

COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 of the Judicial Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland on June 20, 2013.

Members present:

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

Albert D. Brault, Esq.	Anne C. Ogletree, Esq.
James E. Carbine, Esq.	Hon. W. Michel Pierson
Christopher R. Dunn, Esq.	Kathy P. Smith, Clerk
Hon. Angela M. Eaves	Steven M. Sullivan, Esq.
Ms. Pamela Q. Harris	Melvin J. Sykes, Esq.
Harry S. Johnson, Esq.	Del. Joseph F. Vallario, Jr.
Hon. Thomas J. Love	Hon. Julia B. Weatherly
Robert R. Michael, Esq.	Robert Zarbin, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Cheryl Lyons-Schmidt, Esq., Assistant Reporter
Dennis Weaver, Clerk, Circuit Court for Washington County
David R. Durfee, Jr., Esq., Executive Director, Legal Affairs, Administrative Office of the Courts
Russell Butler, Esq., Maryland Crime Victim's Resource Center
Victor Stone, Esq., Maryland Crime Victim's Resource Center
Brian L. Zavín, Esq., Appellate Division, Office of the Public Defender
A. J. Bellido De Luna, Esq., University of Maryland, Section Chair, Council on Legal Education and Admission to the Bar, Maryland State Bar Association
D. Jill Green, Esq., University of Baltimore, Committee Member, Council on Legal Education and Admission to the Bar
Ms. Roberta Warnken, Chief Clerk, District Court of Maryland
Dorothy Lennig, Esq., House of Ruth
Ms. Kathy Blough, Circuit Court for Anne Arundel County
Ms. Lisa Preston, Assistant Chief Deputy Clerk, Circuit Court for Anne Arundel County
Ms. Sharon Burke, Circuit Court for Anne Arundel County
Tammy M. Brown, Esq., Governor's Office of Crime, Control and Prevention

Scott D. Shellenberger, Esq., State's Attorney Office for
Baltimore County
Kathleen Wherthey, Esq., Legal Affairs, Administrative Office of
the Courts
Scott MacGlashan, Clerk, Circuit Court for Queen Anne's County
Suzanne Pelz, Esq., Deputy Director, Office of Government
Relations, Maryland Judiciary
Richard D. Montgomery, Esq., Maryland State Bar Association
Adam Wheeler, Family Law Research Specialist, Department of
Family Administration, Administrative Office of the Courts
Jeffrey Shipley, Esq., Secretary, State Board of Law Examiners

The Chair convened the meeting. He announced that this would be the last meeting officially for Mr. Brault, Mr. Michael, Ms. Ogletree, Mr. Johnson, Mr. Leahy, and Ms. Smith. The Committee is still missing the members who left the Committee last year, and the Chair added that the six members who are leaving after today would be missed as well. The Chair thanked all of them for the service that they had rendered for so many years and rendered so well. He expressed the hope that all of them would remain in touch with the Committee.

The Chair said that Agenda Item 4 would be considered first.

Agenda Item 4. Consideration of amendments to proposed new Rule 19-216 (Legal Assistance by Law Students)

Mr. Brault presented Rule 19-216, Legal Assistance by Law Students, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 19 - ATTORNEYS

CHAPTER 200 - ADMISSION TO THE BAR

AMEND proposed new Rule 19-216 to add provisions pertaining to "externships," as follows:

Rule ~~16~~ 19-216. LEGAL ASSISTANCE BY LAW STUDENTS

(a) Definitions

As used in this Rule, the following terms have the following meanings:

(1) Law School

"Law school" means a law school meeting the requirements of Rule ~~4(a)(2)~~ 19-201 (a)(2).

(2) Clinical Program

"Clinical program" means a law school program for credit, in which a student obtains experience in the operation of the legal system by engaging in the practice of law, that ~~is~~ (A) is under the direction of a faculty member of the school and (B) has been approved by the Section Council of the Section of Legal Education and Admission to the Bar of the Maryland State Bar Association, Inc.

(3) Externship

"Externship" means a field placement for credit, [in a government or not-for-profit organization] in which a law student obtains experience in the operation of the legal system by engaging in the practice of law, that (A) is under the direction of a faculty member of a law school, (B) is in compliance with the applicable ABA standard for study outside the classroom, (C) has been approved by the Section Council of the Section of Legal Education and Admission to the Bar of the Maryland State Bar Association, Inc., and (D) is not part of a clinical program of a law school,

~~(3)~~ (4) Supervising Attorney

"Supervising attorney" means an attorney who is a member in good standing of the Bar of this State and whose service as a supervising attorney for the clinical program or externship is approved by the dean (or the dean's designee) of the law school in which the law student is enrolled ~~or by the dean's designee.~~

(b) Eligibility

A law student enrolled in a clinical program or externship is eligible to engage in the practice of law as provided in this Rule if the student:

(1) is enrolled in a law school;

(2) has read and is familiar with the Maryland ~~Lawyers'~~ Attorneys' Rules of Professional Conduct and the relevant Maryland Rules of Procedure; and

(3) has been certified in accordance with section (c) of this Rule.

(c) Certification

(1) Contents and Filing

The dean of the law school shall file the certification of a student with the Clerk of the Court of Appeals. ~~It~~ The certification shall state that the student is in good academic standing and has successfully completed legal studies in the law school amounting to the equivalent of at least one-third of the total credit hours required to complete the law school program. It ~~shall~~ shall also state its effective date and expiration date, which shall be no later than one year after the effective date.

(2) Withdrawal or Suspension

The dean may withdraw the ~~certificate~~ certification at any time by mailing a notice to that effect to the Clerk of the Court of Appeals. ~~It~~ The certification shall automatically be suspended upon the issuance of an unfavorable

report of the Character Committee made in connection with the student's application ~~for registration as a candidate~~ for admission to the Bar. Upon reversal of the Character Committee, the certification shall be reinstated.

(d) Practice

In connection with a clinical program or externship, a law student for whom a ~~certificate~~ certification is in effect may appear in any trial court or the Court of Special Appeals, before any administrative agency, or otherwise engage in the practice of law in Maryland provided that the supervising attorney (1) is satisfied that the student is competent to perform the duties assigned, (2) assumes responsibility for the quality of the student's work, (3) directs and assists the student to the extent necessary, in the supervising attorney's professional judgment, to ensure that the student's participation is effective on behalf of the client the student represents, and (4) accompanies the student when the student appears in court or before an administrative agency. The law student shall neither ask for nor receive personal compensation of any kind for service rendered under this Rule, but may receive academic credit pursuant to the clinical program or externship.

Source: This Rule is derived from former ~~Rule 18~~ Rule 16 of the Rules Governing Admission to the Bar of Maryland (2013).

Rule 19-216 was accompanied by the following Reporter's note.

Rule 19-216 is derived from former RGAB 16 and contains style changes. At the request of the University of Baltimore and University of Maryland Schools of Law, the Rule is made applicable to "externships" in addition to "clinical programs." The addition was approved in principle at the April 2013 meeting of the Rules Committee.

Mr. Brault told the Committee that Rule 19-216 had been discussed by the Committee previously. The proposed change to Rule 19-216 was found in subsection (a) (3). It added the concept of externship. As he had mentioned at a previous meeting, his view was that the legal profession in America is lacking more and more in competent, qualified trial attorneys as time goes by. The legal profession is very much dependent on what is taught in the the law schools in today's world. When Mr. Brault was a young attorney, the attorneys were able to go into court and try cases every day. This is not the situation now. The cost of civil litigation is so great that there are very few small cases. What is lacking is where the legal talent is developed. The clinical programs in the law schools are the most important action that can be taken to address this. When the idea of externships arose, Mr. Brault immediately felt that this was very necessary. Three of his children had gone to law school, and a granddaughter is currently there.

Mr. Brault drew the Committee's attention to subsection (a) (3) of Rule 19-216. The Committee had to decide whether to add the language "in a government or not-for-profit organization" to subsection (a) (3). The addition of externships conforms to American Bar Association ("ABA") standards, which are in the meeting materials. The externship program has to be under the direction of a faculty member, which is defined in the ABA standards as a full or part-time professor. The externship program has to be in compliance with the ABA Standards for

Studies, and it has to be approved by the Section Council of the Maryland State Bar Association. It is not part of the clinical program. The Rule distinguishes externships from the clinical programs in the law schools, which are group programs. The idea of an externship is for students to practice law under supervision through non-profit agencies.

Mr. Brault noted that Professor Bellido de Luna from the University of Maryland School of Law and Dean Jill Green from the University of Baltimore School of Law were present at the meeting. Section (d) of Rule 19-216 provides that the students do not get paid for the externship, but they may receive academic credit. The general idea is that this becomes an academic credit program to further entice law students to become trial attorneys. Mr. Brault added that his goal was to let students know that going to Harvard Law School and becoming an attorney in a large law firm is not the only way for an attorney to succeed. What is important is that there are trial attorneys in the trial courts who help the public as well as help big corporations.

The Chair pointed out that the Rules Committee had already approved the concept of externships. What is needed is the language in Rule 19-216 to implement it. Professor Bellido de Luna told the Committee that he was the Chair of the Section for Legal Education and Admission to the Bar, and he was a professor at the University of Maryland and the director of the clinical law program there. Dean Green said that she was the Assistant Dean for Law School Development at the University of Baltimore,

and she runs the externship programs at the school. Professor Bellido de Luna thanked the Committee for considering this issue. There had been several discussions with the Section, as they had reviewed the proposed Rule, and they were able to understand the way that the Rules Committee was thinking.

Professor Bellido de Luna reiterated for the Committee members who were not present at the May meeting that the goal was to clarify what is actually happening in practice but was not clear in Rule 16, which is to be renumbered "Rule 19-216." Depending on who was on the Section Council at the time, sometimes externs would be allowed under Rule 16, and sometimes they would not be allowed. This was because externships were not specifically provided for in the Rule.

Professor Bellido de Luna remarked that the Rules Committee was asked for an advisory opinion, but they had informed Professor Bellido de Luna and his colleagues that the Committee does not give advisory opinions. The best course was to propose a change to Rule 19-216 to add the word "extern," so that the practice of externships, which had been in existence for many years, would be allowed. This would not be determined by who was on the Council but by what the Rule intended. Externships would allow students to practice under Rule 16, so that they become better prepared to enter into the legal profession, which is more and more challenging each and every day.

Professor Bellido de Luna referred to the Reporter's note at the end of Rule 19-216, and he pointed out that it was not the

University of Baltimore and the University of Maryland Schools of Law who requested the change to the Rule. The request came from the Section Council, which does all of the admissions for Rule 16.

The Chair asked if anyone had any questions about proposed Rule 19-216. The Reporter inquired whether the language "in a government or not-for-profit organization" should be added to subsection (a) (3). Dean Green replied that they would prefer that this language be added to subsection (a) (3). They do not think that it is appropriate for Rule 16 students to work at for-profit agencies. Professor Bellido de Luna remarked that this happens in practice now where their students in clinical programs have gone into non-profit organizations, such as Maryland Legal Services Corporation and Civil Justice. The continuation of this practice now would be an excellent idea. Because of complications associated with being able to receive compensation, the University of Maryland and probably the University of Baltimore, do not allow students to go to private firms for Rule 16 programs. This is because even though it is not the student who is making money, the firm is making money.

The Chair asked if any member of the Committee had a question or comment. He noted that this was a Subcommittee recommendation, so unless there was a motion to alter, amend, or disapprove it, it would be approved. Mr. Carbine inquired about the bracketed language in subsection (a) (3). The Reporter said that she had drafted it based on the Subcommittee's original

recommendation, but she was not sure if the bracketed language should be in the Rule. Mr. Brault commented that the field placement could be either in a government or not-for-profit organization, so the bracketed language should remain in the Rule. By consensus, the Committee agreed to include the bracketed language in subsection (a)(3).

By consensus, the Committee approved Rule 19-216 as presented with the bracketed language in subsection (a)(3).

Agenda Item 1. Consideration of proposed amendments to Rule 1-322.1 (Exclusion of Personal Identifier Information in Court Filings) and proposed new Rule 1-322.2 (Certificate of Exclusion of Personal Identifier Information)

The Chair presented Rule 1-332.1, Exclusion of Personal Identifier Information in Court Filings, and Rule 1-322.2, Certificate of Exclusion of Personal Identifier Information, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

AMEND Rule 1-322.1 to clarify its applicability, to add a Committee note, to add a cross reference, to permit the filing of personal identifier information required to implement a court order, to correct internal references, and to make stylistic changes, as follows:

Rule 1-322.1. EXCLUSION OF PERSONAL IDENTIFIER INFORMATION IN COURT FILINGS

(a) Applicability

This Rule applies only to pleadings and other papers filed in an action on or after July 1, 2013 by a person other than a judge or judicial appointee. The Rule does not apply to administrative records, business license records, or notice records, as those terms are defined in [Rule 16-901 (a)] [16-1001 (a)].

Committee note: Although not subject to this Rule, judges and judicial appointees should be aware of the purpose of the Rule and refrain from including personal identifier information in their filings, unless necessary.

Cross reference: For the definition of "action," see Rule 1-202. For the prohibition against including certain personal information on recordable instruments, see Code, Real Property Article, §3-111. For the prohibition against publicly posting or displaying on an Internet Website certain personal information contained in court records, including notice records, see Code, Courts Article, §1-205.

~~(a)~~ (b) Generally

Unless Except as otherwise provided in this Rule, required by law, or permitted by court order, or required to implement a court order, the following personal identifier information shall not be included in any electronic or paper filing with a court:

- (1) an individual's Social Security number, taxpayer identification number, or date of birth; or
- (2) the numeric or alphabetic characters of a financial or medical account identifier.

~~(b)~~ (c) Exceptions

Unless otherwise provided by law or court order, section ~~(a)~~ (b) of this Rule does not apply to the following:

(1) a financial account identifier that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative agency proceeding; or

(3) in a charging document, the date of birth of the defendant; ~~or.~~

~~(4) a court record filed prior to July 1, 2013.~~

~~(c)~~ (d) Alternatives

If, by reason of the nature of the action, it is necessary to include in a filing personal identifier information described in section ~~(a)~~ (b) of this Rule, the filer may:

(1) include in the filing only the last four digits of the Social Security or taxpayer identification number, the year of the individual's birth, or the last four characters of the financial or medical account identifier, unless that identifier consists of fewer than eight characters, in which event all characters shall be redacted;

Committee note: Financial accounts include credit and debit card accounts, bank accounts, brokerage accounts, insurance policies, and annuity contracts. PIN numbers or other account passwords also may need to be redacted, as well as health information identifiers.

(2) file the unredacted document under seal, if permitted by order of court;

(3) if the full information is required to be provided only to another party or to a court official, other than a judge or judicial appointee, provide the information separately to that party or official and file only a certificate that the information has been so provided;

Committee note: It may be necessary to provide personal identifier information to a

court official, including a clerk, sheriff, or constable, in order for that official to send or serve notices, summonses, or other documents. Subsection ~~(c)(2)(A)~~ (d)(3) of this Rule is not intended to permit *ex parte* communications with a judge.

(4) if the full information is required to be in the filing and the filing is a paper filing, file the paper in duplicate, one copy with the information redacted as required by section ~~(a)~~ (b) of this Rule and one copy without redaction, together with instructions to the clerk to shield the unredacted copy in conformance with the Rules in Title 16, Chapter [1000] [900]; or

(5) if the full information is required to be in the filing and the filing is electronic, designate, in conformance with the applicable electronic filing requirements, the information to be redacted or shielded for purposes of public access.

Cross reference: See Rule 20-201.

~~(d)~~ (e) Protective Orders

For good cause, the court may, by order, in a case:

(1) require redaction of additional information; and

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

Committee note: Other than remote access to docket entries, nonparties currently do not have remote access to documents filed with the court, except under certain limited circumstances, such as in asbestos-related litigation.

~~(e)~~ (f) Non-conforming Documents

(1) Waiver

A person waives the protection of section ~~(a)~~ (b) of this Rule as to the

person's own information by filing it without redaction and not under seal.

(2) Sanctions

If a person fails to comply with this Rule, the court on motion of a party or on its own initiative, may enter any appropriate order.

Committee note: This Rule does not affect the discoverability of personal information.

Source: This Rule is in part derived from Fed. R. Civ. P. 5.2 (2007) and is in part new.

Rule 1-322.1 was accompanied by the following Reporter's note.

The effective date of new Rule 1-322.1 is July 1, 2013. Court administrators and clerks preparing to implement the Rule have different interpretations of it. To clarify the Rule, amendments have been drafted.

The amendments make clear that the Rule applies only to pleadings and other papers filed in an action other than by a judge or judicial appointee.

2010 Md. Laws, Chapter 452 contains several statutory prohibitions against disclosure of certain personal information that are applicable to court records. A cross reference to two Code provisions included in Chapter 452 -- Code, Real Property Article, §3-111 [prohibiting inclusion of certain personal information on recordable instruments] and Code, Courts Article, §1-205 [prohibiting posting or displaying on an Internet Website certain personal information contained in court records] -- is proposed to be added to the Rule.

Additionally, internal references are corrected and amended to conform to changes to the Rule.

Rule 1-322.1 contains a "sanctions" provision [subsection (e)(2), relettered (f)(2)] that addresses noncompliance with the Rule. It is a policy question whether there should be an additional enforcement mechanism similar to the "proof of service" enforcement mechanism of Rule 1-323. Proposed new Rule 1-322.1 has been drafted to provide such a mechanism if the Committee wishes to recommend this option. Rule 1-322.2 requires that every pleading or paper filed for inclusion in a case record contain a certificate of compliance with Rule 1-322.1 or, if applicable, Rule 20-201 (f)(1)(B). If there is no such certificate, the clerk must refuse to accept the pleading or paper.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

ADD new Rule 1-322.2, as follows:

Rule 1-322.2. CERTIFICATE OF EXCLUSION OF PERSONAL IDENTIFIER INFORMATION

(a) Certificate Required

Every pleading or paper that a party files for inclusion in a case record as defined in Rule **[Alternative 1: [16-1001] [16-901]] [Alternative 2: [16-1001 (c)(1)(A)] [16-901 (c)(1)(A)]** shall contain either (1) a certificate of compliance with Rule 1-322.1 that is signed by an attorney for the party or, if the party is self-represented, by the party, or (2) in an affected action under Title 20 of these Rules, a certificate that complies with Rule 20-201 (f)(1)(B).

Cross reference: For the definition of "affected action," see Rule 20-101.

(b) Action by Clerk

The clerk shall not accept for filing any pleading or other paper requiring a certificate under section (a) of this Rule unless the pleading or paper contains the certificate.

Source: This Rule is new.

Rule 1-322.2 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 1-322.1.

The Chair said that Rule 1-322.1 had been adopted by the Court of Appeals on May 1, 2013 as part of the Maryland Electronic Courts Initiative (MDEC) package, even though it was not an MDEC rule. At least three issues had surfaced since then. The first issue was a request received from the Administrative Office of the Courts ("AOC") indicating that they wanted the exclusions in Rule 1-322.1 to apply only to "case records," which is a defined term in Title 16, Chapter 1000, the Access to Court Records Rules. It essentially means litigation files that are kept by the clerk. It does not apply to land records, to other kinds of notice records, or to administrative records. That was the original intent. The Chair commented that to his knowledge, it had never been intended that the exclusions in Rule 1-322.1 apply to land records and other notice records, but this had not clearly been expressed. The rule proposals that were in the

meeting materials were drafted to address the request by the AOC, which actually emanated from a number of the clerks, who were concerned as to whether Rule 1-322.1 would apply to land records. The draft of the Rules in the meeting materials had tried to address this in Alternatives 1 and 2.

The Chair told the Committee that this issue had become very complicated. More complications had surfaced yesterday with respect to how this was being presented. The Chair and the Reporter had decided that this was going to require some more rewriting. A newer version of Rule 1-322.1 had been handed out at the meeting today.

The Chair noted that this proposal restructured the Rule to address the issue regarding the applicability of land records by starting out with an applicability provision that tries to clarify that Rule 1-322.1 applies only to pleadings and papers filed in an action (the word "action" is a defined term in section (a) of Rule 1-202, Definitions) on or after July 1, 2013, (which is when Rule 1-322.1, as approved by the Court of Appeals, takes effect) by a person other than a judge or judicial appointee. The reason for this exception is that at this point, at least for purposes of Rule 1-322.1, the clerk should not be telling the judge that the judge is not allowed to file his or her order. Any motion to strike what a judge had decided in his or her order is not subject to this.

The Chair pointed out the proposed Committee note after section (a), which alerts judges that they should refrain from

including personal identifier information in their filings, unless it is necessary. The balance of the second sentence of proposed new section (a) makes clear that the Rule does not apply to administrative records (which is a defined term in Rule 16-1001, Definitions), to business license records (which are also issued by clerks), or to notice records, which would pick up land records.

The Chair commented that he had been concerned at one point, apart from pure land records, about the filings of secured transactions under Code, Commercial Law Article, Title 9, because at one time, those were also filed with the clerks as notice records. However, the Chair had been advised that this was no longer the case. The financing statements are filed with the Maryland Department of Assessments and Taxation, so this would be an executive agency problem, not a judicial agency problem.

Ms. Ogletree remarked that some financing statements are filed in the land records. These include statements on farm equipment, irrigation systems, and anything that is partially attached to the land. Ms. Smith noted that those would be covered under land records. The Chair added that it would not be included under Rule 1-322.1.

The Chair said that he had shown Rule 1-322.1 to D. Robert Enten, Esq., who is counsel for the Maryland Bankers Association, and Mr. Enten had no problems with it. The Chair observed that the proposal with respect to the first issue was trying to clarify in the applicability provision that the Rule is intended

to apply to the litigation files that the clerk maintains in actions and not to anything else. The cross reference after section (a) calls attention to two statutes. One is Code, Courts Article, §1-205, which prohibits certain personal information on recordable instruments, and one is Code, Real Property Article, §3-111 which precludes certain personal information with identifiers from being put on websites.

The Chair commented that after many discussions with people in the AOC, the Chair and the Reporter were satisfied with the fact that this is not a rules issue. The statute in the Real Property Article addresses land records, which are excluded from Rule 1-322.1, and the statute in the Courts Article addresses other personal information that cannot be put on a website. Most of Code, Courts Article, §1-205 pertains to executive records. However, it also covers some court records. This is the first part of the proposal to address the issue that had been raised by the AOC and the clerks.

The Chair noted that a second problem surfaced from the House of Ruth. Dorothy Lennig, Esq. who is counsel for the House of Ruth, was present at the meeting. The Chair said that the problem concerned the issue of whether birth dates should be excluded from court records. It appears that birth dates are required to be in domestic violence protective orders in order for them to be registered.

Ms. Lennig told the Committee that Tammy Brown, Esq., of the Governor's Office of Crime Control and Prevention, was also

present. Ms. Lennig said that when a petitioner gets a temporary protective order, it has to be served by law enforcement on the respondent. When the petitioner applies for the temporary protective order, he or she also completes what is called the addendum, which gives law enforcement a great amount of information about the respondent, so that law enforcement can make sure that they serve the correct person. One of the types of information requested in the addendum is the respondent's date of birth. Other information includes the respondent's tattoos, skin color, and type and color of hair, which are identifying items. This information is also on the front page of the temporary protective order when that gets served. This front page has been completely revised and is called the "passport." The goal was to make the front page of the protective order look the same in every state in the U.S., so that people working in law enforcement anywhere in the country would be familiar with it.

Ms. Brown explained that the date of birth is needed on the protective order, so that law enforcement has a unique identifier, which is required to be able to enter into the Maryland Electronic Telecommunication Enforcement Resource System (METERS) and the National Crime Information Center (NCIC). This serves two purposes. The first is that when a final order is complete, if there is a violation, the officer who responds relies on NCIC and METERS to verify that the order is there. If the date of birth is never entered in there, the officer will not

give a "go back and verify" command to then enforce the violation.

Ms. Brown noted that the second piece that would be missing is that when officers enter the birth date into NCIC and METERS, it triggers their Victim Information Notification Everyday (VINES) protective order system, which gives electronic notification to victims to allow them to know that the order has actually been served. If the date of birth is never entered into NCIC or METERS, it will not be fed into the protective order system, and the victims will not be notified, which makes the system ineffective. The State has invested a significant amount of money in this system, and it is beneficial for victims and offers them some security and reassurance. They know when their order has been entered into the system. Code, Family Law Article, §4-505 was passed recently, requiring law enforcement to enter the temporary protective order in the system within two hours of service. It is often very timely notification to the victims.

Judge Eaves commented that for the order to be entered into the METERS and NCIC systems, birth dates are required. This is how law enforcement officers out in the field know about the existence of an order, because they can then access it, or they can call into dispatch and find out about the existence of an order when they are making a call for service to help a victim. The Chair pointed out that the version of Rule 1-322.1 approved by the Rules Committee and the Court of Appeals permits the birth

date of a defendant on a charging document. This had been added at the request of law enforcement, because it is on all of the summonses and citations that the police officers issue. The problem was that the respondent in a protective order case is not a defendant in a charging document. The proposal, which is in the handout, is to provide an exception in section (b) where the information is required to implement the court order. The theory was that this should cover the problem of the birth date being omitted. Ms. Lennig, Ms. Brown, and Judge Eaves said that they thought that this change would take care of the problem.

Judge Weatherly told the Committee that the Family Law Bar had expressed some concern at the recent Maryland State Bar Association meeting as to what should be done about children's dates of birth in complaints for divorce and complaints for custody or visitation in which a child's date of birth is identified. It also triggers finding out whether it is a minor child, which may be relate to getting use and possession of a house or to getting child support. Previously, the Rules Committee had discussed putting dates of birth in custody orders. The clerks often answered that they did not know how to handle the birth date problem. The Rule does not give much instruction to those filing.

The Chair responded that to address this, the exception in section (c), which read as follows: "[u]nless otherwise provided by law or court order, section (b) does not apply to the following..." was included. The Chair inquired if this covered

the birth date issue. Ms. Ogletree answered that it does not quite cover it. The Chair noted the language in section (d) that read: "... If by reason of the nature of the action, it is necessary to include in a filing personal identifier information described in section (b) of this Rule, the filer may...". Judge Weatherly remarked that section (d) then refers to the last four digits of the Social Security or taxpayer identification number, etc. She was not sure if subsection (d)(3) also applied when the court needs to know the full information.

The Chair asked how the Rule should be modified. Ms. Smith replied that the Rule should have some clarifying language, because other agencies require the date of birth, such as for adoptions. If the clerk does not have that information in the file, it cannot be given to the agencies that ask for it. The Chair questioned whether this is required by law. Ms. Ogletree pointed out that Rule 10-402, Petition by a Parent for Judicial Appointment of a Standby Guardian, requires the date of birth of the minor. The Chair commented that Rule 16-1008, Electronic Records and Retrieval, provides that the date of birth of someone can be shielded from public access. The question being discussed regarding Rule 1-322.1 is whether the date of birth can be included at all. The original version of the Rule was to provide for the date of birth where it is required by law or is necessary to implement a court order. If this is not enough, what else should be added to Rule 1-322.1 without opening the floodgates to including this information?

Ms. Harris remarked that the clerks' offices are having problems with these dates coming in on all sorts of pleadings. If there was one piece of paper that would be filed electronically and would give the dates needed, such as date of marriage or date of birth, it could be sealed at least in a family case, but it would be there if someone needed it. It would alleviate the concern about this. The Chair commented that this approach has been taken in other states. Embargoed information is filed separately, put into a file, and sealed somewhere. If anyone needs it, the clerk will have to figure out where it is.

Ms. Smith asked whether date of birth is required by statute. Where did the concept of birth date come in? The Chair answered that excluding birth date came in from the Rules in other states. When the drafting of Rule 1-322.1 was first begun, the drafters looked at Fed. R. Civ. P. 5.2, Privacy Protection for Filings Made with the Court, which is similar, and rules in other states, many of which copied the federal Rule, including a "laundry list" of what cannot be included in filings. Birth dates were regarded as an identifier.

Ms. Ogletree referred to all of the information that is required in a guardianship petition. The petitioner has to give the birth date, addresses, and a great amount of other information. The Chair said that if the law requires it, then the information is given, and it is shielded. Ms. Ogletree asked if it would be easier if the personal information would come in

on a separate sheet, and the sheet would not be readily available. Mr. MacGlashan, Clerk of the Circuit Court for Queen Anne's County, referred to Code, Real Property Article, §3-111, Disclosure of Personal Information on Recordable Instruments Prohibited, and Code, Courts Article, §1-205, Disclosure of Personal Information on Web Sites Prohibited. Date of birth is not mentioned in either of these provisions. Why is it necessary to shield it? It would be opening a Pandora's box.

Judge Weatherly pointed out that in the discussion about this issue, one of the concerns was that the identity of children is being stolen. Sometimes, no one in the family, neither the parents nor the children, know about the theft for years and years. In the family law area, it may be a parent who is using his or her child's name and social security number to apply for a credit card or something similar. It is problematic, because certain things are triggered by entitlement to relief only for minor children. Yet information about minor and adult children is needed. It had been stated in the discussion that it would not be a problem, and the courts would continue to pass custody orders that would identify children using dates of birth. But now the issue is information in pleadings.

The Chair responded to Mr. MacGlashan's question by noting that Rule 1-322.1 was derived from Fed. R. Civ. P. 5.2, which includes date of birth as prohibited information. The list of identifiers was picked up from the federal Rule, which many states have adopted. The Chair added that he did not know

whether the actual date of birth has to be in different papers and pleadings being filed or whether for jurisdictional purposes or for other purposes, it has to be alleged that the child was under a certain age, or that someone is over a certain age. Then it becomes a matter of evidence at trial to prove the age. Rule 1-322.1 tracks the Rules of about 30 other states and the federal courts.

Ms. Smith moved to delete the reference to "date of birth" from Rule 1-322.1. The motion was seconded. Mr. Shellenberger told the Committee that he was the State's Attorney for Baltimore County. He had spoken with the Chair yesterday. Mr. Shellenberger said that dates of birth are a problem in criminal cases. In a second-, third-, or fourth-degree sex offense case, where the age of the defendant and the victim matter, this is an element of the crime. The Chair noted that the prosecutor can put in the age on the charging document, such as "the victim is under the age of 14." Mr. Shellenberger responded that when the case gets to the Court of Appeals, he would hope that the Court does not decide that the charging document is defective. He would prefer not to take that chance.

Mr. Shellenberger said that traditionally, the date of birth of the victim and of the defendant, which would be appropriate on the indictment under this Rule, are put on the charging document. However, if the dates of birth are close together and only a few days apart, alleging that the victim is under the age of 14 may not be enough. There are many different variations of how the

crime can be proven. Every day in District Court, prosecutors who have to show the defendant's driving record as an element of the crime of driving while the privilege has been suspended, have to prove the date of birth.

Mr. Shellenberger said that in Baltimore County, they handle 26,000 traffic cases a year, and each day in District Court, hundreds of driving records are produced. Some are not necessarily handled as evidence, such as when the case involves a guilty plea or a statement of facts. It may go into the court file, but it may not. Mr. Shellenberger remarked that he cannot hire another person to go through the files to redact thousands of dates of birth on defendants' driving records. He expressed the view that precluding the date of birth from being shown in court filings would be an incredible burden and could cause problems. The clerk's office in Baltimore County is days behind on their filing. The concept of simply shielding the information is a great amount of work for the clerks.

The Chair commented that if the date of birth is excluded from Rule 1-322.1, it would be excluded for everyone, not just for defendants and respondents. He recalled that when this was before the Committee previously, there had been concern in the victims' community about including dates of birth. Mr. Butler expressed the opinion that Judge Weatherly had been correct that identity theft is a major issue, as well as security and safety. It is important to make sure that someone's identity is not available to the public. He acknowledged Mr. Shellenberger's

comments on charging documents, adding that the Criminal and Juvenile Subcommittees should look at the elements of charging documents to address some of these issues.

Judge Weatherly clarified that she was in favor of dates of birth being able to be disclosed. Mr. Butler remarked that they should not be on the Internet. The Chair pointed out that information disclosed on the Internet is a different issue. Under the Rules of Procedure now, this information is not put on the Internet.

Mr. Butler observed that the problem is that when people testify in open court as to what the date of birth is by looking at court records or documents, then the recordings of the testimony are available or the videos of the proceedings are available online. This personal information is being exposed, and it could be used by someone with nefarious purposes in mind.

The Chair pointed out that this may be necessary as evidence, though. The problem about the disks of court proceedings that are available can be addressed, because the disks can be redacted. Rule 16-501, In District Court, and Rule 16-503, Electronic Recording of Circuit Court Proceedings, which is before the Court of Appeals now, provides for the redaction of sensitive information from recordings of court proceedings. Mr. Butler responded that the information may be needed for law enforcement purposes. It is a complicated issue with many exceptions.

The Chair told the Committee that apart from the printed

Rules in front of them, two suggestions had been made. One was to amend the Rule further to take out the reference to "date of birth." The other was Ms. Harris' suggestion to put the personal identifier information in a separate document, which gets shielded and sealed. Ms. Ogletree noted that a motion was already on the floor to take out the reference to "date of birth." The Vice Chair asked if the Court of Appeals had already approved the language in Rule 1-322.1. The Chair replied affirmatively, adding that it had been approved on May 1, 2013. The Vice Chair noted that the Committee would be asking the Court to take out language that they had just approved. The Chair said that he did not recall any discussion at the Court of Appeals hearing about dates of birth. No one had objected to it; the Rules Committee had recommended it, because so many other states and the federal courts had the exclusion of it in their rules.

The Chair inquired if the exclusion of dates of birth had caused problems in other states. Judge Pierson commented that no one had really focused on this issue until the effective date approached. The Chair called for a vote on the motion to eliminate the reference to "date of birth" in Rule 1-322.1, and it passed with four opposed.

The Chair asked Ms. Harris if she was still interested in going forward with her suggestion that the personal identifier information in court filings should be set forth on a separate document. She replied that she had thought that this would make it easier to shield this information. The information would be

available for the court, and it would be shielded from the public. Mr. Michael questioned whether it was necessary to have a rule addressing this, or whether this could be done as an administrative policy. Ms. Harris answered that this is a problem for her office. Ms. Smith pointed out that the separate sheet would have to be submitted with every file.

The Chair noted that this is the problem with this suggestion. Mr. Sykes asked whether elimination of the birth date affects the situation where age is an element of the crime, and it has to be used. The Chair said that the change to the Rule allows the date of birth to be in the court filings. The deletion of the reference to "date of birth" from the Rule allows it to be put in the court documents.

The Chair asked whether anyone had a comment on the revised version of Rule 1-322.1 that had been handed out at the meeting, which attempts to address the concerns expressed by the clerks, the AOC, and the House of Ruth. The Rule had not gone before a subcommittee, so it would take a motion to approve the Rule subject to the amendment that had just been approved, deleting the reference to "date of birth." Mr. Michael moved to approve Rule 1-322.1 subject to the amendment, and the motion was seconded. The motion carried by a majority vote.

The Chair presented Rule 1-322.2, Certificate of Exclusion of Personal Identifier Information, for the Committee's consideration.

The Chair explained that Rule 20-201, Requirements for

Electronic Filing, which is one of the MDEC Rules, requires that any paper filed electronically must contain a certificate that the personal identifier information is not in the filing, or if it is in there, that a redacted version without it is also being electronically filed. The Court of Appeals had already approved this Rule, and it was not before the Committee today. Recently, an issue had been raised by the clerks and the AOC, who would like a similar procedure for paper filing. This is what Rule 1-322.2 is designed to do. It tracks Rule 20-201 somewhat. Section (a) of Rule 1-322.2 provides that every paper filing shall contain a certificate of compliance with Rule 1-322.1, and that if the certificate is not there, the clerk shall decline to accept the paper.

The Chair said that two issues were before the Committee. The first was whether Rule 1-322.2 was a good idea. If the Committee was in favor of the Rule, the second issue was whether the procedure should be instituted right away. The problem that needed to be considered was that the proposal to institute Rule 1-322.2, which would take effect as soon as the Court of Appeals could adopt it, even as soon as July 1, 2013, had never been advertised, had never been put out for comment, and no attorney, except the ones at the meeting today, knew about it. Yet every single paper filing would have to have the certificate with it or be rejected by the clerk.

The Chair commented that from what the AOC had told him, the clerks would like this Rule effective July 1, 2013. It would

affect every single paper filed with the clerk for litigation after July 1. The Committee could approve the proposal as it is or with any amendments they thought would be necessary, could reject it, or could defer consideration, so that the proposal could be published for comment and taken up again in the fall.

Mr. Michael inquired what the purpose was of having the Rule become applicable so quickly. Ms. Smith expressed the opinion that Rule 1-322.2 would only be important after the MDEC Rules go into effect. The Rules of Procedure cover the certification issue currently, so that people can point out to the clerks that personal information is in documents, and the clerks can then address it. The Rule is not needed immediately. The Chair said that MDEC is scheduled to take effect some time between January and April of 2014 in Anne Arundel County. After a trial period of about six months, it would be transported to the Eastern Shore Counties.

Ms. Smith reiterated that July 1 would be too soon for Rule 1-322.1 to become effective. Mr. MacGlashan agreed with Ms. Smith. Ms. Wherthey, the Deputy Director of Legal Affairs for the AOC, told the Committee that she had been getting many questions about the certificate requirement. The reason that she was at the meeting was to speak in favor of including the certificate requirement across the board. One reason was the fact that this is required for MDEC but not for paper filings, creating an inequity. The second was that it would give the clerks a bright line rule. Otherwise, there would be confusion

about how to handle pleadings with personal identifier information in them.

Mr. Michael asked Ms. Wherthey what her position was on the possible July 1, 2013 effective date. Ms. Wherthey replied that she and her colleagues understood that this would be giving the bar very short notice. Mr. Michael remarked that the July 1 date would have legal malpractice stamped all over it. Mr. Brault added that he was thinking about the statute of limitations. He referred to *Blundon v. Taylor*, 364 Md. 1 (2001) where the petitioner sought to modify the decision of the Health Claims Arbitration Office, and he filed the request by facsimile filing instead of a paper filing. It was filed on the last day, and the Court of Appeals threw out the case, because the request was not timely and properly filed. Mr. Brault said that making Rule 1-322.2 effective so quickly could set up the bar to make this type of mistake. Mr. Michael referred to Rule 15-1001, Wrongful Death, which the Committee had recently worked on, which has as a condition precedent for bringing the action, that it be filed within three years. There are not many exceptions. If the attorney made a mistake filing the action similar to the one provided for in Rule 1-322.2 that caused him or her to have to refile it, it is legal malpractice *per se*. It is not a good idea to invite this to happen.

Mr. Carbine recollected that he had invented the concept of the redaction certificate, so that for electronic filing, the clerks would not have to go through every page of every document

to search out confidential information. The onus would be on the trial attorney to make a certificate that confidential information is either in the filing or is not in the filing. All that the clerk would have to do is to look at the redaction certificate. If the paper is filed without the redaction certificate, the clerk would not accept it. Mr. Carbine expressed the view that the only change to Rule 1-322.2 that was necessary was to make the effective date July 1, 2014, not July 1, 2013, because no other county but Anne Arundel County would have MDEC prior to July 1, 2014. The attorneys in Anne Arundel County will have to learn about the MDEC Rules, anyway. The Chair added that this includes filing in the District Court.

Mr. Carbine remarked that January 1, 2014 could be the effective date, but if the Court of Appeals does not approve Rule 1-322.1 until October, that is a very short window. This is a watershed change for the practitioner. Very few attorneys in Maryland even know about the redaction certificate that is coming down the road. The Chair referred to Judge Pierson's earlier comment about waiting until the last minute to focus on changes to rules. The process in developing the MDEC Rules had a great amount of transparency to it. Personal letters had been sent to the Maryland State Bar Association ("MSBA") asking them to notify every committee and section that MDEC will be instituted soon. They were notified of the two hearings held on the MDEC Rules at the Court of Appeals, one on the basic issues and another on the Rules themselves. Neither the Rules Committee nor the Court

received any response from any part of the MSBA, except the section on municipal law. Nothing else was received from any of the committees or sections that would be affected by MDEC.

The Chair pointed out that whether Rule 1-322.2 is effective July 1, 2014 or many years later, on July 3 of whatever year it is, people will complain vociferously. Mr. Michael remarked that the people who try to keep up with changes will not have a chance if the effective date is July 1, 2013.

Mr. Shellenberger said that his county has over 40,000 cases a year in District court, circuit court, and juvenile court. Are his assistants going to be able to certify that any personal identifier in any piece of paper has been noted? What happens when one slips through? Does that subject the person to a cause of action or to a grievance procedure? The concept of certification can open up a huge "can of worms." What about the *pro se* person who files? How much time will the clerks have to spend to inform *pro se* litigants that they have to add a certification, or they will not be permitted to file? Is this not denying people access to the courts? Mr. Shellenberger added that he was very concerned about the State's Attorneys all over Maryland who file so many court documents.

The Chair noted that the 40,000 cases filed in Baltimore County have a certificate of service. He asked what happens to the Assistant State's Attorneys if they do not file one or if they file it improperly. Mr. Shellenberger answered that the defense attorney has to call the prosecutor first to tell him or

her that the defense attorney did not get the discovery materials. The Chair responded that he was not referring to discovery materials. Mr. Shellenberger said that for any kind of motion filed with counsel that the prosecutor certifies has been sent, that counsel has to try and work out any problems.

The Chair commented that MDEC will be instituted in Baltimore County after it is instituted in the Eastern Shore counties. Once that happens, the certificate of exclusion of personal identifier information will have to be included when anything is filed. The Court of Appeals had already approved this. Ms. Smith pointed out that it will not be that difficult with MDEC, because, before the document is submitted, the filer will have a box to check, which will add the certificate. Currently, the procedure would be that the filer would have to create a different certificate. If this procedure is instituted too soon, the clerks will be rejecting most documents.

The Reporter observed that the Title 20 Rules are already in effect. Rules 20-201 and 20-203 contain the requirement that the redaction certificate has to be on all filed documents, including initial pleadings. This is quite a "sea change" when attorneys are used to putting a certificate of service for subsequent pleadings. As Ms. Smith had said, for electronic pleadings, the box will be available to check off. Anyone who is paper-filing would have to figure out how to handle this, but hopefully by then, the AOC will update their forms.

The Chair asked the Committee if anyone would like to see

the requirement of a certificate of exclusion for personal identifier information take effect July 1, 2013. No one on the Committee answered affirmatively. The Chair then asked the Committee if they wanted to defer consideration of Rule 1-322.2 until the fall to see whether this certificate procedure for paper filings should be accepted at all, or as had been suggested, defer only the effective date of the Rule. That would mean approving the Rule and recommending to the Court of Appeals that the Rule not take effect for a year or for some other period of time. Mr. Carbine said that the Rule should be adopted and published in the pamphlet that is sent out to update the Rules and posted on the Judiciary website, and it will get more attention paid if it is an actual rule rather than a potential rule in the Rules Committee process.

The Chair asked if Mr. Carbine's proposal was to approve the Rule. Mr. Carbine answered affirmatively, adding that it would be sent to the Court of Appeals, which may not even address it for some time. The Chair responded that it would probably be the fall before the Court even considered it. The Rule would be published for comment, because it is not an emergency, and anyone who chose to could speak about it at the Court of Appeals hearing. Mr. Carbine said that this was his motion. The motion was seconded. The Reporter noted that the language of Rule 1-322.2 would have to be modified somewhat to conform to the language of Rule 1-322.1. The language in section (a) of Rule 1-322.2 that read "...for inclusion in a case record as defined..."

would be changed to "...for inclusion in an action..." because Rule 1-322.1 had been drafted this way.

The Reporter observed that Rule 1-322.2 would be published for comment, so the clerks have the opportunity to weigh in on the Rule. The Chair called for a vote on the motion to defer the effective date of the Rule, and it carried on a vote of nine in favor and six opposed.

Judge Weatherly asked which effective date would be recommended. The Chair responded that he had thought that the date of July 1, 2014 had been agreed on. He asked if Anne Arundel County was still anticipating the startup of MDEC between January and April of 2014. Ms. Blough said that they had been told that it would be April 14, 2014. Judge Pierson referred to the amendment to Rule 1-322.1. The current Rule was to go into effect on July 1, 2013. Is the amendment to the Rule going to be sent up at some time in the future? What will happen when, on July 1, 2013, the Rule provides that the date of birth cannot be put into court records, and the amendment allows it.

The Chair pointed out that two options exist with respect to Rule 1-322.1. One was to let it go the normal route, which would mean that the Court of Appeals would not get the Rule until some time in the fall. The other was that because of the uncertainties that had been expressed by the clerks, and the problem identified by the House of Ruth, which was that dates of birth are needed in domestic violence protective orders, Rule 1-322.1 would be sent up to the Court of Appeals as an emergency.

This would include taking out the date of birth as excluded personal identifier information. Judge Pierson moved that the Rule be sent up as an emergency. The motion was seconded, and it carried on a majority vote.

Agenda Item 2. Consideration of proposed new Rule 8-123.1
(Appeals and Applications for Leave to Appeal by Victims)

The Chair presented Rule 8-123.1, Appeals and Applications for Leave to Appeal by Victims, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 8 - APPELLATE REVIEW IN THE COURT OF

APPEALS AND COURT OF SPECIAL APPEALS

CHAPTER 100 - GENERAL PROVISIONS

ADD new Rule 8-123.1, as follows:

Rule 8-123.1. APPEALS AND APPLICATIONS FOR
LEAVE TO APPEAL BY VICTIMS

(a) Definition

In this Rule:

(1) Final Order

"Final order" means a judgment that disposes of the action and includes an order of probation before judgment and a stet entered under Rule 4-248.

(2) Interlocutory Order

"Interlocutory order" means (A) any written order or oral ruling made on the

record issued prior to the entry of a final order in the action that denies a request made by or on behalf of a victim for the implementation of a right specified in Code, Criminal Procedure Article, §11-103 (b), and (B) the failure of the court, within five days, to act upon a request made in writing or on the record by or on behalf of a victim for the implementation of a right specified in Code, Criminal Procedure Article, §11-103 (b), which shall be regarded as a denial of the request.

(3) Victim

"Victim" means the victim of a crime who is entitled to file an application for leave to appeal or an appeal pursuant to Code, Criminal Procedure Article, §11-103 (b). "Victim" includes a victim's representative, as defined in Code, Criminal Procedure Article, §11-107 (g).

(b) Scope and Application

This Rule applies to and governs applications for leave to appeal and appeals filed in the Court of Special Appeals by a victim under the authority of Code, Criminal Procedure Article, §11-103 (b). It is intended to cover comprehensively the procedure for the processing of such applications and appeals by the Court of Special Appeals and, to the extent of any inconsistency, shall prevail over all other Rules in this Title. To the extent that a matter is not covered by this Rule, specifically or by fair inference, but is covered by another Rule, the application or appeal shall comply with that Rule.

(c) Time for Filing

(1) Application for Leave to Appeal from Interlocutory Order

An application for leave to appeal from an interlocutory order shall be filed within ten days after the effective date of the interlocutory order. The effective date is the date a written order was docketed, an

oral ruling was announced on the record, or, if there is no order or ruling, the fifth day after a request by or on behalf of the victim was filed or made on the record.

(2) Appeal from Final Order

An appeal from a final order denying a right of the victim specified in Code, Criminal Procedure Article, §11-103 (b) shall be filed within ten days after a judgment disposing of the action is entered by the lower court.

DRAFTER'S NOTE:

(1) Subsection (c)(1) is consistent with current Rule 8-204 (b)(2)(B). If subsection (c)(1) is adopted, Rule 8-204 (b)(2)(B) should be repealed.

(2) Code, Criminal Procedure Article, §11-103 (b) is ambiguous regarding the meaning of final order. Is it intended to mean a final decision by the trial court denying a request by a victim - even one made during the proceeding - or when an actual judgment of conviction (or other final disposition) is entered? If it means the former, what is an interlocutory order?

(d) Where Filed; Fees; Transmittal to Clerk of Court of Special Appeals

An application for leave to appeal and a notice of appeal shall be filed in duplicate with the clerk of the lower court, along with (1) any fees and costs required by law and not waived pursuant to Rule 1-325, and (2) a certificate of service. The clerk shall immediately transmit a certified copy of the application or notice of appeal to the clerk of the Court of Special Appeals.

(e) Service

The victim shall serve a copy of the application or notice of appeal on all parties to the action and the Attorney General.

(f) Designation of Parties

The victim shall be the applicant or appellant, as appropriate. The court, the State of Maryland, the defendant in a criminal action, and each party in a juvenile delinquency action shall be respondents or appellees, as appropriate.

DRAFTER'S NOTE: The statute is unclear as to who the parties are to a victim's application or appeal. The State's Attorney and the defendant or alleged delinquent - the parties in the trial court - may not support the court's ruling. If the court is regarded as a respondent or appellee, presumably the Attorney General, as counsel to the courts, will have to defend the court's ruling. By law, however, the Attorney General also represents the State, as prosecutor, in criminal appeals which, unless the State's Attorney is authorized to participate in the appeal, will mean that two divisions of the Attorney General's Office could be in conflict. That kind of conflict has occurred before, in which the Attorney General's name has appeared on briefs taking opposing positions, and the Court has accepted the assurance that there is a sufficient firewall between the two divisions.

(g) Application - Content; Response; Record; Disposition

(1) Content

An application for leave to appeal shall contain (A) a concise statement of each right of the victim specified in Code, Criminal Procedure Article, §11-103 (b) allegedly violated, (B) the factual background and circumstances pertaining to the request for implementation of the right and the court's denial of or refusal to grant the request, and (C) the status of the case at the time the application was filed.

DRAFTER'S NOTE: Compare Rule 8-204 (b) (3), which requires a statement of the reasons why "the judgment" should be reversed or modified. Subsection (g) (1) of this Rule is

more specific and takes into account that the application will in all cases be from an interlocutory order, not a judgment.

(2) Response

Within ten days after service of the application, a respondent may file a response to the application. The response shall be filed with the clerk of the lower court and served on the victim and all parties.

(3) Record

Within five business days after the time for filing a response, the clerk shall transmit to the Court of Special Appeals a certified copy of (A) the application, (B) any responses, (C) any written request by or on behalf of the victim for implementation of a right specified in Code, Criminal Procedure Article, §11-103 (b), and (D) any order entered by the court with respect to such request. At any time prior to its disposition of the application, the Court Special Appeals may require the clerk to transmit any other part of the record, including a transcript of proceedings germane to the application.

DRAFTER'S NOTE: Compare current Rule 8-204 (c) (4) and (b). If section (g) of this Rule is adopted, Rule 8-204 (c) (4) should be repealed.

(4) Disposition

Within 30 days after the later of the time for filing responses to the application or the transmittal of additional information pursuant to subsection (g) (3) of this Rule, the Court of Special Appeals shall (A) deny the application, (B) grant the application and affirm the interlocutory order of the lower court, (C) grant the application, reverse the interlocutory order of the lower court, and grant any lawful and appropriate remedial relief, or (D) grant the application and order further proceedings in the Court of Special Appeals.

DRAFTER'S NOTE: Subsection (g) (4) is consistent with Rule 8-204 (f) but is tailored to the context of an interlocutory order and the limitations of double jeopardy, which may preclude any effective relief.

(h) Appeal

An appeal, whether from a final order or pursuant to the grant of an application for leave to appeal, shall be expedited in accordance with this section.

(1) Designation of Record

Within 15 days after the filing of a notice of appeal or service of an order of the Court of Special Appeals pursuant to subsection (g) (4) (D) of this Rule, the parties, unless precluded by a court order from doing so, shall consult with each other in an attempt to agree on those parts of the record that are germane to the appeal and (A) inform the clerk of any agreement, or (B) in the absence of an agreement, file with the clerk of the lower court a designation of those parts of the record that the party believes are germane to the appeal. Within five business days thereafter, the clerk shall transmit to the Court of Special Appeals a certified copy of those parts of the record agreed to or designated by the parties.

DRAFTER'S NOTE: Compare Rule 8-204 (c) (4). If subsection (h) (1) is adopted, Rule 8-204 (c) (4) should be repealed. There is no reason for the entire record to be sent to the CSA when the only issue is denial of a victim's right. The parties should be able to agree on what is needed, but if they can't, they can each designate what they want. It is possible that there may be an outstanding "no contact" order that precludes the defendant or alleged delinquent child from having contact with the victim.

(2) Briefs

The clerk of the Court of Special Appeals shall notify the parties of the receipt of the record. The appellant's brief shall be filed within 15 days after the sending of such notice. Appellees' brief shall be filed within 15 days after the appellant's brief is filed. Except with permission of the court. Any reply brief by the appellant shall be filed within ten days after the filing of the appellee's brief.

(3) Oral Argument; Decision

Any oral argument ordered by the court shall be held within 30 days after the filing of appellees' briefs. Unless otherwise directed by the court for good cause, the court shall enter an order or mandate disposing of the appeal within 60 days after oral argument or the calendaring of the appeal without oral argument.

DRAFTER'S NOTE: The times specified in subsections (h) (2) and (3) are shorter than those in Rule 8-207, except the 60-day period for disposition is consistent with the time period stated in Rule 8-207 (a) (5).

Source: This Rule is new.

Rule 8-123.1 was accompanied by the following Reporter's note.

The effective date of Chapter 363, Laws of 2013 (HB 250) [Criminal Procedure - Victims' Rights - Remedy and Priority of Restitution] is June 1, 2013. Numerous Rules are affected by this legislation. In lieu of amendments to each Rule, proposed new Rule 8-123.1 consolidates into a single, comprehensive Rule the procedures for applications for leave to appeal and appeals in the Court of Special Appeals by a victim under the authority of Code, Criminal Procedure Article, §11-103 (b).

The Chair told the Committee that he would give them some

background on proposed Rule 8-123.1. The origin of the Rule was amendments to Code, Criminal Procedure Article, §11-103, which were adopted in 2013 by the Maryland General Assembly and which went into effect on June 1, 2013. Previously, Code, Criminal Procedure Article, §11-103 gave victims of a violent crime the right to file an application for leave to appeal to the Court of Special Appeals from the denial of rights in the circuit courts that were provided in other sections of the Code. This appears to have applied only to the denial of rights in the circuit court, because it applied only to victims of violent crimes, which is a term defined in Code, Criminal Procedure Article, §14-101. The crimes seemed to be all triable in the circuit court. Mostly, the rights that were involved were the right of victims to receive notice of court proceedings, to be present in court at any of these proceedings, to make a statement in court at sentencing, and to seek restitution. These are the principal rights of the victims and the subject of case law.

The Chair said that the 2013 amendments made two major changes among others. The first made the statute apply not just to violent crimes, but to all crimes, except non-incarcerable traffic offenses and similar kinds of offenses under the Natural Resources Article.

The Chair noted that the second change in the 2013 law was that it allowed a direct appeal to the Court of Special Appeals from "final orders" denying any of the listed rights. The Chair and the Reporter had looked closely at the 2013 Bill and

concluded that there were significant gaps and ambiguities in it. The bill appeared to be very poorly drafted, which created problems in trying to draft implementing rules.

The Chair noted that one of the problems that appeared to the Chair and the Reporter, and that may appear to others, was that by redefining the term "crime," as being any crime, except for non-incarcerable traffic offenses, for the first time, the statute applies in the District Court, including all of the theft offenses, drunk driving, etc. However, the legislature made no provision in the succeeding section, Code, Criminal Procedure Article, §11-104 for notifying victims of District Court proceedings, or for returning notification request forms to the District Court. How this would work was a mystery to the Chair and to the Reporter, particularly because most District Court cases are over in a day or less. The only right of appeal in §11-103 or application for leave to appeal is to the Court of Special Appeals. But the Court of Special Appeals has no jurisdiction over appeals from the District Court. Appeals from the District Court go to the circuit court, and appeals in criminal cases are tried de novo. It was totally unclear to the Chair and the Reporter how this would actually work. Could a victim take a de novo appeal in a criminal case?

The Chair commented that with respect to circuit court cases, Code, Criminal Procedure Article, §11-103, as amended, made clear that if the appeal or the application for the leave to appeal is filed, the case in the circuit court is not stayed

while the parties are pursuing the appellate proceeding unless all parties consent. It appeared to the Chair and to the Reporter that the likelihood of all parties consenting is remote. So the case is probably not going to be stayed.

Two questions are presented. One is who are the parties are to this appeal. There is the defendant and the State, but the complainant is the victim and the complaint is really against the judge who allegedly denied the victim the right. The prosecutor may not be looking to sustain what the court did as it usually does in criminal appeals. The prosecutor may have thought that the judge made a mistake in not letting the victim make a speech or not providing restitution when the victim asked for it. If the court is going to be a party in some way, who will represent the court if the Attorney General is representing the State as a prosecutor?

The second problem is that these cases are not likely to be stayed. By the time the Court of Special Appeals can get to an application much less than to an appeal, the case could be over in the circuit court. There will be a judgment. The defendant may be acquitted, may get a probation before judgment, or may be convicted and sentenced. Section 11-103, as amended, also recognizes that the Court of Special Appeals cannot grant any relief that would violate double jeopardy, either the federal double jeopardy clause or Maryland common law double jeopardy. What is the Court of Special Appeals to do if it finds that the victim was not notified, was removed from the courtroom for some

reason, was not allowed to speak, was denied restitution, or was not given the amount that was requested, in light of the fact that a defendant's sentence cannot be increased?

Faced with these gaps, the Chair and the Reporter tried to figure out how to create a procedure to give victims the best opportunity to present complaints to the Court of Special Appeals. On May 6, 2013, they sent an e-mail to the State Board of Victim Services and to the Maryland Crime Victims' Resource Center asking for written suggestions. The State Board of Victim Services, which is the statutory agency responsible for victim services, did not reply. Russell Butler, Esq., on behalf of the Maryland Crime Victims' Resource Center, did respond at 4 o'clock p.m. yesterday, with 29 pages of comments, which are in a letter that was handed out at the meeting today.

The Chair said that they had to try to figure out how the statute would work. One way was to look through all of the different rules in Titles 4, 7, and 8 to see which ones would need to be amended. The amendments would address where to file the appeals, when they have to be filed, who the parties to the appellate process are going to be, the record, ordering and paying for transcripts if they are required, record extracts (these are criminal cases, but it is an appeal by a victim from some denial of a statutory right), expedited treatment in the Court of Special Appeals, and costs.

The Chair remarked that he and the Reporter had tried to make a preliminary identification of all of the different rules

that might have to be amended in some way, and if they were amended, the references to victims' rights would have to be placed somewhere in all of these different rules. The thought was that there was no way that victims, especially *pro se* victims, would ever be able to navigate this properly. Instead of amending a myriad of rules, the attempt was to put everything in one rule, Rule 8-123.1, which addresses only victims' appeals and applications. To try to expedite the process, the time for appeal was put into the Rule as 10 days, not 30 days. The 30-day time period exists only by rule generally. Regarding the record, the entire record is not needed. What is at issue is only the denial of rights related to the victims. The attempt was to try to make this appeal as inexpensive and as orderly and expeditious as possible for victims. The Chair and the Reporter gave the drafting their best effort, although it was not an easy task.

The Chair noted that Mr. Butler's comments had been distributed to everyone at the meeting. Mr. Butler introduced Victor Stone, Esq., who is an attorney in Mr. Butler's office. Mr. Butler told the Committee that he had tried to put some history and context behind the history of victims' rights in Maryland, which is very important. As the Chair had pointed out earlier, victims' rights are very limited. They are notice, presence in the courtroom, opportunity to be heard, and restitution. This is more of an appellate practice and does not pertain to guilt or innocence, or to suppression. It is a very limited focus on the rights of victims, which has been allowed by

the legislature.

Mr. Butler said that he wanted to address a few of the Chair's comments. Mr. Butler drew the Committee's attention to page 26 of his comment letter. The comments of the Maryland Crime Victims' Resource Center had been sent to the Rules Committee on May 24, 2013. The Reporter responded that she had sent the comments out to interested persons. Mr. Butler noted that what was in Attachment B had been sent to the Rules Committee. Judging from the Chair's statement that he did not get this until yesterday, Mr. Butler realized that the Chair had not received the comments in the time period that Mr. Butler had thought they had submitted them, which was in the time frame requested by the Reporter. The Chair apologized for the mistake.

Mr. Butler remarked that he now understood why none of his suggestions had been included in the draft of proposed Rule 8-123.1. He apologized for re-sending the comments only yesterday, but he explained that they had just gotten the draft of Rule 8-123.1, and they had noticed many differences between the draft Rule and current Rule 8-204, Application for Leave to Appeal to Court of Special Appeals. When that Rule had been amended, Mr. Butler and his colleagues had collaborated with the Honorable Joseph F. Murphy, Jr., who was then Chief Judge of the Court of Special Appeals, with State's Attorneys, with the Office of the Public Defender, and with the Office of the Attorney General to try to come up with a consensus among the stakeholders on how to make these rules work. Especially for interlocutory leaves to

appeal, there is a need to have a process, so that they can be decided promptly, because jeopardy will attach and cases will be over. However, there has not been a vetting from Mr. Butler and his colleagues who are in a criminal practice, to take a good look at the best way to address some of the issues raised by the Chair.

The Chair referred to the District Court issue. He asked Mr. Butler if his view was that the redefinition of the word "crime" will now make the statute applicable to the District Court. Mr. Butler answered that he thought that the statute was already applicable. A look at House Bill 250, which was the statute amending Code, Criminal Procedure Article, §11-103 revealed that in section (a) of the existing law, nowhere does the term "crime of violence" refer to the 14 sections to which the Chair had referred. There is no definition except that what is in the existing law already provided in subsection (a)(1)(iii) that a "crime of violence" included "a crime or delinquent act involving, causing, or resulting in death or serious bodily injury." There can be a fatality case in the District Court. The Chair inquired if Mr. Butler's position was that the statute already applies to the District Court now. Mr. Butler replied affirmatively. There are at least three cases, two that are on the pending application for leave to appeal docket, which are cases referenced on page 7 of Mr. Butler's comment letter.

The Chair questioned as to what gives the victim the right to appeal to the Court of Special Appeals in a District Court

case. The parties to the case do not have that right. Mr. Butler responded that previously in the District Court in Montgomery County in a juvenile case, there used to be a statute that allowed direct appeals from the District Court. This statute was enacted in 1993, and it had always provided for these rights for victims to seek an application for leave to appeal for an interlocutory or final order. The Chair pointed out that this was when juvenile court was in the District Court in Montgomery County, and this has no longer been the case for years.

Mr. Butler observed that nothing in the statute being discussed today provides that the victim can appeal from a decision in the circuit court, District Court, or juvenile court. It simply uses the word "court." The Chair asked Mr. Butler if his position was that a victim could appeal from a District Court proceeding to the Court of Special Appeals if the case is over. Mr. Butler acknowledged the limitation, and he noted that the limitations on remedy had not been discussed. If double jeopardy has attached, there is no relief that can be ordered.

The Chair inquired as to what gives a victim the right to appeal to the Court of Special Appeals from a District Court case apart from whether any relief can be ordered. Mr. Butler answered that Code, Criminal Procedure Article, §11-103 does not refer to "the circuit court;" it only refers to a "victim." As defined, violent crimes were already within the scope of the statute. The Court of Appeals may differ. Two cases have been on the application docket for over three years in the Court of

Special Appeals, and they have not been moved over to the regular docket.

The Chair asked if to Mr. Butler's knowledge, there had been any case since Code, Criminal Procedure Article, §11-103 was adopted in which an appellate court has permitted an application for leave to appeal to an appellate court from a District Court case. Mr. Butler answered negatively, noting two cases were pending, but they addressed home improvement fraud, and not a crime of violence. The Court of Special Appeals transferred one of the cases to the Circuit Court for Calvert County, which held that the statute only refers to a "violent crime," and the court dismissed the case. But the two cases that are currently on the docket, which are cited in footnote 2 on page 7 of his comment letter, *Fiori v. State and Maas*, Application #3036, from Worcester County, and *Stokes v. State, Zewde, Thomas, Jones, and Williams*, Application #3037, from Washington County, are both District Court cases where restitution was denied, and the victims have challenged this with an application for leave to appeal that has not yet been decided. The Chair asked if the cases have been pending for three years, and Mr. Butler answered affirmatively.

The Chair commented that ultimately the Court of Appeals would have to decide the jurisdiction if the case ever got there. The jurisdiction in the two appellate courts is set forth in Code, Courts Article, §§12-307 and 12-308, not in the Criminal Procedure Article. Mr. Butler noted that when Code, Criminal

Procedure Article, §11-103 was originally enacted, it was in the Courts Article, and later as part of a non-substantive recodification, it was transferred by the Article 27 Committee from the Courts Article to the Criminal Procedure Article. His personal argument would be that if the legislature states in any article of the Code that there is jurisdiction for a court to hear a case, then the court can.

The Chair pointed out that no other person can appeal from the District Court to the Court of Special Appeals, not the defendant and not the State, and the Chair inquired whether only a victim can appeal. Mr. Butler reiterated that the language of the statute is what it is, and there may be judicial interpretation of what it means. The answer was that changing the scope of the statute from a violent crime to all crimes was to address the issue as it was handled in the Calvert County case, where it was a restitution issue, and there was a home improvement violation. He and his colleagues had attached that case to their testimony to the General Assembly back in 2011 as to why, and this year the legislature had extended the scope to all crimes. If the issue does not go to the Court of Special Appeals, then theoretically, the victim could file a writ of mandamus, a petition for certiorari, or a declaratory judgment. There are many potential avenues for a victim to seek. Mr. Butler expressed the view that Code, Criminal Procedure Article, §11-103 is clear on its face.

Mr. Stone told the Committee that the gap is very narrow.

There may be only six victim appeals or applications for leave to appeal during a year, and this number may be too high. What the victims can appeal from and the remedies that they can get typically are very narrow, often simply restitution. In those kinds of cases, the Court of Special Appeals would ask the lower court judge to look at the issue of restitution again. The Chair said that the Court of Appeals had made clear that restitution is part of the judgment of a criminal case. It is indexed as a civil judgment, also, and it is collectible as a civil judgment, but it is part of the sentence. If the court, circuit or District, denies restitution or awards a minimal amount, and the victim would like to appeal this, can the appellate court even suggest or permit the trial judge to increase the sentence?

Mr. Butler responded that Code, Criminal Procedure Article, §11-103 clearly provides for double jeopardy as it has to. As to what double jeopardy is, Mr. Butler had cited *United States v. DiFrancesco*, 449 U.S. 117 (1980), which holds that something procedurally wrong can be corrected if it is authorized, including by statute. Anyone who has been involved in a federal sentencing guideline case knows that if the court incorrectly calculated the guidelines, and the case is procedurally wrong, a remedy can be provided for by statute. Double jeopardy is a bar.

The Chair asked if Mr. Butler's view was that under Code, Criminal Procedure Article, §11-103, it is not double jeopardy for an appellate court to increase the sentence. Mr. Butler said that it could be a trial court increasing the sentence or the

appellate court remanding to the trial court. He was not sure that the Criminal Subcommittee or the Appellate Subcommittee had considered this issue. He and his colleagues had not had an opportunity to participate in drafting the Rule, because obviously their comments sent May 24, 2013 had not been received. There will be challenges to the statute. He had litigated with the Office of the Public Defender in court, and the issues will be litigated again. As to the Chair's question about what happens if the State's Attorney does not want to uphold the decision, the Public Defender and the attorneys for the defendant will zealously argue if it is contrary to their client's position. The real parties in interest in these cases are the State as the prosecutor and also the defendant.

Mr. Butler expressed the view that existing Rule 8-204 clearly allowed both the Attorney General and the defendant to weigh in. There have not been many of these cases. He would be willing to go through the cases to show how proposed Rule 8-123.1 would work. It would be beneficial before the Rule is sent to the Court of Appeals to let the Public Defender, the State's Attorney, and the Court of Special Appeals try to work together on the Rule.

Mr. Butler said that he had made several suggestions that are in the defendant's interest, because the proposed Rule does not include that the pleading that the defendant files at the Court of Special Appeals ought to be considered. It is important to design a mechanism that is fair. Part of the problem with the

proposed Rule is that it does not address what happens in the trial courts. This is key. The cases in other jurisdictions provide that before the case goes to the appellate court, the issues have to be vetted at the trial court. Otherwise, many applications for leave to appeal will be filed, as well as appeals on issues that should be resolved in the trial courts. In many of the cases, victims were not even present in court. There would not be a record to even take to the appellate court. The issue that Mr. Butler believed to be most important was restitution.

The Chair commented that restitution was a substantive issue, and he referred to priority of payments between child support, spousal support, and restitution. Mr. Butler responded that this has been decided. The Chair acknowledged this, and he inquired why a Rule would be necessary. Mr. Butler referred to the judge who orders the defendant to pay his or her court costs or fines that day. Mr. Stone commented that in the typical case, and he reiterated that there are very few of them, because of the infrequency, what happens is that people have overlooked the fact that a victim needs to be brought in. He and his colleagues find out about it after the fact, and typically the victim states that he or she needs restitution. The victim says that he or she did not know what to do when in the courtroom. This is the victim's chance to do something that has been overlooked. If the issue had been raised, the judge would probably have honored it.

The Chair asked how this works. He assumed that if the

victim has asked for something that the judge has refused, this will resolve the issue in the trial court. Mr. Stone responded that it may be that no one has notified the victim or asked the judge to consider restitution, and then later, the victim comes to the Maryland Crime Victims' Resource Center too late for anything to be done. The Chair inquired as to what would be appealable if no one has asked the judge to consider restitution and the judge does not do so. Mr. Stone noted that this issue had been considered in an opinion authored by the Chair, *Chaney v. Maryland*, 397 Md. 460 (2007). The issue was never raised and preserved in the circuit court. Mr. Stone replied that he and his colleagues would like the 30-day period to be able to go back to the trial judge before going to the Court of Appeals. The trial judge may be willing to address the situation. If the victim has to get to the Court of Special Appeals, he or she may come to Mr. Stone or his colleagues and ask for the attorney to preserve the victim's rights, since the time to raise those rights may have passed. No transcript is available, and it is difficult to find out what has happened.

The Chair said that the question of whether the victim has to take an appeal within 10 days or 30 days is a detail that the Committee can consider. The idea was to try to expedite victims' appeals, because the issue is limited. Mr. Butler responded that some of the provisions in existing Rule 8-204 are in some ways much more expeditious than proposed Rule 8-123.1. One example is that similar to when a defendant challenges bail, there are five

days to respond as provided by Rule 8-204. The proposed Rule provides for 10 days to respond. There is another provision in the proposed Rule stating that the Court of Special Appeals can currently have a hearing on the application, which means that a brief or the legal analysis is filed. A hearing could be held without the expedited brief, and it would be scheduled in the sixty days on an application for leave to appeal. In one case, the court said that full briefing was not necessary, so instead memoranda were allowed to be filed.

Mr. Butler noted that one of the provisions he liked the best that the Court of Special Appeals might not like is the recommendation to have the determination done in 30 days. Cases on the leave to appeal docket should not be there for three years. The proposed Rule has some good provisions in it. The suggestions that he and his colleagues had made in Appendix B of the memorandum he had submitted, which apparently was sent but not considered, address the interrelationship of what happens at the trial court level. Code, Criminal Procedure Article, §11-103 was not just about the appellate courts. Someone can file a motion for relief in the trial court, and it is the interrelationship of what happens in the trial court as opposed to what happens in the appellate court that needs to be looked at vis-a-vis the existing rules and what should happen in the trial court cases.

The Chair commented that he and the Reporter had looked at the prospect of addressing Rules such as Rule 4-331 and other

post-trial rules in the circuit court. Those are all rules pertaining to the defendant's seeking relief from a verdict or judgment. This does not involve double jeopardy issues. Rule 8-123.1 would ordinarily involve the victim either asking for a new trial, because the victim was not notified of the proceeding, or asking for the defendant's sentence to be increased in some way. It is a very different animal than what is already provided for in any of the post-trial or post-judgment motions that can be filed in the circuit court. Were any of these issues discussed when the statute was before the legislative committees, including that the revised statute would apply to the District Court, how it is going to work, and where the appeal is going to go?

Mr. Butler replied that he and his colleagues had testified before the House Judiciary Committee. They had thought that this had been resolved when Code, Criminal Procedure Article, §11-103 had been enacted in 1993. The problem was that in 1993, the legislature provided that victims could make applications for leave to appeal, whether the decision was interlocutory or final. Mr. Butler expressed the opinion that the Court of Appeals did not apply the statute correctly. Someone cannot be given the ability to file an appeal or an application for leave to appeal without there being a remedy. This is what the situation has been for 20 years.

Mr. Butler noted that after *Lopez-Sanchez v. State*, 388 Md. 214 (2005), which had been discussed in their memorandum, the legislature changed the law. Enforceable rights had been given.

The Court of Appeals disagreed. With all other constitutional rights of defendants, such as the exclusionary rule, there is no requirement of a statute that mandates a remedy. But for victims, there has not been a remedy. Mr. Butler's organization has been going before the legislature, and whatever the legislature has passed, the Court of Appeals has held that it is not enough. House Bill 250 passed the House of Delegates in 2013, and it also passed in 2012, but died in the Senate. After Mr. Butler and his colleagues made some changes, they got the bill through. Some of the cases including *Hoile v. State*, 404 Md. 591 (2008) were mentioned. In all of the cases, the courts had refused to provide a remedy. Code, Criminal Procedure Article, §11-103 does not state that the court shall provide a remedy; it states that the court may provide a remedy.

The Chair pointed out that the question under double jeopardy is whether the word "may" should be used. Mr. Butler agreed, but he commented that the contours of double jeopardy are going to be determined as cases go through. There may be disputes as to whether double jeopardy applies. Eventually, the Court of Appeals or the U.S. Supreme Court may decide the conflict. *DiFrancesco* is a case on point, but it is an old case from 1980.

Delegate Vallario said that when House Bill 250 had been discussed, he did not recall the issue of the statute's application in the District Court coming up. He did not remember any debate on that issue. They had focused on the circuit court

and the Court of Special Appeals. The Chair pointed out that no amendment had been made to Code, Criminal Procedure Article, §11-104, which addresses notifying victims and getting the request for notification. This statute clearly states that it applies in the circuit court. Mr. Butler responded that a District Court victim will not have a remedy for a violation of Code, Criminal Procedure Article, §11-104, because he or she does not have the right to get notice. This is obvious. However, the statute might apply to restitution, because Code, Criminal Procedure Article §11-603, Restitution Determination, applies both to circuit court and District Court. The rights to have a remedy will apply depending on which provision it is. This only refers to those limited provisions in Code, Criminal Procedure Article, §11-103 (b). There will not be a violation under Code, Criminal Procedure Article, §11-104, because it only applies to the circuit court.

Mr. Stone remarked that he and his colleagues would like for the members of the Rules Committee to send them some of the questions that are bothering them, so that Mr. Stone and his colleagues can get a chance to respond how they think that it might go. This would give the Committee a context to better understand the issues. The Chair stated that this will be necessary. He recalled the first time that he and Mr. Butler had met with Roberta Roper, the victim's relative who had lobbied for victims' rights, when Code, Criminal Procedure Article, §11-103 was first passed. They had identified the problems then that the

victim has certain rights, but how can they be enforced, as a practical matter, when the case is over? This has been the problem since then.

Mr. Butler said that he remembered the Chair asking the Governor to veto the bill when the Chair had been Chief Judge of the Court of Special Appeals. Tim Maloney, Esq., now a member of the Rules Committee, had been one of the co-sponsors of that bill. The Chair responded that he had wanted the postponement until these issues were resolved, so that the legislature was not making promises to victims that could not be fulfilled. Even then, how was the Court of Special Appeals going to address the denial of rights of a victim if the case is over?

Judge Weatherly inquired whether the Public Defender goes up in this appeal process if a defendant in the District Court or the circuit court is represented by a Public Defender? For the restitution award in District Court of \$1000, would this be appealable? The Chair responded that they were just trying to look at this and see how it would all work. If the defendant is convicted in the District Court and takes a de novo appeal to the circuit court, the victim has a right to come into the circuit court for the de novo appeal. This is easy to figure out. Assuming the victim could legally get to the Court of Special Appeals, the victim should not be there on what happened in the District Court while the defendant is in the circuit court on a de novo appeal.

Mr. Butler remarked that he did not think that there was any

need to expedite the proceedings from final orders. An example of a good reason for this is a victim in circuit court who was denied the right to be present, and the defendant was found guilty after a trial. Clearly, the victim cannot force another trial, so that the victim has the right to be present. But if the defendant appeals, and possibly wins, there may be a conditional cross-appeal. Then the Court of Special Appeals or the Court of Appeals can hold that the defendant gets a new trial, but if so, the victims' issues must be addressed.

The Chair pointed out that if there is a new trial, whatever happened before would be moot. Mr. Butler responded that the legal issue that the circuit court may have decided incorrectly could be addressed. When he and his colleagues represent victims, they may not always win on the issues, but the victim is allowed to be heard. The problem as pointed out by Mr. Stone earlier is when the victim is not notified and is not present. How many attorneys who are in a criminal case have been faced with a victim who, while the case is progressing, suddenly tells the judge that the victim has rights? The reality is that *pro se* people are not going to be asserting their rights, because they are not knowledgeable about those rights.

The Chair said that the victim is in court, so the fact that he or she had not been notified is moot. Mr. Butler pointed out that the victim may not have known that he or she could ask for restitution. Mr. Stone observed that two of the Maryland Crime Victims' Resource Center's cases had involved two different

judges, one a District Court judge and the other a circuit court judge. When asked about restitution by the State's Attorney, the judges answered that it was a matter for a separate civil case, and they each said that they would not address it. Mr. Stone commented that he and his colleagues would like for the Court of Special Appeals to recognize that the two judges made a mistake, and the matter of restitution had to be addressed by the trial judge. The purpose of the statute was not to create more work for the courts by separating the criminal case from a civil case on restitution.

The Chair noted that the options for the Committee were to approve any amendments to proposed Rule 8-123.1 or to reject the Rule and let the issues be decided by the courts. The Rule could be deferred, and a group of interested persons could meet to figure out the best way to set up procedures based on Code, Criminal Procedure Article, §11-103. Some of the decisions may depend on the validity of Mr. Butler's assumptions that courts can modify judgments in cases that have already been closed. Mr. Butler may or may not be correct. If he is wrong, the Rules may permit one thing, but not another. If Mr. Butler is correct, this matter has to be addressed. This was the problem the Chair and the Reporter had noted when they first saw Code, Criminal Procedure Article, §11-103. What does the statute do, and what does it mean? It may be that some guidance is needed.

Mr. Butler suggested that Code, Criminal Procedure Article, §11-103 cannot be looked at in a vacuum, but must be looked at

with some of the other related statutes. What it does for trial courts and for appellate courts is that it allows the Judiciary to provide a remedy for victims, as long as it does not violate the defendant's rights to double jeopardy. The contours of this are that while the Rules may help in terms of guidance, ultimately the appellate courts will be the ones that will determine what the parameters are under the U.S. Constitution and the State Constitution.

Mr. Butler observed that there are some issues that everyone would agree to, so he would choose the Chair's third suggestion, which was to get the stakeholders involved and meet with the Appellate, Criminal, and Juvenile Subcommittees. It would be important to look at the pertinent cases in advance and consider how these scenarios would apply under Code, Criminal Procedure Article, §11-103 both at the trial court level and at the appellate level. Mr. Butler said that he had a number of problems with the proposed Rule that would take a great amount of time to explain. He was disappointed that the Chair had not been able to look at the submitted memorandum from Mr. Butler in advance, because if the Chair had considered the suggestions, the proposed Rule would have been substantially different.

The Chair acknowledged what Mr. Butler had said. The Chair remarked that one question was that if there are to be Rules, at least with respect to the appellate aspect of this, is it a preferable approach to amend all of the existing rules that pertain to what victims can and cannot do or to try to put it in

one rule? This does not have to be decided now. Mr. Stone suggested that the place to start could be with the initial draft done by the Maryland Victims' Resource Center, so that people could comment and ask questions about it. The Chair responded that this was a possibility among consideration of other drafts.

Mr. Carbine commented that several years ago, the Committee had had a problem with a statute and had asked the legislature to change it. He expressed the view that no Rule should be drafted until another piece of legislation is drafted that would solve the problems that had been pointed out today. The discussion today had been different from the normal dialogue during Rules Committee meetings. At some point, the Court of Appeals is going to be asked to interpret the statute. A rule is being created, but subject matter jurisdiction cannot be created by rule. The Committee may look foolish in front of the Court of Appeals. Mr. Carbine reiterated that this should not be tinkered with at all, and the legislature should be asked to revise the statute to more clearly define what it intended. The legislature can create subject matter jurisdiction.

Mr. Brault asked if anyone had proposed that the appeal rights might better fit as a review under Rule 2-551, In Banc Review. Mr. Butler answered that this had not been considered. Nothing in the statute provides for a remedy. He did not see any reason why motions could not be filed pursuant to Rule 2-551. This could work. Judge Eaves asked if this would only cover those cases where the person has been sentenced to two years or

more. Mr. Brault remarked that there would have to be some legislation. According to Code, Criminal Procedure Article, §11-103, an in banc review can be done on an interlocutory basis, and under Rule 2-551, it has to be filed within 10 days, and the briefing schedule is quicker than a regular appeal. The appeal is taken to the circuit court. An appeal to the Court of Special Appeals probably takes close to two years, and it may be three years for the Court of Appeals.

Mr. Brault expressed the opinion that the legislature should be asked to provide for an appeal pursuant to Rule 2-551. Mr. Stone remarked that he had thought of this, but he and his colleagues had never tried to take an appeal through Rule 2-551. Mr. Brault noted that the in banc review could take place before the sentence is imposed. Mr. Butler pointed out that the appeal does not have to be only from a final judgment, but it can be from an interlocutory judgment. Mr. Brault observed that Code, Criminal Procedure Article, §11-103 provides in section (b) that a victim can appeal from an interlocutory order. This is not existing law. Maybe the legislature can be asked to include an appeal from an interlocutory order for victims' rights, and in that way, the in banc court could review what was done about the victim, while the circuit court is deciding what to do with sentencing.

Mr. Butler told the Committee that he had filed writs of mandamus under 18 U.S.C. §3771 around the country in four different U.S. Courts of Appeal. The statute has a very onerous

provision that the appellate court has to rule within 72 hours, and briefs and reply briefs have to be done in 72 hours, so that the court can rule. It is a very cumbersome process, but it does work. However, no one likes it. This includes the court, the victims, the prosecutors, and the defense attorneys. Mr. Brault commented that attorneys do not do many in banc reviews. He recalled that it is looked upon as an excessive burden on the circuit courts, and the Committee was to downplay the concept in writing rules, so that this type of appeal would not become popular. Most attorneys have not even heard of in banc reviews. This could alleviate the problem of crowded dockets.

The Chair asked if there was a sentiment from the Committee to defer any rule-making to conform to Code, Criminal Procedure Article, §11-103 at this point and to see how this plays out, either through more legislation or through more court decisions interpreting the current legislation. Whatever procedures come out of all of this ought to be as expeditious and as inexpensive as possible. Many of the victims are going to be *pro se*, and they will never be able to find their way through Title 8 of the Rules, especially since some attorneys have trouble with it. The law is in effect, regardless.

Mr. Carbine suggested that deciding on a rule or changes to current rules to conform to Code, Criminal Procedure Article, §11-103 should be deferred. Judge Weatherly expressed the opinion that the Subcommittees should look at this. The Chair responded that this could be sent to the Subcommittees, but the

question is how the statute is going to be addressed. Mr. Butler had expressed the view that the statute is clear, and it gives clear rights. Some people believe that it is not clear at all and is ambiguous. To craft rules, it is important to understand the intent of the statute.

Mr. Butler agreed with Judge Weatherly about this issue being sent to the Subcommittees. It may be that after the Criminal and Appellate Subcommittees look at what Mr. Butler and his colleagues had suggested, they may agree that no action should be taken. But what Mr. Butler and his colleagues had tried to do in the version of the Rule that they had submitted was to make the procedure work within the contours of the statute. The vetting process would be helpful. Whatever the Committee would like to do, Mr. Butler and his colleagues will work with them to make sure that Code, Criminal Procedure Article, §11-103 is implemented properly.

The Chair thanked Mr. Butler and Mr. Stone for their input. He stated that Rule 8-123.1 would be deferred.

Agenda Item 3. Consideration of proposed amendments to: Rule 8-511 (Amicus Curiae), Rule 8-301 (Method of Securing Review - Court of Appeals), Rule 8-303 (Petition for Writ of Certiorari - Procedure), and Rule 8-503 (Style and Form of Briefs)

The Chair told the Committee that he would give them some background on this topic. For at least 20 years, the Court of Appeals has had an unwritten procedure for selecting bypass cases, taking cases that are pending in the Court of Special

Appeals before any decision by that court. The way that it works is that each week, the Clerk of the Court of Special Appeals sends to the Court of Appeals all appellants' briefs that had been filed during that week. The briefs are given to a bypass committee, which consists of two Court of Appeals judges, and the judges rotate, serving for two months. They read the appellants' briefs and make recommendations to the full Court as to whether to grant certiorari on the Court's own initiative.

The Chair said that the problem with respect to amicus curiae briefs is that under current Rule 8-511 (b), an amicus brief has to be filed at the same time as the brief of the party that the amicus is supporting. But by the time that the Court of Appeals takes the case, the appellant's brief already has been filed. In those cases, it is always too late for the amicus desiring to support the appellant to do so. This is not necessarily true for the appellee, because in many of these cases, the appellee's brief has not yet been filed. This creates an imbalance where it is possible under the current Rule for an amicus to come in on behalf of the appellee, but not the appellant. The Court of Appeals asked the Committee to address this problem.

The Chair said that although he had been unaware of it, what apparently was happening, but not very frequently, was that people are filing motions to file an amicus brief not on the merits of the case, but on the question of whether the Court should even take the case and grant cert. The Chair and the

Reporter had looked at the amicus rules in the federal appellate courts and in every other state. What they found had not been helpful pertaining to the question posed by the Court, because no other jurisdiction seems to have a bypass committee like the Court of Appeals has. They found other procedures common in the rules of the federal courts and the other state courts that are not mentioned in the Maryland Amicus Rules. The Chair had asked the Court of Appeals whether they wanted the Rules Committee to consider some of the other procedures from other states, and they answered affirmatively. The Rules being considered today are the product of this.

The Vice Chair presented Rule 8-511, Amicus Curiae, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 8 - APPELLATE REVIEW IN THE COURT OF

APPEALS AND COURT OF SPECIAL APPEALS

CHAPTER 500 - RECORD EXTRACT, BRIEFS, AND

ARGUMENT

AMEND Rule 8-511, as follows:

Rule 8-511. AMICUS CURIAE

(a) ~~Generally~~ Authorization to File Amicus Curiae Brief

~~A person may participate as an Amicus curiae only with permission of the Court. brief may be filed only:~~

(1) upon written consent of all parties

to the appeal;

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

(3) upon request by the Court; or

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

(b) Motion and Brief

(1) Content of Motion

~~The Court, on motion of an amicus curiae or a party or on its own initiative, may grant permission to the amicus curiae to file a brief. A motion requesting permission for an amicus curiae to file a an amicus curiae brief shall:~~

~~(1) (A) identify the interest of the amicus curiae, movant;~~

~~(2) (B) state the reasons why the amicus curiae brief is desirable;~~

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

~~(3) (D) state the issues that the amicus curiae movant intends to raise,; and~~

~~(4) (E) identify every person or entity, other than the amicus curiae movant, its members, or its ~~counsel~~ attorneys, who made a monetary or other contribution to the preparation or submission of the brief, and identify the nature of the contribution. ~~The style (except for the color of the cover), content, and time for filing of the amicus brief shall be the same as prescribed by these rules for the brief fo the party whose petition as to affirmance or reversal the amicus curiae supports.; and~~~~

~~(F) if filed in the Court of Appeals to seek leave to file an amicus curiae brief supporting or opposing a petition for writ of~~

certiorari or other extraordinary writ, state whether, if the writ is issued, the movant intends to seek consent of the parties or move for permission to file an amicus curiae brief on the issues before the Court.

(2) Attachment of Brief

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

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

(3) Service

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

(4) If Motion Granted

If the motion is granted, the brief shall be regarded as having been filed when the motion was filed. Within ten days after the order granting the motion is filed, the amicus curiae shall file the additional number of briefs required by Rule 8-502 (c).

(c) Time for Filing

(1) Generally

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

(2) Time for Filing in Court of Appeals

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

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

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

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

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

~~(c)~~ (e) Oral Argument; Reply Brief

~~The~~ An amicus curiae ~~shall~~ may not participate in oral argument or file a reply brief without permission of the Court. Permission ~~shall~~ may be granted only for extraordinary reasons.

(f) Appellee's Reply Brief

Within ten days after the filing of an amicus curiae brief that is not substantially in support of the position of the appellee, the appellee may file a reply brief limited to the issues in the amicus curiae brief that are not substantially in support of the appellee's position and are not fairly covered in the appellant's principal brief. Any such reply brief shall not exceed _____ pages in the Court of Special Appeals or _____ pages in the Court of Appeals.

Source: This Rule is derived in part from Fed. R. App. P. 29 and Sup. Ct. R. 37 ~~(b) 6~~ and is in part new.

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

The Court of Appeals has requested that the Rules Committee propose revisions to Rules pertaining to amicus curiae briefs. Of

particular concern are timing issues related to the filing of amicus briefs in "bypass" cases, i.e., cases in which the Court of Appeals, having reviewed an appellant's brief that was filed in the Court of Special Appeals, issues a writ of certiorari on its own initiative. The current Rules could be interpreted as precluding the filing of an amicus brief in support of the appellant if the amicus brief had not already been filed in the Court of Special Appeals.

Proposed new section (c) of Rule 8-511 addresses this problem by tying the time for filing all amicus briefs on the issues before the Court to the time for filing the principal brief of the appellee and by the addition of the phrase, "unless the Court orders otherwise."

Additional amendments to Rule 8-511 substantially rewrite the Rule.

In section (a) the four bases for authority to file an amicus brief are listed, one of which is upon the Court's grant of a motion filed under section (b) of the Rule.

Subsection (b)(1) specifies the content of a motion requesting permission to file an amicus brief. A new provision requires the movant to state whether the movant requested permission of the parties to file the amicus brief and if not, why not. Another new provision recognizes that occasionally a person may wish to file an amicus brief on the issue of whether the Court of Appeals should grant certiorari. Subsection (b)(1)(F) requires a person who moves for permission to file such a brief to state in the motion whether the movant also seeks to file an amicus brief on the issues before the Court if the writ is granted.

Subsection (b)(2) requires that the movant attach a copy of the proposed brief to two of the copies of the motion requesting permission to file the brief. Subsection (b)(3) requires service of the motion and proposed brief on all parties. If the motion is granted, subsection (b)(4) requires the

amicus to file the additional number of copies required by Rule 8-502 (c). Subsection (b)(4) also contains a "relation back" provision - that the brief is regarded as having been filed on the date the motion was filed.

Section (c) contains provisions pertaining to the time for filing an amicus brief, as well as an express authorization of the practice of filing an amicus brief on the issue of whether the Court of Appeals should issue a writ of certiorari or other extraordinary writ.

Section (d) requires compliance with Rules 8-503 and 8-504.

Section (e) carries forward the provision of current Rule 8-511 (c), prohibiting oral argument by an amicus unless permission is granted by the Court for extraordinary reasons. Added to the section is a comparable prohibition against the filing of a reply brief by the amicus unless the Court grants permission for extraordinary reasons.

Section (f) is new. Because the time for filing an amicus brief is keyed to the time for filing the appellee's principal brief, it is possible that new issues are raised in the amicus brief that the appellee has not had the opportunity to brief. For the limited purpose of addressing those new issues that are not substantially in support of the appellee's position and are not fairly covered in the appellant's principal brief, the appellee is permitted to file a reply brief within ten days after the amicus brief is filed.

Amendments to other Rules pertaining to certiorari and to amicus briefs also are proposed.

Amendments to Rule 8-301 expressly state the Court's authority to issue a writ of certiorari on its own initiative.

An amendments to Rule 8-303 adds to the

requirements of a petition for a writ of certiorari a particularized statement of why review of the issues presented is desirable and in the public interest.

Amendments to Rule 8-503 (c) divide the section into four subsections, use the federal terminology "principal brief" to describe the brief of a party that is not a reply brief or a brief on the issue of whether a writ of certiorari or other extraordinary writ should be issued, and set a page limit of 15 pages for an amicus brief filed in the Court of Special Appeals and 25 pages for an amicus brief filed in the Court of Appeals.

The Vice Chair explained that Rule 8-511 specifies the situations when an amicus brief may be filed and by whom. A new feature of the Rule is that the brief can be filed upon the written consent of all parties. If both parties agree, the court does not have to take any action. Also, the Attorney General would now be able to file an amicus brief without asking permission. This is similar to the situation in the U.S. Supreme Court. The U.S. Attorney General and the Solicitor General can file an amicus without having to be invited. Also, the Court would be able to ask a party or a person to file an amicus. The Court can grant a motion to allow someone to file. This is the way it works now. Section (b) addresses the content of the motion, which identifies the interest of the person who wants to file. The Rule requires that the person filing the amicus has to specify that someone else has contributed to the preparation of the brief. An attorney can file his or her brief at the same time as the motion to file an amicus. Two copies have to be

filed, and when the Court grants the motion, as is almost always the case, the attorney can file the rest of his or her briefs.

The Vice Chair pointed out that the major change to Rule 8-511 is the time of filing the amicus brief. It would be filed at or before the time that the appellee's brief is due. It does not matter which side the amicus is supporting. This gives people more time to file the amicus brief. The Rule also provides a procedure for seeking leave to file an amicus brief in support of or in opposition to a petition for a writ of certiorari. To address the fairness issue, the amicus brief is being filed the same time the appellee files his or her brief. Does the appellee get a chance to respond? Section (f) of Rule 8-511 addresses this by giving that party a chance to file a reply brief within 10 days after the filing of an amicus brief.

The Chair observed that the section of Rule 8-511 that provides for filing the amicus brief when the appellee's brief is new. U.S. Supreme Court Rule 37, the federal appellate rules, and the rules in other states permit an amicus brief to be filed seven days after the brief of the party that the amicus brief is supporting. The theory is that it gives the person a week to look at the party's brief, so that the person can determine what he or she wants to include in the amicus brief. Rule 8-511 takes the approach that all of the amicus briefs should come in at the same time, and then give the appellee the opportunity to respond.

Mr. Michael remarked about the amount of paper this procedure involves. The Chair responded that in the U.S. Supreme

Court, amicus briefs are filed in about 80% of the cases, and they often get multiple briefs. In one abortion case, several years ago, about 67 amicus briefs on behalf of 400 different organizations had been filed. The Court of Appeals is getting them more frequently as well.

The U.S. Supreme Court expressly allows amicus briefs on the issue of whether to grant certiorari. State supreme courts that are cert courts may get amicus briefs on that issue, but not intermediate appellate courts, because there is no cert procedure. Two states, Virginia (Sup. Ct. Rules, Rule 5:30) and Arizona (Arizona Rule of Civil Procedure, Rule 16), have a rule expressly allowing such briefs. Briefs come in to the Court of Appeals on the question of whether to grant cert or whether to grant the other extraordinary writs referenced in subsection (b) (1) (F).

Mr. Sullivan said that the Office of the Attorney General gets calls from people asking about filing an amicus brief when a cert petition had just been filed. He did not know if this was appreciated by the Court of Appeals. The revision to Rule 8-511 will make clear that the Court welcomes the filing of these briefs.

Ms. Ogletree inquired whether the reply brief to the amicus brief would be a different color from a regular reply brief. Mr. Sullivan commented that Rule 8-503, Style and Form of Briefs, may have to be changed. The Chair noted that Rule 8-503 provides that the amicus briefs are gray. Ms. Ogletree observed that

reply briefs are light red. Mr. Carbine pointed out that what is being discussed would be an appellee's reply brief which currently does not exist. He remarked that the Committee needs to take two actions concerning the reply brief. One is to fill in the blanks in section (f) to state how long the reply brief should be. The other is to assign a color to the reply brief.

Ms. Ogletree said that in the Court of Special Appeals, reply briefs are red. Mr. Carbine added that the appellant's reply briefs are tan, but there is no color for the appellee's reply brief. The Chair asked why the two could not be the same color. Mr. Carbine noted that the amicus brief is gray. The Vice Chair commented that in the Court of Special Appeals, there are often multiple appellees, so that there are three green briefs. Mr. Brault said that an amicus brief is usually answered by another amicus brief. The Chair stated that U.S. Supreme Court Rule 37 and the Fed. Rule App. Proc. 29 take account of an amicus brief that is not supporting any of the parties.

The Vice Chair remarked that as well as determining the color of the brief, the page numbers should be determined. Mr. Carbine expressed his agreement with whatever color is decided upon. The Vice Chair noted that the final rule for consideration was Rule 8-503, which has a provision for page limits of briefs, and this could be followed for the page limits in Rule 8-511.

The Vice Chair told the Committee that subsection (d)(4) of Rule 8-503 specifies a page limit for the amicus briefs. It is 15 pages in the Court of Special Appeals and 25 pages in the

Court of Appeals. Mr. Carbine remarked that he was looking at section (f) of Rule 8-511, which addresses the appellee's reply to the amicus brief. The Reporter explained that this is such an unusual document that the part of the Rule pertaining to it is contained in all of section (f). When she had put section (f) at the end of Rule 8-511, she had realized that there had been no mention of page limits elsewhere in Rule 8-503. The Style Subcommittee could decide where to put this provision, but as Mr. Carbine had pointed out, a decision as to the number of pages is needed. The appellee's reply brief is only under this limited circumstance according to Rule 8-511.

Mr. Michael asked why there is a difference in page numbers between the two appellate courts. The Vice Chair answered that the judges in the Court of Special Appeals have to read a tremendous amount of material, so that they have to minimize the number of pages. The Chair commented that this is true with the principal briefs as well. Section (d) of Rule 8-503 provides that an appellate brief shall not exceed 35 pages in the Court of Special Appeals and 50 pages in the Court of Appeals. Mr. Carbine remarked that he had been involved in cases where the Court of Appeals grants cert on a bypass, and his brief for the Court of Special Appeals had only 35 pages where the appellee was entitled to 50 pages. The Reporter said that she had thought about this issue, and she inquired if the appellant could ask to have more pages in his or her brief. Mr. Brault replied that in that situation, the brief has already been written.

The Vice Chair suggested that the blanks in section (f) of Rule 8-511 should be 15 pages in the Court of Special Appeals and 25 pages in the Court of Appeals. They should not be longer than the amicus brief length. Mr. Sullivan suggested that the wording could be that the briefs "shall in no case exceed the length of the reply brief." The Chair commented that if the Court of Appeals approves of this Rule, it will decide what the length of the reply briefs should be. The Vice Chair asked whether Rule 8-511 could be sent to the Court with the blanks left in section (f). The Reporter suggested that some number be included. Should it be 15 and 25, or just 15 for both? The Vice Chair responded that it should be 15 for both. By consensus, the Committee agreed with the Vice Chair's suggestion.

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

The Vice Chair presented Rule 8-301, Method of Securing Review - Court of Appeals, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 8 - APPELLATE REVIEW IN THE COURT OF APPEALS AND COURT OF SPECIAL APPEALS CHAPTER 300 - OBTAINING APPELLATE REVIEW IN COURT OF APPEALS

AMEND Rule 8-301, as follows:

Rule 8-301. METHOD OF SECURING REVIEW -
COURT OF APPEALS

(a) Generally

Appellate review by the Court of Appeals may be obtained only:

(1) by direct appeal or application for leave to appeal, where allowed by law;

(2) pursuant to the Maryland Uniform Certification of Questions of Law Act; ~~or~~

(3) by writ of certiorari ~~in all other cases~~ upon petition filed pursuant to Rules 8-302 and 8-303; or

(4) by writ of certiorari issued on the Court's own initiative.

Cross reference: For Code provisions governing direct appeals to the Court of Appeals, see Code, Criminal Law Article, §2-401 concerning automatic review in death penalty cases; Code, Election Law Article, §12-203 concerning appeals from circuit court decisions regarding contested elections; and Code, Financial Institutions Article, §9-712 (d)(2) concerning appeals from circuit court decisions approving transfer of assets of savings and loan associations. For the Maryland Uniform Certification of Questions of Law Act, see Code, Courts Article, §§12-601 through 12-613. For the authority of the Court to issue a writ of certiorari on its own initiative, see Code, Courts Article, §12-201.

. . .

Rule 8-301 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 8-511.

The Vice Chair noted that the change to Rule 8-301 was technical. It pertained to the method of getting review in the Court of Appeals. The change clarified that it is not only cert petitions filed by parties that trigger the jurisdiction of the

Court of Appeals, but also a writ of certiorari issued on the Court's own initiative. This is already the law in Code, Courts Article, §12-201. The Subcommittee felt that it should be added to the Rule.

By consensus, the Committee approved Rule 8-301 as presented.

The Vice Chair presented Rule 8-303, Petition for Writ of Certiorari - Procedure, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 8 - APPELLATE REVIEW IN THE COURT OF
APPEALS AND COURT OF SPECIAL APPEALS
CHAPTER 300 - OBTAINING APPELLATE REVIEW IN
COURT OF APPEALS

AMEND Rule 8-303 (b) (1), as follows:

Rule 8-303. PETITION FOR WRIT OF CERTIORARI
- PROCEDURE

. . .

(b) Petition

(1) Contents

The petition shall present accurately, briefly, and clearly whatever is essential to a ready and adequate understanding of the points requiring consideration. Except with the permission of the Court of Appeals, a petition shall not exceed ~~25~~ 15 pages. It shall contain the following information:

(A) A reference to the action in the lower court by name and docket number;

(B) A statement whether the case has been decided by the Court of Special Appeals;

(C) If the case is then pending in the Court of Special Appeals, a statement whether briefs have been filed in that Court or the date briefs are due, if known;

(D) A statement whether the judgment of the circuit court has adjudicated all claims in the action in their entirety, and the rights and liabilities of all parties to the action;

(E) The date of the judgment sought to be reviewed and the date of any mandate of the Court of Special Appeals;

(F) The questions presented for review;

(G) A particularized statement of why review of those issues by the Court of Appeals is desirable and in the public interest.

~~(G)~~ (H) A reference to pertinent constitutional provisions, statutes, ordinances, or regulations;

~~(H)~~ (I) A concise statement of the facts material to the consideration of the questions presented; and

~~(I)~~ (J) A concise argument in support of the petition.

. . .

Rule 8-303 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 8-511.

The Vice Chair said that Rule 8-303 addresses the procedure for certiorari. It limits a cert petition to 15 pages, which is a good idea. It also adds to the content of the cert petition a particularized statement of why review of the issues by the Court

of Appeals is desirable and in the public interest. The Chair noted that this suggestion came from the Court of Appeals. The Vice Chair added that this language is also in Code, Courts Article, §§12-203 and 12-305. This should appear now in every cert petition. Whether the language "particularized statement" is helpful remains to be seen.

By consensus, the Committee approved Rule 8-303 as presented.

The Vice Chair presented Rule 8-503, Style and Form of Briefs, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 8 - APPELLATE REVIEW IN THE COURT OF

APPEALS AND COURT OF SPECIAL APPEALS

CHAPTER 500 - RECORD EXTRACT, BRIEFS, AND

ARGUMENT

AMEND Rule 8-503, as follows:

Rule 8-503. STYLE AND FORM OF BRIEFS

. . .

(d) Length

(1) Principal Briefs of Parties

Except as otherwise provided in section (e) of this Rule or with permission of the Court, ~~a~~ the principal brief of ~~the~~ an appellant ~~and or~~ appellee shall not exceed 35 pages in the Court of Special Appeals or 50 pages in the Court of Appeals. This limitation does not apply to ~~(1)~~ (A) the table of contents and citations required by

Rule 8-504 (a) (1); ~~(2)~~ (B) the citation and text required by Rule 8-504 (a) (7); ~~and or~~ (C) a motion to dismiss and argument supporting or opposing the motion.

(2) Motion to Dismiss

Except with permission of the Court, any portion of a party's brief pertaining to a motion to dismiss shall not exceed an additional ten pages in the Court of Special Appeals or 25 pages in the Court of Appeals.

(3) Reply Brief

Any reply brief filed by the appellant shall not exceed 15 pages in the Court of Special Appeals or 25 pages in the Court of Appeals.

(4) Amicus Curiae Brief

Except with the permission of the Court, an amicus curiae brief shall not exceed 15 pages in the Court of Special Appeals or 25 pages in the Court of Appeals.

. . .

Rule 8-503 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 8-511.

The Vice Chair explained that section (d) of Rule 8-503 had been divided up to include principal briefs of parties, a motion to dismiss, a reply brief, and an amicus curiae brief. The size of the amicus brief had been limited to 15 pages in the Court of Special Appeals and 25 pages in the Court of Appeals. He inquired if the amount of 25 pages is appropriate for Court of Appeals briefs. The Chair replied that the Court of Appeals briefs do exceed 15 pages. The Vice Chair remarked that if the

case is important, 25 pages would be appropriate. The Reporter asked whether the Committee agreed with the 15- and 25- page limits. By consensus, the Committee agreed.

By consensus, the Committee approved Rule 8-503 as presented.

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