is not likely to cause substantial prejudice to a party or adversely affect the fairness of the proceeding and (2) no party lacks the ability to participate by remote electronic participation in the proceeding.~~

~~(c)~~(b) Other Criminal and Delinquency Proceedings by Consent

(1) Generally

Subject to the conditions in this Title and any other reasonable conditions the court may impose in a particular case, one, some, or all participants may participate by remote electronic participation in all or any part of any other proceeding in which the

presiding judicial officer and all parties consent to remote electronic participation.

(2) Consent by Defendant or Respondent

The court may not accept the consent of a defendant or respondent to waive an in-person proceeding pursuant to ~~subsections *(a)(12)* or (c)(1)~~ subsection (a)(12) or (b)(1) of this Rule unless, after an examination of the defendant or respondent in person or by remote electronic participation on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant or respondent, or any combination thereof, the court determines and announces on the record that the consent is made knowingly and voluntarily. The consent of a defendant or respondent pursuant to this subsection is effective only for the specified proceeding and not for any subsequent proceedings.

(c) If No Presumption or Consent

In a criminal or delinquency proceeding not described in subsections (a)(1) to (a)(11) of this Rule, the court may allow testimony by means of remote electronic participation over the objection of a party only upon a finding that:

(1) there is a necessity for the witness to testify remotely;

(2) the equipment and procedures for such testimony comply with the requirements of Rule 21-104; and

(3) requiring in-person testimony would undermine important public policy considerations in the administration of justice.

(d) Objection by a Party; Findings

(1) Generally

Upon objection by a party in writing or on the record, the court, before requiring remote electronic participation in any proceeding, shall make findings in writing or on the record that (1) remote electronic participation is not likely to cause substantial prejudice to a party or adversely affect the fairness of the proceeding and (2) no party lacks the ability to

participate by remote electronic participation in the proceeding.

(2) Additional Findings

In ruling on an objection to the taking of testimony by remote electronic means in a criminal or delinquency proceeding not described in subsections (a)(1) to (a)(11) of this Rule, the court also shall make findings with respect to the requirements set forth in section (c) of this Rule.

~~(d)~~(e) Conditions of Remote Electronic Participation by Witness

Unless otherwise ordered by the court, conditions of remote electronic participation in criminal and delinquency proceedings shall include ensuring that a witness:

(1) is alone in a secure room when testifying, and, upon request, shares the surroundings to demonstrate compliance;

Committee note: Subsection ~~(d)(1)~~(e)(1) of this Rule aims to mirror the separation between a witness and an attorney for the witness while the witness is providing testimony. This subsection does not prohibit remote electronic participation in a proceeding by an attorney for a witness. Nothing in this Rule shall preclude accommodations for a child witness or a witness who otherwise needs assistance when testifying.

(2) is not being coached in any way;

(3) is not referring to any documents, notes, or other materials while testifying, unless permitted by the court;

(4) is not exchanging text messages, e-mail, or in any way communicating with any third parties while testifying;

(5) is not recording the proceeding; and

(6) is not using any electronic devices other than a device necessary to facilitate the remote electronic participation.

Committee note: Section ~~(d)~~(e) of this Rule is not intended to limit any other reasonable conditions that the court may impose for remote electronic participation or to preclude the court from authorizing an accommodation under the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. and Rule 1-332.

The Rules Committee endorses two caveats stated in the March 9, 2022 Report of the Judicial Council's Joint Subcommittee on Post-COVID Judicial Operations:

(1) Remote proceedings generally are not recommended when the finder of fact needs to assess the credibility of evidence but may be appropriate when the parties consent or the case needs to be heard on an expedited basis and remote proceedings will facilitate the participation of individuals who would have difficulty attending in person; and

(2) Where a judicial officer has discretion to hold or decline to hold a remote proceeding, the judicial officer should consider (i) the preference of the parties, (ii) whether the proceeding will involve contested evidence, (iii) whether the finder of fact will need to assess witness credibility, (iv) the availability of participants who will be affected by the decision, (v) possible coaching or intimidation of witnesses appearing remotely, (vi) access by witnesses to technology and connectivity that would allow participation, (vii) the length and complexity of the proceeding, (viii) the burden on the parties and the court, (ix) whether remote participation will cause substantial prejudice to a party or affect the fairness of the proceeding, (x) a defendant's or juvenile respondent's right of confrontation, and (xi) any other factors the judicial officer considers relevant.

Source: This Rule is derived in part from recommendations made in the March 9, 2022 Report of the Judicial Council's Joint Subcommittee on Post-COVID Judicial Operations and from former Rules 2-802 and 2-803 (2023), and is in part new.

Rule 21-301 was accompanied by the following Reporter's note:

> Proposed amendments to Rule 21-301 address when remote electronic participation may be permitted during a criminal trial. It was brought to the attention of the Rules Committee that Rule 21-301, effective July 1, 2023, does not address testimony by remote electronic participation at a criminal trial over the defendant's objection. However, courts have allowed testimony by video conferencing in criminal proceedings, over objection, after evaluating the impact on the defendant's Sixth Amendment rights. See *Maryland v. Craig*, 497 U.S. 836 (1990). Testimony by remote electronic participation may be necessary in certain circumstances. For example, in *Spinks v. State*, 252 Md. App. 604 (2021), the victim testified via Skype over the defendant's objection because, after leaving the country to attend to his mother's medical condition, he could not re-enter the United States due to an expired visa. Similarly, in *White v. State*, 223 Md. App. 353 (2015), the testimony of an out-of-state witness was permitted by remote electronic participation because a serious back condition prevented her travel. Accordingly, proposed amendments to Rule 21-301 authorize remote testimony over the defendant's objection if certain findings establish that the testimony is consistent with Sixth Amendment requirements.
>
> Rule 21-301 is restructured to account for a new section addressing the situation described above. Under the Rule's revised structure, section (a) still addresses proceedings that are presumptively appropriate for remote electronic participation. Section (b), formerly section (c), addresses remote electronic participation by the consent of the parties.
>
> New section (c) addresses permissible remote electronic participation when there is neither a presumption nor consent of the parties. The section lists the findings required before testimony by remote electronic participation may be permitted over a party's objection and aims to protect the Sixth Amendment rights of the defendant.

Section (d) concerns objections by a party. Subsection (d)(1) consists of the substance of transferred section (b). New subsection (d)(2) pertains to additional findings required when there is neither a presumption nor consent. Section (e), formerly section (d), provides the required conditions of remote electronic participation.

To account for the restructured Rule, internal references are updated in the stem of section (a), in subsections (a)(12) and (b)(2), and in the Committee notes after subsections (e)(1) and (e)(6).

Mr. Marcus informed the Committee that Rule 21-301 governs remote electronic participation in criminal and delinquency proceedings. He said that case law has developed on the ability of the court to order remote participation by a witness. The proposed amendments clarify the required findings before the court can order remote participation over the defendant's objection. He said that one case, *Maryland v. Craig*, 497 U.S. 836 (1990), dealt with an early use of electronic participation by a child witness. The trial court determined that the child should be permitted to testify outside of the physical presence of the defendant via live video. The case made its way to the U.S. Supreme Court and the issue was whether the trial judge conducted adequate factfinding and an evaluation of the impact of the remote participation on the defendant's Sixth Amendment rights. Two Appellate Court cases have provided additional guidance in the years since *Craig*: *Spinks v. State*, 252 Md. App. 604 (2021) and *White v. State*, 223 Md. App. 353 (2015).

Mr. Marcus said that the proposed amendments arose after Judge Robert Taylor contacted the Committee with recommendations to clarify Rule 21-301's provisions regarding permissible remote electronic participation by a witness in a criminal proceeding. Mr. Marcus said that the amendments delete current section (b). New section (c) governs remote participation where there is no presumption that remote participation is appropriate or consent to remote participation. He explained that the court must develop the record and ensure that there is an adequate basis to permit or order remote participation. The new language also includes factors for consideration. New section (d) requires the court to make specific findings before ordering remote electronic participation over the objection of a party.

Judge Bryant asked what subsection (c)(3) means by "requiring in-person testimony would undermine important public policy considerations in the administration of justice." She suggested that the language seems murky, and she would be unsure how to apply it and develop the record on that factor. She proposed eliminating that factor. Judge Chen asked if that language is from one of the cases referenced in the Reporter's note. Assistant Reporter Drummond said that both *Spinks* and *White* use the "important public policy considerations" phrasing. Judge Brown said that she agrees that the factor is amorphous but believes there is enough to assist the court in developing

the record. She noted that it is not uncommon for the Rules to pull language from case law.

Judge Ballou-Watts asked if there should be a cross reference to the cases. Judge Bryant agreed. She said that trial judges applying this Rule later will not have the benefit of the discussion of the Committee. Ms. Doyle agreed and moved to add a cross reference to *Craig*, *Spinks*, and *White*. The motion was seconded and approved by consensus. The Reporter said that the cross reference will start with the Supreme Court case followed by the two Appellate Court cases. She noted that the Maryland Supreme Court may be reluctant to cite to an opinion of the Appellate Court.

There being no further motion to amend or reject the proposed amendments to Rule 21-301, they were approved as amended.

Agenda Item 10. Consideration of proposed amendments to Rule 4-707 (Denial of Petition; Appointment of Counsel), Rule 4-708 (Response to Answer), and Rule 4-709 (Hearing; Procedure if No Hearing)

Mr. Marcus presented Rule 4-707, Denial of Petition; Appointment of Counsel; Rule 4-708, Response to Answer; and Rule 4-709, Hearing; Procedure if No Hearing, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 – CRIMINAL CAUSES

CHAPTER 700 – POST CONVICTION DNA TESTING

AMEND Rule 4-707 by deleting section (a), by adding new section (b) pertaining to a response to an answer, comprised of the provisions of former Rule 4-708, and by making stylistic changes, as follows:

RULE 4-707. ~~DENIAL OF PETITION;~~ APPOINTMENT OF COUNSEL; RESPONSE TO ANSWER

~~(a) Denial of Petition~~

~~Upon consideration of the State's answer, the court may deny the petition if it finds as a matter of law that (1) the petitioner has no standing or (2) the facts alleged in the petition do not entitle the petitioner to relief.~~

~~(b)~~(a) Appointment of Counsel

If the court finds that a petitioner who has requested the appointment of counsel is indigent, the court may appoint counsel within 30 days after the State has filed its answer unless ~~(1) the court denies the petition as a matter of law or (2)~~ counsel has already filed an appearance to represent the petitioner.

(b) Response to answer

The petitioner may file a response to the State's answer no later than 60 days after service of the answer. The response may (1) challenge the adequacy or the accuracy of the answer, (2) request that a search of other law enforcement agency databases or logs be conducted for the purpose of identifying the source of physical evidence used for DNA testing, and (3) be accompanied by an amendment to the petition. The petitioner shall serve the response on the State's Attorney. The Court may Rule on the petition prior to the filing of a response or, if no response if filed, prior

to the expiration of the 60-day period referenced in this section.

Source: This Rule is new.

Rule 4-707 was accompanied by the following Reporter's note:

The Supreme Court in Satterfield v. State, Misc. No. 10, Sept. Term, 2022, found Rules 4-707 and 4-708, when read together, to "provide two or more possible alternative interpretations … for the purposes of rule construction" and to be, therefore, "inconsistent." (Id, at page 24, *internal quotations omitted*).

In order to resolve the inconsistency between Rule 4-707 and Rule 4-708 and to bring the Rules into conformity with the Supreme Court's holding in *Satterfield v. State*, it is proposed that Rule 4-708 be deleted, and that the provision contained in Rule 4-708 be added to Rule 4-707 as new section (b), with the deletion of a reference to the date of entry of an order appointing counsel. In addition, section (a) of Rule 4-707 is deleted to ensure that these revisions are true to the holding in *Satterfield v. State.* Language is added to the end of section (b) of Rule 4-707 clarifying that the trial court may not rule on the petition until after 60 days have passed or a response has been filed. Stylistic changes are proposed to Rule 4-707.

Conforming amendments are also proposed to subsection (b)(1) of Rule 4-709.

~~MARYLAND RULES OF PROCEDURE~~

~~TITLE 4 – CRIMINAL CAUSES~~

~~CHAPTER 700 – POST CONVICTION DNA TESTING~~

DELETE Rule 4-708, as follows:

~~RULE 4-708. RESPONSE TO ANSWER~~

~~The petitioner may file a response to the answer no later than 60 days after the later of service of the State's answer or entry of an order appointing counsel pursuant to Rule 4-707. The response may (1) challenge the adequacy or the accuracy of the answer, (2) request that a search of other law enforcement agency databases or logs be conducted for the purpose of identifying the source of physical evidence used for DNA testing, and (3) be accompanied by an amendment to the petition. The petitioner shall serve the response on the State's Attorney.~~

~~Source: This Rule is new.~~

Rule 4-708 was accompanied by the following Reporter's note:

See the Reporter's note to Rule 4-707.

MARYLAND RULES OF PROCEDURE

TITLE 4 – CRIMINAL CAUSES

CHAPTER 700 – POST CONVICTION DNA TESTING

AMEND Rule 4-709 by adding a reference to the petition, answer, and any response to subsection (b)(1), as follows:

RULE 4-709. HEARING; PROCEDURE IF NO HEARING

(a) When Required

Except as otherwise provided in subsection (b)(2) of this Rule, the court shall hold a hearing if, from the petition, answer, and any response, the court finds that the petitioner has standing to file the petition and the petition is filed in the appropriate court, and finds one of the following:

(1) specific scientific identification evidence exists or may exist that is related to the judgment of conviction, a method of DNA testing of the evidence may exist that is generally accepted within the relevant scientific community, and there is or may be a reasonable probability that the testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing;

(2) if the State contends that it has been unable to locate the evidence, there is a genuine dispute as to whether the State's search was adequate;

(3) if the State contends that the evidence existed or may have existed but was destroyed, there is a genuine dispute whether the destruction was in conformance with any relevant governing protocols or was otherwise lawful;

(4) the State is unable to produce scientific evidence that the State was required to preserve pursuant to Code, Criminal Procedure Article, § 8-201(j)(1); or

(5) there is some other genuine dispute as to whether DNA testing or a DNA database or log search by a law enforcement agency should be ordered.

(b) When Not Required

(1) For Denial of Petition

The court shall deny the petition without a hearing if, from the petition, answer, and any response, it finds that:

(A) the petitioner has no standing to request DNA testing or a search of a law enforcement agency DNA database or logs; or

(B) as a matter of law, the facts alleged in the petition pursuant to subsections (a)(2) and (3) of Rule

4-704 do not entitle the petitioner to relief under Code, Criminal Procedure Article, § 8-201.

(2) For Grant of Petition

The court may enter an order granting the petition without a hearing if the State and the petitioner enter into a written stipulation as to DNA testing or a DNA database or log search and the court is satisfied with the contents of the stipulation. An order for DNA testing shall comply with the requirements of Rule 4-710(a)(2)(B).

(c) When Hearing Is Discretionary

In its discretion, the court may hold a hearing when one is not required.

(d) Time of Hearing

Any hearing shall be held within (1) 90 days after service of any response to the State's answer or, (2) if no response is timely filed, 120 days after service of the State's answer.

(e) Written Order If No Hearing

If the court declines to hold a hearing, it shall enter a written order stating the reasons why no hearing is required. A copy of that order shall be served on the petitioner and the State's Attorney.

Cross reference: For victim notification, see Code, Criminal Procedure Article, §§ 11-104 and 11-503.

Source: This Rule is new.

Rule 4-709 was accompanied by the following Reporter's note:

See the Reporter's note to Rule 4-707.

In conjunction with the proposed amendments to Rule 4-707 and the proposed deletion of Rule 4-708, the phrase "from the petition, answer, and any response" is proposed to be added to subsection (b)(1) of this Rule.

Mr. Marcus said that the proposed amendments to Agenda Item 10 were prompted by a Supreme Court decision which found that Rules 4-707 and 4-708 were inconsistent when read together (*Satterfield v. State*, 483 Md. 452 (2023)). He said that the Criminal Rules Subcommittee sought to clarify the Rules, which govern a defendant's petition for post-conviction DNA testing. He informed the Committee that Mr. Zavin and Committee staff did significant work on drafting the proposed amendments, which delete Rule 4-708 and move that Rule's provisions pertaining to the petitioner's response to the State's answer to Rule 4-707.

Mr. Marcus explained that the amendments clarify that the State may file an answer to a petition for post-conviction DNA testing and, if an answer is filed, the defendant has 60 days to file a response. If the State files an answer, the court cannot rule on the petition before the defendant has had the opportunity to respond to the State's answer. The change to require the court to wait for all possible answers and responses to be filed before ruling resolves the ambiguity identified by the Court in *Satterfield*. Rule 4-709 is amended to conform to this change.

Mr. Marcus remarked that the deletion of Rule 4-708 leaves a gap in the Rule numbers of Title 4, Chapter 700. He asked whether the Committee should consider renumbering the remaining

Rules in the Chapter or leave the gap. The Reporter pointed out that re-numbering existing Rules can create confusion later when tracing the history of a Rule. By consensus, the Committee decided not to pursue renumbering the Rules.

Mr. Laws commented that the verb "rule" in new section (b) of Rule 4-707 was capitalized when it should not be and that "not" should be inserted before the word "rule." The Reporter thanked Mr. Laws and said that those changes would be made. Mr. Laws also asked whether "response" as it is used in the Rule should be "reply." Judge Bryant suggested that the Style Subcommittee can consider that issue. Ms. Doyle expressed her agreement with Mr. Laws's suggestion.

There being no motion to amend or reject the proposed amendments to Rules 4-707 and 4-709 and the deletion of Rule 4-708, the changes were approved subject to the style edits discussed by the Committee.

Agenda Item 11. Consideration of proposed amendments to Form 4-503.2 (General Waiver and Release)

Mr. Marcus presented Form 4-503.2, General Waiver and Release, for consideration.

TITLE 4 – CRIMINAL CAUSES

APPENDIX OF FORMS

FORMS FOR EXPUNGEMENT OF RECORDS

AMEND Form 4-503.2 by adding the word "tort" to the waiver and release to conform this Rule to the enabling statute, as follows:

Form 4-503.2. GENERAL WAIVER AND RELEASE

I, _____, hereby release and forever discharge _____
(complainant)
and the _____,
(law enforcement agency)
all of its officers, agents and employees, and any and all other persons from any and all tort claims which I may have for wrongful conduct by reason of my arrest, detention, or confinement on or about _____.

This General Waiver and Release is conditioned on the expungement of the record of my arrest, detention, or confinement and compliance with Code*, Criminal Procedure Article, § 10-105, as applicable, and shall be void if these conditions are not met.

WITNESS my hand and seal this _____(Date)

TESTE:

_____
Witness

_____(Seal)
Signature

* The reference to "Code" in this General Waiver and Release is to the Annotated Code of Maryland.

Form 4-503.2 was accompanied by the following Reporter's note:

The Criminal Subcommittee proposes an amendment to Form 4-503.2 in order to bring the form into closer alignment with Code, Criminal Procedure Article, § 10-105(c)(1).

Mr. Marcus informed the Committee that the proposed amendment to Form 4-503.2 alters the form so that it more closely tracks the language of Code, Criminal Procedure Article, § 10-105(c)(1). The Committee received a letter pointing out that the "General Waiver and Release" form was not consistent with the statutory language. The Criminal Rules Subcommittee recommends adding the word "tort" before "claims" in the form to align with the statute more closely.

There being no motion to amend or reject the proposed amendment to Form 4-503.2, it was approved as presented.

Agenda Item 12. Consideration of proposed amendments to Rule 4-271 (Trial Date)

Mr. Marcus presented Rule 4-271, Trial Date, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 – CRIMINAL CAUSES

CHAPTER 200 – PRETRIAL PROCEDURES

AMEND Rule 4-271 by adding a cross reference after subsection (a)(1), as follows:

Rule 4-271. TRIAL DATE

(a) Trial Date in Circuit Court

(1) The date for trial in the circuit court shall be set within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213, and shall be not later than 180 days after the earlier of those events. When a case has been transferred from the District Court because of a demand for jury trial, and an appearance of counsel entered in the District Court was automatically entered in the circuit court pursuant to Rule 4-214 (a), the date of the appearance of counsel for purposes of this Rule is the date the case was docketed in the circuit court. On motion of a party, or on the court's initiative, and for good cause shown, the county administrative judge or that judge's designee may grant a change of a circuit court trial date. If a circuit court trial date is changed, any subsequent changes of the trial date may be made only by the county administrative judge or that judge's designee for good cause shown.

Cross reference: See Code, Criminal Procedure Article, § 6-103; see also *Jackson v. State*, 485 Md. 1 (2023).

(2) Upon a finding by the Chief Justice of the Supreme Court that the number of demands for jury trial filed in the District Court for a county is having a critical impact on the efficient operation of the circuit court for that county, the Chief Justice, by Administrative Order, may exempt from this section cases transferred to that circuit court from the District Court because of a demand for jury trial.

(b) Change of Trial Date in District Court

The date for trial in the District Court may be changed on motion of a party, or on the court's initiative, and for good cause shown.

> Committee note: Subsection (a)(1) of this Rule is intended to incorporate and continue the provisions of Rule 746 from which it is derived. Stylistic changes have been made.
>
> Source: This Rule is derived as follows:
> Section (a) is in part derived from former Rule 746 a and b, and is in part new.
> Section (b) is derived from former M.D.R. 746.

Rule 4-271 was accompanied by the following Reporter's note:

> An amendment to Rule 4-271 is proposed based on the Supreme Court's decision in Jackson v. State, 485 Md. 1 (2023). In Jackson, the Court considered whether certain conduct by defense counsel precluded dismissal for a Hicks violation.
>
> A cross reference is proposed following subsection (a)(1), including citations to the statutory basis for the Hicks Rule and to Jackson v. State, to ensure that practitioners are aware of the status of the law in this area.

Mr. Marcus said that the proposed amendment to Rule 4-271 adds references to the Criminal Procedure Article and *Jackson v. State*, 485 Md. 1 (2023). In *Jackson*, a criminal trial was set beyond the 180-day speedy trial deadline ("the Hicks date"), with apparent tacit agreement by defense counsel. The Court determined that while the defendants in the consolidated cases did not expressly consent to a trial beyond the Hicks date, the words and conduct of the attorneys were tantamount to seeking a trial beyond the Hicks date. Mr. Marcus said that the cross reference is a service to the defense bar to alert attorneys

that they must object to preserve a claim for a speedy trial violation.

There being no motion to amend or reject the proposed amendment to Rule 4-271, it was approved as presented.

There being no further business before the Committee, the Chair adjourned the meeting.