COURT OF APPEALS STANDING COMMITTEE

ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Rooms UL 4 and 5 of the Judicial Education and Conference Center, 2011 Commerce Park Drive, Annapolis, Maryland on June 21, 2018.

Members present:

Hon. Alan M. Wilner, Chair

Hon. Yvette M. Bryant
James E. Carbine, Esq.
Sen. Robert G. Cassilly
Hon. John P. Davey
Mary Anne Day, Esq.
Hon. Angela M. Eaves
Alvin I. Frederick, Esq.
Ms. Pamela Q. Harris
Victor H. Laws, III, Esq.
Bruce L. Marcus, Esq.
Donna Ellen McBride, Esq.
Hon. Danielle M. Mosley
Hon. Douglas R. M. Nazarian
Hon. Paula A. Price
Scott D. Shellenberger, Esq.
Dennis Weaver, Clerk
Hon. Dorothy J. Wilson
Thurman W. Zollicoffer, Esq.

In attendance:

Nisa C. Subasinghe, Esq., Juvenile and Family Services, Administrative Office of the Courts
Hon. John Morrissey, Chief Judge, District Court of Maryland
Hon. Richard Sandy, Circuit Court for Frederick County
Sidonie Becton, Esq., Law Clerk for Hon. Yvette M. Bryant, Circuit Court for Baltimore City
Nancy Faulkner, Director of Court Operations, Anne Arundel County Circuit Court
Erin McCarthy, Esq., Anne Arundel County Circuit Court
Pauline Mandell, Esq., Maryland Crime Victims' Resource Center, Inc.
Thomas B. Stahl, Esq., Spencer & Stahl, P.C.
Brian L. Zavin, Esq., Office of the Public Defender
Michele E. Gilman, Esq., University of Baltimore School of Law
Hon. Philip T. Caroom, Senior Judge, Circuit Court for Anne Arundel County
Hon. Pamela J. White, Circuit Court for Baltimore City
Pamela C. Ortiz, Esq., Director, Access to Justice Department

Ksenia Boitsova, Court Interpreter Program Administrator
Karen Krask, Esq., Examiner, Frederick County Circuit Court
Sandra F. Haines, Reporter
Susan L. Macek, Assistant Reporter
Sherie B. Libber, Assistant Reporter

The Chair convened the meeting. He announced that the Court of Appeals had reappointed Mr. Armstrong, Ms. Day, Mr. Frederick, Ms. McBride, Judge Price, and Mr. Wells for an additional five years. The Chair introduced the newest member of the Committee, Ms. Dawne Lindsey, who is the Clerk of the Circuit Court for Alleghany County. She is the replacement for Mr. Weaver who is retiring as the Clerk of the Circuit Court for Washington County. The Chair said that Mr. Weaver will be missed.

The Chair introduced Ms. Christene Ploss, who is the new Executive Aide for the Rules Committee, replacing Cathy Cox. The Chair told the Committee that this was the first full Committee meeting for Senator Cassilly, who is on the Senate Judicial Proceedings Committee. He was nominated by the President of the Senate and appointed by the Court of Appeals to replace the late Senator Wayne Norman, who had been the representative of the Maryland Senate on the Committee. Senator Cassilly said that he did not replace Senator Norman; he replaced a vacancy from the Senate. The Chair added that the legislative members have been very important to the Committee.

The Chair announced with deep regret the retirement of Sherie Libber as one of the Assistant Reporters. She has been on the Rules Committee staff for 34 years and she will be sorely missed. The Reporter presented Ms. Libber with a certificate of retirement honoring her work with the Committee. The certificate was signed by the Honorable Mary Ellen Barbera, Chief Judge of the Court of Appeals, and by Ms. Pamela Harris, the State Court Administrator. Ms. Libber said that it had been her pleasure and honor to work with the Committee.

The Chair said that he wanted to announce three upcoming projects. One is amending the Bar Admission Rules to accommodate the Uniform Bar Examination ("UBE"), which will become the Maryland Bar examination commencing with the July 2019 Bar examination. There also will be a Maryland component to the UBE that will be an online set of questions and the Multistate Professional Responsibility Examination ("MPRE"), which will be required. There will be three components to the Bar Examination. The Maryland component will not be part of the bar exam itself, but it is going to be an additional requirement for admission. The same will be true for the MPRE. This will hopefully be ready for the Rules Committee to review in September, so that it can be in place for the July 2019 admissions. Once reviewed by the Committee, the revised Rules will be sent to the Court of Appeals, which will hold a hearing

on them. We are estimating that the Rules will take effect on March 1, 2019.

The Chair noted that the second project is implementing the Attorney Information System ("AIS"). An internal draft of the necessary changes already has been done. That, along with the UBE Rules, will be presented to the Attorneys and Judges Subcommittee at the beginning of August. Several new Rules will be involved in implementing the AIS system, and there will also be amendments to the Client Protection Fund Rules, to the Interest on Lawyer Trust Account Reporting Rules, and to the Pro Bono Reporting Rules.

The Chair told the Committee that other projects may arise.

Mr. Marcus commented that the Committee is an extremely accomplished group of people. This past week, Steven Sullivan, a member of the Committee, appeared before U.S. Supreme Court as counsel for the State. Mr. Marcus wanted to note this accomplishment, and he said that he was very proud to work with Mr. Sullivan.

Agenda Item 1. Consideration of proposed amendments to Rule 4-347 (Proceedings for Revocation of Probation)

Mr. Marcus presented Rule 4-347, Proceedings for Revocation of Probation, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 – TRIAL AND SENTENCING

AMEND Rule 4-347 by revising section (c) to clarify the circumstances under which a defendant arrested on a violation of probation warrant is presented to a judicial officer of the District Court, a judge of the Circuit Court, or the judge who issued the warrant and to provide a time limit for conducting pretrial release hearings; and adding a Committee Note regarding technical violations, as follows:

Rule 4-347. PROCEEDINGS FOR REVOCATION OF PROBATION

(a) How initiated

Proceedings for revocation of probation shall be initiated by an order directing the issuance of a summons or warrant. The order may be issued by the court on its own initiative or on a verified petition of the State's Attorney or the Division of Parole and Probation. The petition, or order if issued on the court's initiative, shall state each condition of probation that the defendant is charged with having violated, and the nature of the violation.

...

(c) Release pending revocation hearing

(1) Unless the judge who issues the warrant (A) sets conditions of release, ~~or~~ (B) expressly denies ~~bail~~ pretrial release, or (C) directs that the defendant be presented only to that judge, a defendant arrested upon a warrant shall be taken before a judicial officer of the District Court or before a judge of the circuit court without unnecessary delay ~~or, if the warrant so specifies, before a judge of the District Court or circuit court~~ for the purpose of

determining the defendant's eligibility for release.

(2) If the judge who issues the warrant expressly denies pretrial release, sets conditions of release that the defendant is unable to meet, or directs that the defendant be presented before that judge, the defendant shall be taken before that judge, or, in the absence of that judge, before another judge of the court designated by the administrative judge, within five business days following the defendant's arrest for consideration or reconsideration of the defendant's eligibility for release.

Committee Note: Particularly where the only alleged violations are technical ones under Code, Criminal Procedure Article, §§ 6-223 and 6-224, care must be taken that a defendant is not detained unnecessarily while awaiting a revocation hearing. Although the 15, 30, and 45-day penalties provided for in those sections are not binding on the court, they are presumptively appropriate and should not be circumvented by having the defendant remain in pre-hearing detention for a longer period.

Rule 4-347 was accompanied by the following Reporter's note.

The proposed amendments to Rule 4-347 address concerns brought to the Committee's attention regarding the length of pre-hearing detention faced by some defendants arrested on a violation of probation warrant. The problem seems particularly acute when (1) the only alleged violation is a "technical violation" under the Justice Reinvestment Act, or (2) the judge who issued or ordered the issuance of the warrant denies pre-hearing release in the warrant or directs that the defendant, upon

arrest, be presented only to that judge, and does not schedule a prompt VOP hearing.

Section (c) is amended to provide that, (1)if the issuing judge, in the warrant, denies pretrial release, sets conditions of pre-hearing release that the defendant is unable to meet, or directs that the defendant be presented only to that judge, the defendant must be presented to that judge, or, in the absence of that judge, another judge designated by the administrative judge, within five business days following the defendant's arrest for consideration or reconsideration of eligibility for pre-hearing release.

A Committee Note is added explaining the reason for expedition when the only alleged violations are "technical" ones under JRA. The reason for requiring a release hearing before the judge who already denied pretrial release or set conditions that the defendant is unable to meet, after considering only the petition, is to give the defendant an opportunity to provide information or argument that may convince the judge to reconsider that decision. That opportunity is routinely provided to arrested defendants presented to a judicial officer as a matter of due process.

Mr. Marcus told the Committee that the changes to Rule 4-347 pertained to violations of probation ("VOPs") in light of provisions in the Justice Reinvestment Act. Two statutes relate to this, Code, Criminal Procedure Article, §§6-223 and 6-224. Code, Correctional Services Article, §6-101 contains relevant definitions. The legislature has carved out certain minor violations, which it has defined as "technical violations," for

special treatment. They are defined in section (m) of §6-101 of the Correctional Services Article. Technical violations do not involve an arrest or a summons issued by a commissioner on a statement of charges filed by a law enforcement officer, a violation of a criminal prohibition other than a minor traffic offense, a violation of a no-contact or stay-away order, or absconding.

Mr. Marcus noted that a presumptive punishment schedule is engrafted into the statute. For a first technical violation, the presumptive sanction is a period of incarceration of not more than 15 days. For a second one, the period of incarceration is no more than 30 days, and for a third one, it is a period of no more than 45 days. The count is not bound by those limits, but if the court does not follow them, it must state a good reason for not doing so. With a 15-day period of time, there may be probationers who are apprehended on warrants who could well serve the 15 days before they are afforded the opportunity to have a full-blown VOP hearing.

Mr. Marcus said that the concern is how to reconcile the changes in the statute related to probation violations with the potential of probationers being incarcerated for a period of time without having a meaningful hearing on pretrial release. The proposed amendment provides for a time limit for those individuals who are on probation where the judge who issues the

warrant has set certain conditions in the event that the probationer is picked up. These might be returnable to the circuit court with no bail, a bench warrant returnable to that judge only, and other circumstances that would potentially have that probationer sitting in jail awaiting that hearing. The Subcommittee tried to strike a balance, recognizing that trial judges do have ideas when they put someone on probation and, at the time of sentencing, may have made some promises or possibly threats about what would happen if the probationer failed to adhere to the terms and conditions of probation.

Mr. Marcus noted that the proposal before the Committee to amend Rule 4-347 is to provide that there be a period of time before that probationer is brought before a judge for considerations on pretrial or prehearing release. After considerable discussion, the Subcommittee recommended that the time frame for these hearings would be five business days. At that point in time, the probationer will have an opportunity to be seen and heard on the issue of pretrial release pending a full hearing.

Mr. Marcus said that a letter was sent in this morning from the Honorable Philip Caroom, a retired judge from the Circuit Court of Anne Arundel County who was present at the meeting. Judge Caroom thanked the Subcommittee for its efforts in drafting the amendments to Rule 4-347. One of the points in the

letter is that this is a genuine problem that he has personally seen. There was one case where someone was held for 37 days on a first technical violation without having had a pre-hearing release review, and the person should not have served more than 15 days. A preliminary study by the staff of the Honorable John Morrissey, Chief Judge of the District Court, revealed that this is happening throughout the State. Many people are waiting for a bail review for more than the presumptive maximum times the law provides for.

Judge Caroom told the Committee that the second point in his letter was the choice of the five-day time period for pretrial detention for technical violations of probation without the possibility of pretrial release. Nationally recognized studies indicate that especially for a low-risk probationer, sitting in pretrial detention for more than three days will have a substantial negative impact on those probationers. Some of the protective factors that make them less likely to commit crimes again may be lost. They may also lose their jobs and have other problems. The more time they sit in pretrial detention, the likelier they are to fail to appear later in the proceeding. The Subcommittee had considered whether the requirements in Rule 4-347 should be to have a bail review hearing within three or five days. The Maryland Alliance for Justice Reform is urging that the three-day period be chosen,

because that is what the research supports. This would make it consistent with section (c) of Rule 1-361, Execution of Warrants and Body Attachments.

Judge Caroom remarked that normally, someone who is arrested on a charging document will have a bail hearing when the court is next in session, which would be up to three days later. Someone arrested on a technical violation should have the same right and same opportunity for a prompt bail review that a person with a new charge would have. Rule 1-361 (c), which is in a footnote in the letter that was sent, is essentially the same rule as the amendments to Rule 4-347, which provide that if the judge who issued the warrant is not available, then the Administrative Judge can designate another judge to hear the case. Judge Caroom and his colleagues are asking for a three-day period for the case to be heard rather than a five-day period. It would provide the same standards for a prompt bail review. The three-day period is a policy that has been adopted by the more progressive states that have considered this issue and the research behind it.

Mr. Zollicoffer referred to the language in Rule 1-361 (c) that reads: "without unnecessary delay", and he asked what the meaning of this was. If a person is arrested on a Friday, and the following Monday is a holiday, this means five days would have passed before the person is brought before a judge. Judge

Caroom reiterated that paralleling the language of Rule 1-361 (c) would be appropriate. The Subcommittee had heard from the Honorable W. Michel Pierson, the Administrative Judge of the Circuit Court for Baltimore City, that it is very difficult to find out who is in pretrial detention much less to get the people before a judge, so this is why the Subcommittee was leaning in the direction of a longer waiting period.

The Chair said that before this issue had been presented to the Subcommittee, it had been presented to the Conference of Circuit Judges, based on Judge Caroom's letter. The Conference had approved the approach being taken, but left the time period three or five days, with a preference for three, but five also being a possibility. Because of the statistics in some of the counties and Baltimore City, the Subcommittee chose five days. Judge Pierson had told the Subcommittee that he was opposed to this concept, because he said that he could not do it. The Subcommittee felt that the time period should be five days. The Rules Committee is free to choose any number. Judge Caroom remarked that as a policy matter, this may not be the best choice.

Mr. Shellenberger commented that at the Subcommittee meeting, there had been a very robust discussion of this. Even if the Rule provides for five days, it does not mean that a judge could not require the defendant to be brought in before

him or her in one day. Five days is the ceiling. If a judge issues a bench warrant but does not put instructions in it, then the defendant usually goes before a judicial officer on the day he or she is arrested. The five-day time period is triggered only when the judge who issues the warrant expressly denies pretrial release and sets conditions or requires the defendant to go before that judge.

Mr. Shellenberger noted that in a number of jurisdictions, when there has been a VOP, the judge will require the defendant to be brought in as soon as possible. The Rule states that the time period for the defendant to be brought before the judicial officer cannot be any longer than five days, because people should not be sitting in jail beyond the 15 days. Baltimore City argued strongly that five days was too little. In Baltimore County, the Honorable Kathleen Cox, Administrative Judge, expressed the view that it should be five days because of the logistics of getting people in. Currently, there is no time period. Mr. Shellenberger expressed the opinion that five days was a good choice. He also noted that there is no sanction for violating this.

Judge Mosley asked what would happen if the time period is not met. Mr. Shellenberger replied that a habeas corpus petition could be filed. A judge may release the defendant because the Rule has been violated. Senator Cassilly pointed

out that this is not pretrial detention. It is a VOP. This means that the person has already been tried. It is not someone who is detained who may be totally innocent of any criminal charge. The defendant is someone who is in the criminal justice system. The studies did not focus on three vs. five days. The studies focused on 30 days vs. 90 days, or ten days vs. six months. Going from five to three days is not a big difference.

The Chair said that in response to Mr. Shellenberger's comment that there is no sanction, the only sanction for not complying with the 24-hour time period for the initial arrest is the fact that if that is violated, statements made afterwards would be held inadmissible. There is no administrative sanction. If a person is not presented to a District Court commissioner within 24 hours, inculpatory statements made by the defendant after that cannot be used as evidence. The Reporter added that section (a) of Rule 1-201, Rules of Construction, provides that if no consequences are prescribed by rule, the court may compel compliance with a rule or may determine the consequences of the noncompliance in light of the totality of the circumstances and the purpose of the rule. There is always this underlying possibility.

Judge Caroom told the Committee that he wanted to respond to some of the points that had been made. If a judge has ordered that the defendant is to be brought before him or her,

the actual practice in most jurisdictions is that there is a box for the judge to check, and then the judge signs his or her name. Judge Caroom said that if it is possible to get the defendant before the judge in three days or less, then there is no need to wait five days. The way the Rule is written, the Administrative Judge only has the power to send this to another judge after the requisite amount of time has passed. If a judge who checked the box and signed his or name on numerous VOPs, then goes on vacation, all of the VOP's will have to wait five days, or the Administrative Judge is going to violate the Rule. Assuming the Rule is going to be followed, it is a way to assure that those who are alleged to have violated their probation do not have to sit in jail for a long period of time.

Judge Morrissey commented that he did not mean to counter what Judge Caroom had said, but having done thousands of bail reviews, Judge Morrissey noted that it was his practice not to check the box requiring that defendants be brought back to him. In Prince George's County, it was common practice that defendants were brought before an available judge on the day of their arrest. This is not consistent throughout the State. The Rule will bring some consistency. The District Court will comply with the Rule whenever possible. Judge Morrissey said that he had already requested that the District Court Administrative Judges make sure that the Rule will be complied

with. Judge Morrissey added that he had communicated with Judge Cox and with the Conference of Circuit Judges to make sure that the circuit courts know about this Rule. The practice even without the Rule is good. Judge Caroom remarked that the concern is not Judge Morrissey.

Mr. Zavin told the Committee that he is an Assistant Public Defender. He expressed his preference for the three-day option. He pointed out that the five-day option is five business days. If someone is arrested on a Wednesday, and the next weekend is a holiday weekend, the five-day period may not be able to be complied with, and someone could be held for a week. Mr. Zavin suggested that for a technical VOP, the time period should be three days, because for clients of the Office of the Public Defender ("OPD"), two extra days in jail makes a difference. He reiterated that the studies have shown that every day someone spends behind bars takes away from the person's connection to his or her family. The likelihood that the person's employer is going to hold the job for him or her diminishes.

Mr. Zavin said that in the past three days, he had spoken with Assistant Public Defenders throughout the State, except for Western Maryland. He was told that in almost all jurisdictions, except for one, it is fairly routine that defendants in jail on VOPs are held longer than the presumptive amount of time allowed. Prince George's County is working to have technical

VOPs resolved in two days. In another jurisdiction, in a recent case, one of the clients of the OPD had used some foul language in the presence of his probation officer. He then was held in jail for longer than the amount of time for a technical violation. The charges ultimately were dropped, but during the time he was held, he was beaten up, suffered a permanent injury, and lost his job. Five days is much too long to be held on a technical violation.

The Chair noted that the Subcommittee's recommendation is five days, so it would take a motion to alter it or to change any other part of the Rule. No motion was forthcoming, so the Chair said that the Subcommittee's recommendation was approved. He added that in all of the discussions that he had been privy to and in his communications with Judge Cox, no one had said that five days is better than three days. The issue has been what will actually work. What is practicable? He had heard that in some areas, it is not only practicable, but it is being done. Sometimes it is done the next day, sometimes within two or three days. In other parts of the State, jurisdictions reported that this is just not practicable.

Senator Cassilly commented that at the Subcommittee meeting, Judge Pierson had shown a spreadsheet of VOPs for that one day. That information was communicated to various judges, and the whole picture was very powerful. The Chair agreed.

Judge Pierson had said that some of the defendants are held for a week after they are arrested, and that the Baltimore City Jail may not be able to be comply. The Chair inquired whether Judge Pierson should be asked whether, administratively, a better arrangement could be worked out for the Baltimore City Detention Center.

The amendments to Rule 4-347 were approved as presented.

Agenda Item 2. Consideration of proposed amendments to Rule 1-202 (Definitions) and Rule 4-102 (Definitions)

Mr. Marcus presented Rule 1-202 (Definitions) and Rule 4-102 (Definitions) for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 – GENERAL PROVISIONS

CHAPTER 200 – CONSTRUCTION, INTERPRETATION, AND DEFINITIONS

AMEND Rule 1-202 by adding a definition of "Warrant" and by including in the definition subsections that differentiate "arrest warrants," "bench warrants," and "search warrants" from one another, and by adding a Committee note and cross reference following section (dd), as follows:

. . .

(dd) Warrant; Arrest Warrant; Bench Warrant; Search Warrant

(1) "Warrant" means an arrest warrant, a bench warrant, or a search warrant.

(2) "Arrest warrant" means a written order that (A) in the District Court is signed by a judicial officer; (B) in a circuit court is signed by (i) a judge or (ii) the clerk of the court upon an order by a judge that is in writing or otherwise of record, is docketed, and expressly directs the clerk to issue the warrant; and (C) commands a peace officer to arrest the person named in the warrant.

(3) "Bench warrant" means an arrest warrant that (A) is signed by (i) a judge or (ii) the clerk of the court upon an order by a judge that is in writing or otherwise of record, is docketed, and directs the clerk to issue the warrant, and (B) commands a peace officer to arrest the person named in the warrant. A bench warrant normally is issued to enforce a subpoena or other order to appear in court or at a place directed by the court.

(4) "Search warrant" means a written order signed by a judge pursuant to Code, Criminal Procedure Article, § 1-203 that commands a peace officer to search for and seize property described in the warrant. Committee note: A clerk of the court may sign an arrest warrant or bench warrant upon an order to "issue" the warrant, provided the order conforms to this section.

Cross reference: See Wilson v. State, 345 Md. 437, 450 (1997); Nnoli v. Nnoli, 389 Md. 315, 323, n.1 (2005).

~~(dd)~~(ee) Writ

"Writ" means a written order issued by a court and addressed to a sheriff or other person whose action the court desires to command to require performance of a specified act or to give authority to have the act done.

Source: This Rule is derived as follows:

. . .

Section (dd) is derived in part from former Rule 702 h and M.D.R. 702 m and is in part new.

Section (ee) is derived from former Rule 5 ff.

Rule 1-202 was accompanied by the following Reporter's note.

Amendments to Rule 1-202 are proposed in light of recommended changes to Rule 4-212.

Confusion arose over the practice of judges ordering certain warrants to "issue" and the question of whether and when a clerk may sign a warrant so issued. The existing definition of "warrant" in Rule 4-102 appears to limit to a judicial officer the power to sign a warrant. The definition of "judicial officer" in the same Rule includes "a judge or District Court commissioner."

In practice, several courts report an efficiency consideration in permitting a judge to order the issuance of an arrest or bench warrant but allowing a clerk to sign the order. Recommended amendments include provisions for such orders to be made in writing or otherwise of record, and docketed, allowing interested parties to identify the authority under which a warrant is issued.

Differentiation among "arrest warrant," "bench warrant," and "search warrant" is made because of the different authorities under which those warrants may issue and the different purposes they serve.

A Committee note follows section (d)(d) to clarify that a judge ordering an arrest or bench warrant to issue need not also

order a clerk to sign the warrant. The preference and practice of a judge or a court will frequently be known to a clerk; a judge wishing to personally sign a warrant may have the warrant returned to the judge when it has been prepared by the clerk.

In addition, a cross reference is added following the Committee note, which refers to case law on the distinction among warrant types and terminology.

MARYLAND RULES OF PROCEDURE

TITLE 4 – CRIMINAL CAUSES

CHAPTER 100 – GENERAL

AMEND Rule 4-102 by deleting section (n), as follows:

. . .

~~(n) Warrant~~

~~"Warrant" means a written order by a judicial officer commanding a peace officer to arrest the person named in it or to search for and seize property as described in it.~~

Source: This Rule is derived as follows:

. . .

~~Section (n) is derived from former Rule 702 h and M.D.R.702 m.~~

Rule 1-202 was accompanied by the following Reporter's note.

Section (n) of Rule 4-102 is proposed to be deleted, with the definition of "warrant"

contained in it transferred, with amendments, to Rule 1-202.

Mr. Marcus told the Committee that at the April 2018 Rules Committee meeting, the issue of the request for a warrant or for a body attachment on original process had been discussed. The question was whether a judge needed to sign the warrant or whether a clerk could issue the warrant at the direction of a judge. One of the issues that resulted from the discussion was to better define how a warrant is described in the Rules. One of the suggestions for amendment is to add a new section (dd) to Rule 1-202. The new section breaks out warrants into three categories, which are bench warrant, arrest warrant, or search warrant. This is significant, because the arrest warrants and bench warrants that are on original process could easily be confused with search warrants, which fall under an entirely different statutory scheme, and the requirements to issue them are different.

Mr. Marcus noted that a conforming amendment would be the deletion of section (n) of Rule 4-102. The Chair commented that this was triggered by the circuit court clerks. Some of them took the position that the judge had told them that they could issue and sign arrest warrants if directed to do so by a judge. Other clerks felt that they were not allowed to sign warrants -- that only a judge could do so. A disparity around the State

existed. The thought was that this should be clarified. The substance is that with an arrest warrant, if the judge orders the clerk to issue the warrant, and the order is either in writing or on the record, and it is docketed so that it can be found, then the clerk can obey the order and issue the warrant, which includes signing it on the order of the judge.

By consensus, the Committee approved Rules 1-202 and 4-102 as presented.

Agenda Item 3. Consideration of proposed amendments to Rule 1-322 (Filings of Pleadings, Papers and Other Items)

Mr. Marcus presented Rule 1-322, Filings of Pleadings, Papers, and Other Items, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 – GENERAL PROVISIONS

CHAPTER 300 – GENERAL PROVISIONS

AMEND Rule 1-322 to permit a self-represented party confined in a certain facility to file certain pleadings and papers by a specified method under certain circumstances, to add provisions pertaining to proof of the date of filing by the specified method, to add a form Certificate of Filing by the specified method, and to add a Committee note, as follows:

Rule 1-322. FILING OF PLEADINGS, PAPERS, AND OTHER ITEMS

(a) Generally

The filing of pleadings, papers, and other items with the court shall be made by filing them with the clerk of the court, except that a judge of that court may accept the filing, in which event the judge shall note on the item the date the judge accepted it for filing and forthwith transmit the item to the office of the clerk. On the same day that an item is received in a clerk's office, the clerk shall note on it the date it was received and enter on the docket that date and any date noted on the item by a judge. The item shall be deemed filed on the ~~earlier~~ earliest of (1) the filing date noted by a judge on the item ~~or~~ (2) the date noted by the clerk on the item, or (3) the date established under section (d) of this Rule. No item may be filed directly by electronic transmission, except (1) pursuant to an electronic filing system approved under Rule 16-203, (2) as permitted by Rule 14-209.1, (3) as provided in section (b) of this Rule, or (4) pursuant to Title 20 of these Rules.

(b) Electronic Transmission of Mandates of the U.S. Supreme Court

A Maryland court shall accept a mandate of the Supreme Court of the United States transmitted by electronic means unless the court does not have the technology to receive it in the form transmitted, in which event the clerk shall promptly so inform the Clerk of the Supreme Court and request an alternative method of transmission. The clerk of the Maryland court may request reasonable verification of the authenticity of a mandate transmitted by electronic means.

(c) Photocopies; Facsimile Copies

A photocopy or facsimile copy of a pleading or paper, once filed with the

court, shall be treated as an original for all court purposes. The attorney or party filing the copy shall retain the original from which the filed copy was made for production to the court upon the request of the court or any party.

(d) Filings by Self-Represented Individuals Confined in Certain Facilities

(1) Application of section

This section applies only to self-represented individuals who (A) are confined in a correctional or other detention facility pursuant to a court order in a criminal or juvenile delinquency case, (B) have no direct access to the U.S. Postal Service or the ability to file an electronic submission under the Rules in Title 20, and (C) seek relief from a criminal conviction or their confinement by filing (i) a motion for new trial, an appeal, an application for review of sentence by a panel, a motion for modification of sentence, a petition for certiorari in the Court of Appeals, an application for leave to appeal, a motion or petition for a writ of habeas corpus or coram nobis, a motion or petition for statutory post-conviction relief, or a petition for judicial review of the denial of an inmate grievance complaint, or (ii) a paper in connection with any of those matters.

(2) Generally

A pleading or paper filed under this section shall be deemed to have been filed on the date that the pleading or paper, in mailable form and with proper postage

affixed, was deposited by the individual into a receptacle designated by the facility for outgoing mail or personally delivered to an employee of the facility authorized by the facility to collect such mail. For purposes of processing, a clerk shall record the date a filing was received by the clerk, docket the filing, and make a note for the court of any discernable filing date as defined in subsection (d)(3).

(3) Proof of Date of Filing

The date of filing may be proved by (A) a date stamp affixed by the facility to the pleading, paper, or envelope containing the pleading or paper, or (B) a Certificate of Filing attached to or included with the pleading or paper, substantially in the form provided in subsection (d)(4) of this Rule that, in the event of a dispute, the court finds to be credible.

(4) Certificate of Filing

A Certificate of Filing shall be substantially in the following form:

CERTIFICATE OF FILING

I, _____, certify that (1) I am (name) involuntarily confined in _____; (name of facility)

(2) I have no direct access to the U.S. Postal Service or to a permitted means of electronically filing the attached pleading or paper; (3) on _____ at approximately (date) _____ (time) I personally [ ] deposited the attached pleading or paper for mailing in a receptacle designated by the facility for outgoing mail or [ ] delivered it to an employee of the facility authorized

by the facility to collect outgoing mail; and (4) the item was in mailable form and had the correct postage on it.

I solemnly affirm this _____ day of _____, 20__ under the penalty of perjury and upon personal knowledge that the foregoing statements are true.

_____
(Signature)

Committee note: This section recognizes that individuals who are confined in a correctional or detention facility usually have no direct access to the U.S. Postal Service and may be dependent on the facility to deliver outgoing mail to the Postal Service on behalf of the confined individual. The best the individual in that situation can do is to deposit the item in a mail collection receptacle provided by the facility or, if that be the practice of the facility, deliver it to an employee of the facility authorized by the facility to collect outgoing mail. The section also recognizes that the facility may not actually collect the mail on the day it is deposited and may not affix a date-stamp showing when the mail was collected. Proving the date that the item was actually deposited in the facility's mailbox may therefore be difficult, other than by an affidavit from the filer, which may not always be credible. In the event of any question or dispute, the court can consider, in addition to the affidavit and for such relevance it may have, the U.S.P.S post mark on the envelope, any internal date stamp applied by the facility, any written policy of the facility regarding outgoing mail from confined individuals that had been communicated to those individuals, and other relevant and reliable evidence.

Cross reference: See Rule 1-301 (d), requiring that court papers be legible and of permanent quality.

Source: This Rule is derived in part from the 1980 version of Fed. R. Civ. P. 5 (e) and Rule 102 1 d of the Rules of the United States District Court for the District of Maryland and is in part new.

Rule 1-322 was accompanied by the following Reporter's note.

REPORTER'S NOTE

Rule 1-322 is proposed to be amended by adding a new section (d) pertaining to the date of filing of pleadings or papers by self-represented individuals who are confined in a correctional or other detention facility pursuant to a court order and who do not have direct access to the U.S. Postal service or a permitted method of electronically filing pleadings or papers in court. These amendments are proposed, in part, in response to Hackney v. State, No. 53, Sept. Term, 2017, 2018 WL 2126467 (Md. May 9, 2018), in which the Court of Appeals adopted the prison mailbox rule.

Subsection (d)(1) limits the application of section (d) to self-represented individuals confined in a facility who do not have direct access to U.S. Postal Service or a permitted method of electronically filings pleadings or papers. Subsection (d)(1) also limits the application of section (d) to certain specified filings.

Subsection (d)(2) provides that the date of filing by self-represented individuals who are covered under subsections (d)(1) shall be deemed to be the date the individual deposited the pleading or paper into a designated receptacle or delivered the pleading or paper to an authorized employee of the facility, with proper postage affixed and in a mailable form.

> Subsection (d)(3) provides that the date of filing may be proved by a date stamp affixed by the facility to the pleading, paper, or envelope containing the pleading or paper, or a Certificate of Filing that the court finds to be credible. The Certificate of Filing must be attached to the pleading or paper.
>
> Subsection (d)(4) provides that a Certificate of Filing must be substantially in the form provided in that subsection.
>
> The Committee note following section (d) instructs that in the event of a dispute about the date of filing, a court may consider, in addition to the affidavit, the postmark, any internal date stamp applied by the facility, any written policy of the facility regarding outgoing mail from confined individuals, and other relevant evidence.
>
> The Federal Rules and statutes and rules of several states address how to establish a filing date of a pleading or paper by a party who is confined in an institution, usually a jail or a prison, and does not have direct access to the U.S. mail. *See, e.g.*, Barbara J. Van Arsdale, Application of "Prisoner Mailbox Rule" by State Courts under State Statutory and Common Law, 29 A.L.R.6th 237 (2007); 2A Federal Procedure, L.Ed., § 3:609, Appeals by inmates confined in institutions (December 2016 Update).

Mr. Marcus explained that the proposed addition to Rule 1-322 has been referred to as "the Prisoners Mailbox Rule." In earlier discussions, the Committee had talked about *pro se* individuals held in places of confinement, including people held

for mental health issues, and how they can send mail from the institution. The Court of Appeals in *Hackney v. State,* 459 Md. 108 (2018) has now defined what the prisoner mailbox rule is. The task for the Committee is to put into the Rules what the Court of Appeals stated in the case. Rule 1-322 (d) contains a limited solution addressing the problem of self-represented individuals who are confined and who do not have access to the United States Postal Service facilities in the institutions.

Mr. Marcus said that in these particular cases, the problem that arose was that there are specific instances where the timing of the filing is critical. These include motions for a new trial, which obviously have a time frame specified by Rule; notices of appeal; petitions for a writ of certiorari, which also have a time frame; applications for leave to appeal, which usually apply to guilty pleas that are taken and appeals by application only, not by right, to the Court of Special Appeals; motions or petitions for a writ of habeas corpus or a writ of corum nobis; motions or petitions for statutory post-conviction relief, which have sunset provisions in the statute; and petitions for judicial review of the denial of inmate grievances, which are similar to judicial review of administrative decisions. All of these have definite time frames.

Mr. Marcus remarked that the way that the Court of Appeals resolves this problem is to say that there has to be a way for a self-represented individual to meaningfully note his or her appeal or to be able to file pleadings within a specified time frame. The proposed Rule essentially requires a certificate of filing by the self-represented person attesting to when it was that he or she deposited whatever the pleading is, whether it is a motion or anything else, into a designated receptacle for outgoing mail and/or delivered it to a person in that institution. One of the issues that came up in the Subcommittee was the mechanics of how the docketing would be done. Once that paper, pleading, petition, etc. reaches the court, the clerks would then be in a position to have to discern what the actual filing date is. The recommendation of the Subcommittee is that the clerk's office in the appropriate court would docket that filing on the date that it was received by the court, and a judicial officer would then make a determination about the actual filing date and whether, under the Rule, that filing was timely. The response of the Subcommittee to the Court of Appeals is set forth in the proposed Rule. It has essentially been dictated to the Committee at least as to the solution to the problem. The mechanics are left to the Committee.

By consensus, the Committee approved Rule 1-322 as presented.

Agenda Item 4. Reconsideration of proposed amendments to Rule 4-346 (Probation), Rule 4-351 (Commitment Record) and Rule 11-115 (Disposition Hearing)

Mr. Marcus presented Rules 4-346, Probation; 4-351, Commitment Record; and 11-115, Disposition Hearing, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 – CRIMINAL CAUSES

CHAPTER 300 – TRIAL AND SENTENCING

AMEND Rule 4-346 by adding a new section (c) pertaining to the delivery of probation orders, judgments of restitution, and victim notifications to the Division of Parole and Probation, as follows:

Rule 4-346. PROBATION

(a) Manner of Imposing

When placing a defendant on probation, the court shall advise the defendant of the conditions and duration of probation and the possible consequences of a violation of any of the conditions. The court also shall file and furnish to the defendant a written order stating the conditions and duration of probation.

(b) Modification of Probation Order

During the period of probation, on motion of the defendant or of any person charged with supervising the defendant while on probation or on its own initiative, the court, after giving the defendant an opportunity to be heard, may modify,

clarify, or terminate any condition of probation, change its duration, or impose additional conditions.

(c) Delivery or Transmittal to the Division of Parole and Probation

The clerk shall deliver or transmit a copy of any probation order, the details or a copy of any order or judgment of restitution, and the details or a copy of any request for victim notification to the Division of Parole and Probation.

Cross reference: For orders of probation or parole recommending that a defendant reside in or travel to another state as a condition of probation or parole, see the Interstate Compact for Adult Offender Supervision, Code, Correctional Services Article, §6-201 et seq. For evaluation as to the need for drug or alcohol treatment before probation is ordered in cases involving operating a motor vehicle or vessel while under the influence of or impaired by drugs or alcohol, see Code, Criminal Procedure Article, §6-220. For victim notification procedures, see Code, Criminal Procedure Article, §11-104 (f). For procedures concerning compliance with restitution judgments, see Code, Criminal Procedure Article, §11-607.

Source: This Rule is in part derived from former Rule 775 and M.D.R. 775 and in part new.

Rule 4-346 was accompanied by the following Reporter's note.

REPORTER'S NOTE

An attorney advised the Criminal Rules Subcommittee that at times, victim

notification forms and orders of restitution are not reaching the individuals who need the information in order to provide notice to victims or to collect restitution, including the Division of Parole and Probation.

To address these issues, amendments to three Rules are proposed, including Rule 4-346. The proposed amendment to Rule 4-346 requires the clerk to transmit or deliver to the Division of Parole and Probation a copy of any probation order, any order or judgment of restitution, and any request for victim notification.

MARYLAND RULES OF PROCEDURE

TITLE 4 – CRIMINAL CAUSES

CHAPTER 300 – TRIAL AND SENTENCING

AMEND Rule 4-351 by adding the language "or transmit" to section (a), by correcting a cross reference after subsection (a)(6), and by adding a new subsection (a)(7) pertaining to delivery to the custodial officer of any request for victim notification, as follows:

Rule 4-351. COMMITMENT RECORD

(a) Content

When a person is convicted of an offense and sentenced to imprisonment, the clerk shall deliver <u>or transmit</u> to the officer into whose custody the defendant has been placed a commitment record containing:

(1) The name and date of birth of the defendant;

(2) The docket reference of the action and the name of the sentencing judge;

(3) The offense and each count for which the defendant was sentenced;

(4) The sentence for each count, the date the sentence was imposed, the date from which the sentence runs, and any credit allowed to the defendant by law;

(5) A statement whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of the preceding term or to any other outstanding or unserved sentence; ~~and~~

(6) the details or a copy of any order or judgment of restitution~~.~~; and

(7) the details or a copy of any request for victim notification.

Cross reference: See Code, Criminal Procedure Article, §6-216 (c) concerning Maryland Sentencing Guidelines Worksheets prepared by a court. See Code, Criminal Procedure Article, §11-104 ~~(f)~~ (g) for notification procedures for victims. See Code, Criminal Procedure Article, §11-607 for procedures concerning compliance with restitution judgments.

(b) Effect of Error

An omission or error in the commitment record or other failure to comply with this Rule does not invalidate imprisonment after conviction.

Source: This Rule is derived from former Rule 777 and M.D.R. 777.

Rule 4-351 was accompanied by the following Reporter's note.

REPORTER'S NOTE

An attorney advised the Criminal Rules Subcommittee that at times, victim

notification forms and orders of restitution are not reaching the individuals who need the information in order to provide notice to victims or to collect restitution, including correctional officers and detention centers.

To address these issues, amendments to three Rules are proposed, including Rule 4-351. The proposed amendment to Rule 4-351 requires the clerk to transmit or deliver to the officer into whose custody a defendant has been placed the details or a copy of any request for victim notification.

In addition, the language "or transmit" is proposed to be added to section (a), and a citation in the cross reference following subsection (a)(6) has been updated.

MARYLAND RULES OF PROCEDURE

TITLE 11 – JUVENILE CAUSES

AMEND Rule 11-115 by adding a new section (e) requiring the delivery or transmittal of the details or a copy of any order or judgment of restitution and any request for victim notification to the custodial agency, as follows:

Rule 11-115. DISPOSITION HEARING

. . .

(e) Delivery or Transmittal of Documents to Custodial Agency

Along with any commitment or probation order, the clerk shall deliver or transmit the details or a copy of any order or judgment of restitution and any request

for victim notification to the agency having custody of or supervision over the child.

Source: This Rule is former Rule 915.

Rule 11-115 was accompanied by the following Reporter's note.

REPORTER'S NOTE

An attorney advised the Criminal Rules Subcommittee that at times, victim notification forms and orders of restitution are not reaching the individuals who need the information in order to provide notice to victims or to collect restitution, including the agencies that have custody of or supervision over a child.

To address these issues, amendments to three Rules are proposed, including Rule 11-115. The proposed amendment to Rule 11-115 requires the clerk to deliver or transmit to the agency having custody of or supervision over a child the details or a copy of any order or judgment of restitution and any request for victim notification.

Mr. Marcus said that these Rules had been discussed previously. Two competing issues relate to the proposal. The Committee had received correspondence from victims' rights advocates who were concerned that the required notifications were not getting to victims as required by statute. The issue was the fact that this involves a balancing act. On one hand, there is a strong need for confidentiality for victims, and on

the other hand, it is important to make sure that the victims get the notifications to which they are entitled, whether it is about a change in the defendant's probation status or a change in restitution payments. The question is how to provide all of the items that are available to victims under the Victims' Rights Act, Code, Criminal Procedure Article, §11-104, without violating the victims' confidentiality. The Subcommittee reviewed the correspondence. The proposals before the Committee provide that there be transmittals. One of the questions that had been posed to the Committee was how it can be ensured that the agencies do their jobs.

Mr. Marcus noted that three modifications to the Rules address three different circumstances. Rule 4-346 applies to those persons who are under the supervision of the Division of Parole and Probation. Rule 4-351 applies to persons who have been committed to places of confinement. Rule 11-115 relates to those individuals who have been committed to the Department of Juvenile Services. The proposed amendments to these Rules require transmittal of information to the agencies so that the agencies can provide updated information to the victims. It is important to recognize that the scope of the authority of the Committee does not reach the Executive Branch. As a result, the Court of Appeals does not have the ability to dictate to the Department of Juvenile Services or to the Department of Public

Safety by rule how to conduct their procedures. The Rules describe the obligation of court employees to transmit the information.

The Chair said that at the last meeting at which this issue was considered, the issue arose about transmitting to executive agencies the victims' requests for notification, which obviously contain the victims' addresses unless the victims have chosen to use an alternative address. The Judiciary has no control over access to that document once it is in the hands of the Division of Correction. Russell Butler, Esq., Executive Director of the Maryland Crime Victims' Resource Center, who had initially proposed these changes, had indicated that he had spoken with those agencies and was satisfied that they have protective measures in place to assure that unauthorized people do not get that information.

By consensus, the Committee approved the changes to Rules 4-346, 4-351, and 11-115.

Agenda Item 5. Consideration of proposed amendments to Rule 19-305.5(Unauthorized Practice of Law; Multi-Jurisdictional Practice of Law)

Mr. Frederick presented Rule 19-305.5, Unauthorized Practice of Law; Multi-Jurisdictional Practice of Law, for the Committee's consideration.

AMEND Rule 19-305.5 by adding a new section (e) pertaining to foreign attorneys, as follows:

Rule 19-305.5. UNAUTHORIZED PRACTICE OF LAW; MULTI-JURISDICTIONAL PRACTICE OF LAW (5.5)

(a) An attorney shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) An attorney who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the attorney is admitted to practice law in this jurisdiction.

(c) An attorney admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with an attorney who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the attorney, or a person the attorney is assisting, is authorized by law or order to

appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the attorney's practice in a jurisdiction in which the attorney is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within subsections (c)(2) or (c)(3) of this Rule and arise out of or are reasonably related to the attorney's practice in a jurisdiction in which the attorney is admitted to practice.

(d) An attorney admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the attorney's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the attorney is authorized to provide by federal law or other law of this jurisdiction.

(e) (1) In this section, "foreign attorney" means an attorney who (A) is not admitted to practice law in any United States jurisdiction, (B) is a member in good standing of a recognized legal profession in a country other than the United States and, as such, is authorized to practice law in that country, (C) is subject to effective regulation and discipline by a duly constituted professional body or a public authority of that country, and (D) has not been disbarred or suspended from the

practice of law in any jurisdiction of the United States.

(2) A foreign attorney may not establish an office or other systematic and continuous presence in this State for the practice of law, or hold out to the public or otherwise represent that the attorney is admitted to practice law in this State. Any violation of this provision or any material misrepresentation regarding the requirements in subsection (e)(1) of this Rule by the foreign attorney will subject the foreign attorney to liability for the unauthorized practice of law.

(3) A foreign attorney, with respect to any matter, may (A) act as a consultant to a Maryland attorney on the law and practice in a country in which the foreign attorney is admitted to practice, including principles of international law recognized and enforced in that country and (B) in association with a Maryland attorney who actively participates in the matter, participate in discussions with a client of the Maryland attorney or with other persons involved with the matter, provided that the Maryland attorney shall remain fully responsible to the client for all advice and other conduct by the foreign attorney with respect to the matter.

Committee Note: This section is not intended to permit a foreign attorney to be admitted *pro hac vice* in any proceeding, but it does not preclude the foreign attorney (1) from being present with a Maryland attorney at a judicial, administrative, or ADR proceeding to provide consultative services to the Maryland attorney during the proceeding, or (2) subject to Rule 5-702, from testifying as an expert witness.

. . .

Model Rules Comparison: Rule 19-305.5 (5.5) is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, except that section (e) is new.

Rule 19-305.5 was accompanied by the following Reporter's note.

REPORTER'S NOTE

In April 2015, Chief Judge Barbera of the Court of Appeals forwarded to the Rules Committee a Resolution of the Conference of Chief Justices endorsing certain proposals by the American Bar Association that would allow attorneys admitted to practice in foreign countries, but not in any U.S. State (i.e., foreign attorneys), to engage in the limited practice of law in U.S. States. She asked that the Committee study those proposals, some of which have since been amended by the ABA.

At present, Maryland does not permit a foreign attorney, who is not admitted in Maryland after successfully completing the Maryland Bar Examination or admitted in another State or U.S. jurisdiction, to practice law here.

Consideration of practice by foreign attorneys was deferred from action until a report by the International Law Committee (ILC) of the MSBA could be finalized. ILC produced its report in November 2016, which made two recommendations: that (1) Maryland should allow foreign attorneys to "gain 'foreign legal consultant' status," and (2) the specifics for accomplishing that "should be done through the Rules Committee (or other appropriate entity) with reference to the ABA Model Rule." The committee noted that foreign legal consultant rules implemented in other States require that the

foreign attorney be a member in good standing of the legal profession in his/her home country and that they limit any U.S. practice to the subject matter and experience developed in his/her home country.

Members of the Attorneys and Judges Subcommittee who considered the matter expressed concern over how and by whom such an entrepreneurial operation could be regulated and the cost of establishing and maintaining a regulatory structure. A question was raised regarding how many individuals would be likely to apply and be accepted and whether the service they might perform is otherwise available. The Subcommittee took no final action but indicated a need to do some further investigation.

Since that time, the Subcommittee has learned, principally from ILC, that, except in a handful of States – New York, California, Texas, District of Columbia, and Florida – very few applications to become foreign legal consultants have been made and accepted, in many States none at all.

The matter was brought before the Subcommittee for consideration again, and the Subcommittee proposes a new section (e) to Rule 19-305.5 that defines "foreign attorney"; forbids systematic and continuous presence in this State for the practice of law, or any representation to the public or otherwise that the attorney is admitted to practice law; and permits a foreign attorney to act as a consultant to a Maryland attorney on the law and practice in a country in which the foreign attorney is admitted to practice, as well as participate in discussions, in association with a Maryland attorney who actively participates in the matter, with a client of the Maryland attorney or with other persons involved with the matter, with limitations. These

> proposals reflect the Subcommittee's review of the reports and recommendations it received from various sources, as well as the compelling interests embedded in the issue of practice by foreign attorneys in Maryland courts.

Mr. Frederick said that Rule 19-305.5 addresses the issue of foreign attorneys. In this context, the word "foreign" means that the attorney is from a foreign country. This came to the Rules Committee as a proposal from the Honorable Mary Ellen Barbera, Chief Judge of the Court of Appeals. There had been a number of proposals from across the country for attorneys who are licensed in foreign countries to be able to assist attorneys in certain states with issues that relate to those foreign countries. The question that the Attorneys and Judges Subcommittee dealt with was how much assistance one can get from a foreign attorney. For example, can a foreign attorney come to Maryland and appear *pro hac vice*? The Subcommittee concluded that the foreign attorney could not, because the statute does not allow it. Can a foreign attorney come into a Maryland court and work with another law firm and be able to open up his or her own office? How can someone determine whether the foreign attorney is in good standing, licensed to practice law, and not in the middle of the attorney discipline process? Jeffrey Shipley, Secretary and Director of the State Board of Law Examiners, had expressed some concern about this.

Mr. Frederick commented that the Maryland State Bar Association had been very helpful by providing the Subcommittee a great amount of information on this subject. This had been discussed at multiple Subcommittee meetings, and many people had weighed in. The Rule before the Committee today is a reasonable compromise that would enable a Maryland law firm to provide full service to their clients who want to do business overseas by having a foreign attorney essentially under the umbrella of the firm. The foreign attorney is a consultant. The qualifications of the foreign attorney have to satisfy the Maryland attorney, because he or she is the one who is ultimately responsible. The Maryland attorney has to be sure that the foreign attorney is a member in good standing of a recognized legal profession in another country, is subject to effective regulation and discipline by a duly constituted professional body or a public authority of that country, and has not been disbarred or suspended from the practice of law in any jurisdiction of the United States.

Mr. Frederick remarked that a disbarred attorney under the proposed Rule is not going to be able to represent an individual in Maryland without a Maryland attorney vouching for him or her, and the Maryland attorney is going to be responsible for that foreign attorney. The Subcommittee was concerned that if someone wanted to market a product in China, he or she would

have the ability to get versed on Chinese law with the Maryland attorney and have the full ability of the Maryland law firm to provide services to the client. Discussions between the client and the foreign attorney would be subject to attorney/client privilege, and confidentiality would be protected, but the citizens of the State of Maryland would not be exposed to someone who is licensed in a foreign country but not otherwise capable of being regulated.

Mr. Frederick pointed out that the Maryland State Bar Association has endorsed the proposed Rule. At the last Subcommittee meeting, no one expressed any opposition. The Chair noted that there were four resolutions adopted five years ago by the American Bar Association that were endorsed by the Conference of Chief Justices, a committee of the chief judges in the United States. The matter was referred to the Rules Committee by Chief Judge Barbera. One of the resolutions addressed allowing foreign attorneys to be admitted *pro hac vice*. This was not allowed, because there is a statute in Maryland that permits only attorneys who are barred in another state (Code, Business Occupations, §10-215) to be admitted *pro hac vice*.

The Chair said that the second resolution was to permit foreign attorneys who are house counsel to a Maryland corporation to practice in conformance with the attorney's

employment but not otherwise. The Subcommittee felt that this also was not allowable, because of a statute, Code, Business Occupations and Professions Article, § 10-206 (d). It requires house counsel who are not admitted in Maryland to be barred in another state. Additionally, allowing foreign attorneys to come to Maryland and open up shop as "foreign legal consultants" was not approved by the Subcommittee because this would be difficult to regulate.

Mr. Stahl told the Committee that he was present on behalf of the MSBA and was one of the liaisons to the Rules Committee. He had assisted members of the MSBA International Law Committee and attended many meetings of the Attorneys and Judges Subcommittee. He had provided some of the information in the Committee note to assist the Subcommittee on this issue. At the Subcommittee, there had been a great deal of discussion about making this much broader. The Subcommittee had restricted this issue to its present form, which was still acceptable to those who had been seeking something much more expansive. Rule 19-305.5 will provide a precise role for foreign attorneys who will work under the supervision of Maryland attorneys.

By consensus, the Committee approved Rule 19-305.5 as presented.

Agenda Item 6. Consideration of proposed amendments to Rule 19-217(Legal Assistance by Law Students)

Mr. Frederick presented Rule 19-217, Legal Assistance by Law Students, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

CHAPTER 200 – ADMISSION TO THE BAR

AMEND Rule 19-217 by revising the definition of "supervising attorney" in subsection (a)(4), as follows:

Rule 19-217. 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 that meets the requirements of Rule 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 (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 American Bar Association 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 Maryland State Bar Association, Inc., and (D) is not part of a clinical program of a law school.

(4) Supervising Attorney

"Supervising attorney" means (A) 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 of the law school in which the law student is enrolled or by the dean's designee.~~, or (B) an attorney who has been authorized to practice pursuant to Rule 19-215 and who certifies in writing to the Clerk of the Court of Appeals that the attorney has read and is familiar with the Maryland Rules of **[Civil Procedure, Criminal Causes, Evidence, and the Maryland Attorneys' Rules of Professional Conduct,]** as well as the Maryland law and Rules relating to any particular area of law in which the individual intends to practice. Service as a supervising attorney for a clinical program or externship must be approved by the dean of the law school in which the law student is enrolled or by the dean's designee.

Cross reference: See Rule 19-305.1 (5.1) for the responsibilities of a supervising attorney.

(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 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. 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 also shall 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 certification at any time by mailing a notice to that effect to the Clerk of the Court of Appeals. The certification shall be suspended automatically upon the issuance of an unfavorable report of the Character Committee made in connection with the student's application for admission to the Bar. Upon any reversal of the unfavorable report, the certification shall be reinstated.

(d) Practice

In connection with a clinical program or externship, a law student for whom a certification is in effect may appear in any trial court or the Court of Special Appeals, or before any administrative agency, and may 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 16 of the Rules Governing Admission to the Bar of Maryland (2016).

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

REPORTER'S NOTE

Rule 19-217 is proposed to be amended after consideration of a request from the University of Baltimore School of Law to modify the definition of "supervising attorney." UB requests the modification so that its clinical fellows who are members of another state's bar may supervise law students practicing under this Rule in one of the school's clinics.

Clinical programs at both UB and the University of Maryland Carey School of Law function as small legal service providers. At UB, the clinics serve over 200 low-income individuals and organizations each year. Both law schools employ a number of clinical fellows -- licensed attorneys who supervise student practice in the clinic.

Rule 19-217 provides that an attorney supervising clinical students must be a member of the Maryland bar in good standing. A clinical fellow who is a member of another state's bar must become a member of the Maryland bar before engaging in the supervision of students. This requirement entails a significant investment of time and financial resources; however, fellows' positions are contractually limited to no more than three years.

By contrast, out-of-state attorneys providing legal services who meet the requirements of Rule 19-215 are not required to become a member of the Maryland bar, though their authorization to practice may be limited to two years if they receive compensation for their services. UB states that its fellows engage in the same legal services work as these attorneys and its fellows receive similar supervision by members of the Maryland bar. In addition, many cases the clinics receive are referred by the same legal services organizations contemplated in Rule 19-215.

The Attorneys and Judges Subcommittee recommends modifying the definition of "supervising attorney" in subsection (a)(4) to include attorneys authorized to practice law under Rule 19-215, provided that those attorneys also certify to the Clerk of the Court of Appeals their familiarity with the Rules relevant to their practice. Attorneys must also be approved by the dean of their law school, or the dean's designee.

A cross reference to Rule 19-305.1, on the responsibilities of a supervising attorney, is proposed to be added following the amended definition.

Mr. Frederick explained that the University of Baltimore ("UB") School of Law has a clinical law program that is among the best in the country. It is staffed with top-notch people who come into Maryland for two to three years, and they are not always licensed in Maryland. However, they are working under the auspices of others in the clinical program who are licensed in Maryland. The question is whether the visiting law professors are required to sit for the Maryland bar examination. It is expensive to study for, it is expensive to take, and by the time they get the results, they are ready to move on to be an assistant professor at some other institution. Is there some way to protect the citizens of the State of Maryland and satisfy the objective of the University of Baltimore? This led to a robust discussion at the Subcommittee meeting with many differing opinions being heard. The Subcommittee came up with a compromise that seemed to be acceptable to all of the members of the Subcommittee. This is the version of Rule 19-217 that is before the Committee today.

Mr. Frederick said that the Rule provides that someone who has been authorized to practice under Rule 19-215 may become authorized to practice under Rule 19-217. This means that

professors coming to Maryland to staff the UB clinical program will be able to supervise law students in the clinic. They have to certify their knowledge of evidence and other subjects. It is important that incompetent attorneys are not allowed to participate in the program.

Professor Gilman told the Committee that she is the Director of Clinical Legal Education at UB. She thanked the Subcommittee and the Chair for helping reach a compromise as to the wording of the Rule. The goal is to get justice for the low-income clients of the UB clinic. Access to justice will provide a service to their clients. Professor Gilman's counterpart at the University of Maryland also is satisfied with the Rule.

Judge Bryant asked about the bracketed language in subsection (a)(4). The Chair responded that some of the language of Rule 19-217 was taken from Rule 19-216, Special Authorization for Military Spouse Attorneys. If the law professors are going to supervise students in the Maryland courts, and they are barred in another state, they should know something about the Maryland Rules and the peculiarities of Maryland law. For example, if they are handling domestic relations matters, there are substantive laws and procedures that are different from other states. The law professors would have to certify that they have become familiar with that area of

Maryland law. Professor Gilman had indicated to the Subcommittee that these law professors always have available as a resource the professors at the law school who teach these subjects. Professor Gilman commented that even the faculty members co-teach in the clinic with professors who are members of the Maryland bar.

Judge Bryant said that she was not questioning the Rule, she just wanted to know why the language in (a)(4) was in bold. If a law professor is working with students in civil law, is it necessary to be familiar with the criminal rules? It should read "…and is familiar with the Maryland Rules as well as the Maryland law and Rules relating to any particular area of law…". The Chair agreed. The language was taken from subsection (c)(5)(E) of Rule 19-216. He asked if anyone had a motion to remove the bracketed language. The Reporter inquired if the language "the Maryland Attorneys' Rules of Professional Conduct" should be left in.

The Chair suggested that the language "Civil Procedure, Criminal Causes, Evidence" should be deleted, and the language "Maryland Attorneys' Rules of Professional Conduct" should be left in. Judge Price suggested that the bracketed language and the Rule should read: "as well as the Maryland law and Rules as they relate to any particular areas of law in which the individual intends to practice."

The Chair noted that this is what was intended. If a professor is going to be supervising students in a domestic violence docket, then he or she needs to know that area of law. Judge Price responded that this is why she suggested that the language "as they relate to any particular areas of law in which the individual intends to practice" be included in the Rule.

The Reporter suggested that subsection (a)(4) read: "is familiar with the Maryland Attorneys' Rules of Professional Conduct, as well as the Maryland law and Rules relating to any particular area of law in which the individual intends to practice." Mr. Frederick moved to add this language in, the motion was seconded, and it passed on a majority vote.

By consensus, the Committee approved Rule 19-217 as amended.

Agenda Item 7. Consideration of proposed amendments to Rule 20-103 (Administration of MDEC) and Rule 20-203 (Review by Clerk; Striking of Submission; Deficiency Notice; Correction; Enforcement)

The Chair presented Rules 20-103, Administration of MDEC, and 20-203, Review by Clerk; Striking of Submission; Deficiency Notice; Correction; Enforcement, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 20 – ELECTRONIC FILING AND CASE MANAGEMENT

CHAPTER 100 – GENERAL PROVISIONS

AMEND Rule 20-103 by restyling subsection (b)(1) and adding additional language pertaining to submission deficiencies, and by adding a Committee note following section (b), as follows:

Rule 20-103. ADMINISTRATION OF MDEC

(a) General Authority of State Court Administrator

Subject to supervision by the Chief Judge of the Court of Appeals, the State Court Administrator shall be responsible for the administration of the MDEC system and shall implement the procedures established by the Rules in this Title.

(b) Policies and Procedures

(1) Authority to Adopt

The State Court Administrator shall adopt policies and procedures that are ~~(A)~~ necessary or useful for the proper and efficient implementation of the MDEC System and ~~(B)~~ consistent with ~~(i)~~ the Rules in this Title, ~~(ii)~~ other provisions in the Maryland Rules that are not superseded by the Rules in this Title, and ~~(iii)~~ other applicable law. The policies and procedures may include:

(A) examples of deficiencies in submissions that the State Court Administrator has determined constitute a material violation of the Rules in Title 20 or an applicable policy or procedure and justify the issuance of a deficiency notice under Rule 20-203(d); and,

(B) with the approval of the Chief Judge of the Court of Appeals, ~~the policies and procedures may include~~ the approval of pilot projects and programs in one or more courts to test the fiscal and operational efficacy of those projects or programs.

Committee note: The examples of deficiencies listed by the State Court Administrator are not intended (1) to be an exclusive or exhaustive list of deficiencies justifying the issuance of a deficiency notice, or (2) to preclude a judge from determining that the submission does not materially violate a Rule in Title 20 or an applicable policy or procedure. They are intended, however, to require the clerk to issue a deficiency notice when the submission is deficient in a manner listed by the State Court Administrator. See Rule 20-201(d).

(2) Publication of Policies and Procedures

Policies and procedures adopted by the State Court Administrator that affect the use of the MDEC system by judicial personnel, attorneys, or members of the public shall be posted on the Judiciary website and, upon written request, shall be made available in paper form by the State Court Administrator.

Source: This Rule is new.

Rule 20-103 was accompanied by the following Reporter's note.

REPORTER'S NOTE

Rule 20-103 is proposed to be amended in order to conform it to recommended changes to Rule 20-203.

Subsection (b)(1) is restyled and new language is added. The new text specifies that the policies and procedures the State Court Administrator adopts may include examples of deficiencies that the Administrator has determined constitute a material violation of the Rules in Title 20 or an applicable policy or procedure, and justify the issuance of a deficiency notice.

A Committee note following section (b) is also suggested. The note clarifies that the list of deficiency examples is not exclusive or exhaustive. The list likewise does not preclude a judge from finding that a submission does not materially violate a Rule in Title 20 or an applicable policy or procedure. Clerks are, however, required to issue a deficiency notice when a submission is deficient in a manner listed by the State Court Administrator.

MARYLAND RULES OF PROCEDURE

TITLE 20 – ELECTRONIC FILING AND CASE MANAGEMENT

CHAPTER 200 – FILING AND SERVICE

AMEND Rule 20-203 by deleting reference to all Rules in subsection (a)(2) except Rule 20-201(g) and deleting the second sentence of that subsection, by deleting references to Rule 20-107(a)(1) from section (c), by clarifying procedures pertaining to certain non-compliant submissions, by extending the time to resolve a deficiency in a filing to 14 days, and by providing for the refund of certain fees only upon motion and order of the court, as follows:

Rule 20-203. REVIEW BY CLERK; STRIKING OF SUBMISSION; DEFICIENCY NOTICE; CORRECTION; ENFORCEMENT

(a) Time and Scope of Review

(1) Inapplicability of Section

This section does not apply to a submission filed by a judge, or, subject to Rule 20-201 (m), a judicial appointee.

(2) Review by Clerk

As soon as practicable, the clerk shall review a submission for compliance with Rule ~~20-106, 20-107 (a)(1),~~ 20-201 ~~(d),~~ (g)~~, and (l)~~ and the published policies and procedures for acceptance established by the State Court Administrator. ~~Until the submission is accepted by the clerk, it remains in the clerk's queue and shall not be docketed.~~

(b) Docketing

(1) Generally

The clerk shall promptly correct errors of non-compliance that apply to the form and language of the proposed docket entry for the submission. The docket entry as described by the filer and corrected by the clerk shall become the official docket entry for the submission. If a corrected docket entry requires a different fee than the fee required for the original docket entry, the clerk shall advise the filer, electronically, if possible, or otherwise by first-class mail of the new fee and the reasons for the change. The filer may seek review of the clerk's action by filing a motion with the administrative judge having direct administrative supervision over the court.

(2) Submission Signed by Judge or Judicial Appointee

The clerk shall enter on the docket each judgment, order, or other submission signed by a judge or judicial appointee.

(3) Submission Generated by Clerk

The clerk shall enter on the docket each writ, notice, or other submission generated by the clerk.

(c) Striking of Certain Non-compliant Submissions

If, upon review pursuant to section (a) of this Rule, the clerk determines that a submission, other than a submission filed by a judge or, subject to Rule 20-201 (m), by a judicial appointee, fails to comply with the requirements of ~~Rule 20-107 (a)(1) or~~ Rule 20-201 (g), the clerk shall (1) make a docket entry that the submission was received, (2) strike the submission, ~~(2)~~ (3) notify the filer and all other parties of the striking and the reason for it, and ~~(3)~~ (4) enter on the docket that the submission ~~was received, that it~~ was stricken for non-compliance with the applicable ~~section~~ subsection of ~~Rule 20-107 (a)(1) or~~ Rule 20-201 (g), and that notice pursuant to this section was sent. The filer may seek review of the clerk's action by filing a motion with the administrative judge having direct administrative supervision over the court. Any fee associated with the filing shall be refunded only on motion and order of the court.

(d) Deficiency Notice

(1) Issuance of Notice

If, upon review, the clerk concludes that a submission is not subject to striking under section (c) of this Rule but

materially violates a provision of the Rules in Title 20 or an applicable published policy or procedure established by the State Court Administrator, the clerk shall send to the filer with a copy to the other parties a deficiency notice describing the nature of the violation.

(2) Judicial Review; Striking of Submission

The filer may file a request that the administrative judge, or a judge designated by the administrative judge, direct the clerk to withdraw the deficiency notice. Unless (A) the judge issues such an order, or (B) the deficiency is otherwise resolved within ~~10~~ 14 days after the notice was sent, upon notification by the clerk, the court shall strike the submission.

(e) Restricted Information

(1) Shielding Upon Issuance of Deficiency Notice

If, after filing, a submission is found to contain restricted information, the clerk shall issue a deficiency notice pursuant to section (d) of this Rule and shall shield the submission from public access until the deficiency is corrected.

(2) Shielding of Unredacted Version of Submission

If, pursuant to Rule 20-201 (h)(2), a filer has filed electronically a redacted and an unredacted submission, the clerk shall docket both submissions and shield the unredacted submission from public access. Any party and any person who is the subject of the restricted information contained in the unredacted submission may file a motion to strike the unredacted submission. Upon the filing of a motion and any timely

answer, the court shall enter an appropriate order.

(3) Shielding on Motion of Party

A party aggrieved by the refusal of the clerk to shield a filing or part of a filing that contains restricted information may file a motion pursuant to Rule 16-912.

Source: This Rule is new.

Rule 20-203 was accompanied by the following Reporter's note.

REPORTER'S NOTE

Proposed amendments to Rule 20-203 address the handling of certain non-compliant submissions.

Reference to Rules 20-106, 20-107 (a)(1), 20-201 (d), and 20-201(l), and the second sentence of subsection (a)(2), are deleted from the subsection to assure that non-compliant submissions are not rejected at the "File and Serve" level of MDEC processing. Rather, a non-compliant submission is transmitted out of "File and Serve" into the "Odyssey" portion of the MDEC system, where the clerk proceeds to handle it in accordance with other sections of the Rule, as applicable.

Section (c) is revised and restyled to delete references to Rule 20-107(a)(1) and to clarify the procedure for handling a submission that fails to comply with the requirements of Rule 20-201 (g). Deletion of the references to Rule 20-107(a)(1) means non-compliance with that subsection is no longer cause for striking a submission but rather is cause for a deficiency notice. The latter affords the filer an opportunity to correct the deficiency or deficiencies,

making it less likely than a striking to impact litigation through issues such as an elapsed statute of limitations.

A new sentence is added at the end of section (c) to provide that any fee associated with a filing that is stricken pursuant to section (c) is refundable only on motion and order of the court.

The Chair said that this emanates from the concerns and recommendations of the MDEC (Maryland Electronic Courts) Executive Steering Committee. Rule 20-103 was intended to bring greater uniformity in the way that clerks deal with submissions that for various reasons do not comply with MDEC filing requirements. Some clerks are issuing deficiency notices for some of the non-compliant filings, and others are not for the same kind of non-conformance. The amendment to section (b) of Rule 20-103 allows the State Court Administrator, in her Policies and Procedures Manual, to list the kinds of deficiencies that will require a deficiency notice. It is not intended that this list be exhaustive. There may be other kinds of deficiencies that warrant a deficiency notice. The deficiencies described in the list of the State Court Administrator will require a deficiency notice.

The Chair noted that Rule 20-203 contains the latest change in policy regarding the actual striking of the submission by the clerk. At one time there were four kinds of deficiencies that

required striking; at another time, there were three, then two, and now the current proposal is one. This is failure of the submission to contain a certificate of service if one is required. The reason for not requiring striking for other deficiencies is that many deficiencies can be dealt with by a deficiency notice procedure. The deficient submission will be served on the other side. The mere fact that it is deficient or the mere fact that it is going to have a deficiency notice does not stop it from being served. The other side will have notice of it. If it does not contain a certificate of service, there is the prospect that it will not be served, and the other side may not know about it, which is why the recommendation is to leave that as a ground for striking. However, it is the only one.

The Chair commented that the other aspect of the changes to the Rules is that, because the "File and Serve" component of MDEC does not communicate with "Odyssey," another component of MDEC, Odyssey does not know what the clerk is doing when he or she strikes a submission before the submission reaches Odyssey. The goal is to provide that when the clerk does strike for failure of the submission to contain a certificate of service, the clerk will docket the filing and docket the striking, and, as a result, Odyssey will contain a record that this has happened. This provides transparency in a situation where there

is no transparency now. That is the purpose of the change to Rule 20-203.

Ms. Lindsey expressed her preference for the changes to the two Rules, because they provide more clarity. Senator Cassilly referred to the new language in subsection (b)(1) of Rule 20-103, which reads: "the policies and procedures may include…". This sounds as if the policies and procedures may be optional. He suggested that the language should be "[t]he policies and procedures should consist only of: …". The Chair responded that there is a Policies and Procedures Manual. It has other material in it as well. Senator Cassilly suggested that the wording could be "the policies and procedures may be supplemented by or with…". The Chair said that could work. Senator Cassilly said that the way he reads subsection (b)(1) the policies and procedures are defined as the items listed in subsection (b)(1). The Chair asked if Senator Cassilly preferred the language "may be supplemented by or with." Senator Cassilly moved to add that language to subsection (b)(1). The motion was seconded, and it passed on a majority vote.

Judge Morrissey commented that if the Court of Appeals approves these Rules, notification will be sent to all the attorneys with a "best practice" tip, noting what the

deficiencies are, so that the attorneys can check their pleadings to ensure that they were done properly.

By consensus, the Committee approved Rule 20-103 as amended and Rule 20-203 as presented.

Agenda Item 8. Consideration of proposed amendments to Rule 1-333 (Court Interpreters) and Appendix: Court Interpreter Inquiry Questions

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The Chair presented Rule 1-333, Court Interpreters, and Appendix: Court Interpreter Inquiry Questions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

AMEND Rule 1-333 by deleting the language "eligible for certification" and adding the word "eligible" before the word "interpreter"; by substituting the word "non-registry" for the word "non-certified" and by deleting language referring to interpreters who are "certified" or "eligible for certification"; in subsection (a)(5), by adding language referring to an interpreter who has not completed the Maryland Judiciary's Orientation Program and is not listed on the Court Interpreter Registry; in subsection (a)(7), by adding a new definition of the term "registry"; in subsection (c)(1), by adding the language "Registry interpreter" and the word "not"; in subsection (c)(2)(A), by adding the language "except as provided in subsection (2)(B)," by changing the word "shall" to the word "may," and by adding language referring to the interpreter's skills and qualifications, to any potential conflicts

or other ethical issues, and to the court permitting parties to participate in the inquiry; by adding a subsection (c)(2)(B) allowing the court to dispense with any inquiry if the interpreter is a court-employed staff interpreter; in the Committee note after subsection (c)(2)(B), by deleting the reference to the inquiry questions promulgated by the Maryland Judicial Conference Advisory Committee on Interpreters and to publication of the inquiry questions in a certain Report and by adding the word "included"; by adding a tagline to subsection (c)(3)(A); in subsection (c)(3)(A), by deleting language referring to appointment by the court and to swearing or affirming under the penalty of perjury and substituting the language "take an oath"; in subsection (c)(3)(A), by deleting the reference to subscribing an oath; and by adding a new subsection (c)(3)(B) and a Committee note following it pertaining to court-employed staff interpreters, as follows:

Rule 1-333. COURT INTERPRETERS

(a) Definitions

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

. . .

(4) Eligible Interpreter ~~Eligible for Certification~~

"Eligible Interpreter ~~eligible for certification~~" means an interpreter who is not a certified interpreter but who:

(A) has submitted to the Maryland Administrative Office of the Courts a completed Maryland State Judiciary

Information Form for Spoken and Sign Language Court Interpreters and a statement swearing or affirming compliance with the Maryland Code of Conduct for Court Interpreters;

(B) has successfully completed the Maryland Judiciary's orientation workshop on court interpreting; and

(C) does not have, in a state or federal court of record, a pending criminal charge or conviction on a charge punishable by a fine of more than $500 or imprisonment for more than six months unless the interpreter has been pardoned or the conviction has been overturned or expunged in accordance with law.

(5) ~~Non-certified~~ Non-Registry Interpreters

"~~Non-certified~~ Non-registry interpreter" means an interpreter ~~other than a certified interpreter or an interpreter eligible for certification~~ who has not completed the Maryland Judiciary's Orientation Program and is not listed on the Court Interpreter Registry.

(6) Proceeding

"Proceeding" means (A) any trial, hearing, argument on appeal, or other matter held in open court in an action, and (B) an event not conducted in open court that is in connection with an action and is in a category of events for which the court is required by Administrative Order of the Chief Judge of the Court of Appeals to provide an interpreter for an individual who needs an interpreter.

(7) Registry

"Registry" means the Court Interpreter Registry, a listing of certified

or eligible interpreters who have qualified for assignments under the Maryland Court Interpreter Program.

~~(7)~~ (8) Victim

"Victim" includes a victim's representative as defined in Code, Criminal Procedure Article, §11-104.

. . .

(c) Selection and Appointment of Interpreters

(1) Certified Interpreter Required; Exceptions

When the court determines that an interpreter is needed, the court shall make a diligent effort to obtain the services of a certified interpreter. If a certified interpreter is not available, the court shall make a diligent effort to obtain the services of an eligible interpreter ~~eligible for certification~~. The court may appoint a ~~non-certified~~ non-Registry interpreter only if ~~neither a certified interpreter nor an interpreter eligible for certification~~ a Registry interpreter is not available. An individual related by blood or marriage to a party or to the individual who needs an interpreter may not act as an interpreter.

Committee note: The court should be cautious about appointing a ~~non-certified~~ non-Registry interpreter and should consider carefully the seriousness of the case and the availability of resources before doing so.

(2) Inquiry of Prospective Interpreter

(A) Except as provided in subsection (2)(B), ~~Before~~ before appointing an interpreter under this Rule, the court shall conduct an appropriate inquiry of the prospective interpreter on the record with

respect to the interpreter's skills and qualifications and any potential conflicts or other ethical issues. The court may permit the parties to participate in that inquiry.

(B) If the interpreter is a court-employed staff interpreter, the court may dispense with any inquiry regarding the interpreter's skills and qualifications.

Committee note: The court should use the Court Interpreter Inquiry Questions ~~promulgated by the Maryland Judicial Conference Advisory Committee on Interpreters and published, together with suggested responses, in the October 20, 1998 Report of the Advisory Committee. The questions and suggested responses are reprinted~~ included as an Appendix to these Rules.

(3) Oath

(A) Generally

~~Upon appointment by the court and before~~ Before acting as an interpreter in ~~the~~ a proceeding, ~~the~~ an interpreter shall ~~swear or affirm under the penalties of perjury~~ take an oath to interpret accurately, completely, and impartially and to refrain from knowingly disclosing confidential or privileged information obtained while serving in the proceeding. If the interpreter is to serve in a grand jury proceeding, the interpreter also shall take ~~and subscribe~~ an oath that the interpreter will keep secret all matters and things occurring before the grand jury.

(B) Court-employed Staff Interpreters

Upon employment, a court-employed staff interpreter shall make the prescribed oaths in writing and file them with the clerk of each court in which the interpreter

shall serve and with the Administrative Office of the Courts. The oath shall be applicable to all proceedings in which the interpreter is called to serve and need not be repeated on each occasion.

Committee note: Court-employed staff interpreters often are in and out of court, substituting for other court-employed staff interpreters, and the need for an oath may be overlooked. The intent of subsection (c)(3)(B) is to assure that each applicable prescribed oath has been made.

Rule 1-333 was accompanied by the following Reporter's note.

REPORTER'S NOTE

The Court Access and Community Relations Committee of the Maryland Judicial Council reviewed Rule 1-333 to evaluate whether additional changes are necessary to address whether and when a trial court is to administer an oath to court interpreters. This matter was discussed by the Language Access Subcommittee and the full Court Access and Community Relations Committee. The Committee recommends that the court continue to administer the interpreter's oath at the commencement of court proceedings but provides an exception for staff interpreters who will record an oath with the Maryland Administrative Office of the Courts. The Committee's recommended changes are shown in the revised version of Rule 1-333.

In previous versions of Rule 1-333, two kinds of interpreters were referred to - "certified interpreters" and "interpreters eligible for certification." The Court Access and Community Relations Committee has removed the designation of "interpreter eligible for certification" and replaced it with the term "eligible interpreter." The

important designations are "certified interpreters," "eligible interpreters," "non-Registry interpreters," and "Registry interpreters." These are defined in section (a). Eligible interpreters are not certified, but they have submitted to the Administrative Office of the Courts an information form and have completed the Judiciary's orientation workshop on court interpreting. They also do not have certain criminal charges pending against them. The Court Access and Community Relations Committee has added the term "Registry," which is the Court Interpreter Registry consisting of certified or eligible interpreters who have qualified for assignments under the Maryland Court Interpreter Program. These interpreters went through the appropriate training. In place of the term "non-certified interpreter," the Committee has substituted the term "non-Registry interpreter." Non-Registry interpreters are usually obtained from other agencies.

In subsection (c)(2), the Court Access and Community Relations Committee added language providing that the court may dispense with any inquiry regarding an interpreter's skills and qualifications if the interpreter is a court-employed staff interpreter. This will streamline the inquiry process. In the Committee note after subsection (c)(2), the Committee directed the court to use the Court Interpreter Inquiry Questions that are included in an Appendix to the Rules.

The General Court Administration Subcommittee approved the proposed changes to Rule 1-333.

APPENDIX: COURT INTERPRETER INQUIRY QUESTIONS

DELETE the current Appendix: Court Interpreter Inquiry Questions and add the new Appendix: Court Interpreter Inquiry Questions, as follows:

Court Interpreters Inquiry Questions

All spoken and sign language interpreters appointed by the court may be asked the following questions at the beginning of the hearing:

(a) State your full name.

(b) Are you listed on the Maryland Court Interpreter Registry?

(c) Do you have any potential conflicts of interest in this case?

(d) Did you have an opportunity to speak with the person for whom interpreter services are to be provided before the hearing today to make sure you understand each other?

(e) Do you anticipate any difficulties in communicating with that person?

Interpreters who are listed on the Maryland Court Interpreter Registry, regardless of whether they are eligible or certified, have been trained and qualified for service, and need not be voir dired other than to establish their status on the Registry. The following questions may be used when an interpreter who is not listed on the Registry has been assigned to serve in a court proceeding. This may include interpreters provided through an approved

agency. Agency interpreters may not have received training on interpreting in a legal setting. The court may also want to voir dire interpreters who are listed on the Registry if the court is concerned about the interpreter's skills or ability or has a concern about ethical issues.

These questions are intended to elicit from a prospective interpreter, whether sign or spoken, the information that the Court needs to determine whether an individual is a competent court interpreter and whether the individual is the appropriate interpreter for the particular case.

(1) Where are you employed currently?

(The Court needs to determine whether there is any potential conflict due to full- or part-time employment of an interpreter or assignments as an independent contractor.)

(2) How long have you known [sign/spoken] language?

(Research indicates that it takes between 6 to 10 years of language study before an individual has the language skills necessary to learn the interpreting process in his or her second language.)

(3) Where did you learn [sign/spoken language]?

(A mix of formal and informal language training is an asset. For a second language, 6 to 10 years' use should be expected.)

(4) Can you communicate fluently in [sign/spoken language]?

(5) What is your educational background?

(Formal education may vary dramatically among interpreters, depending on their cultural heritage, but the Court should

realize the complexity of interpreting. For this reason, the Court is urged not to accept an interpreter on the basis of a voir dire examination unless the interpreter has at least a high school education or its cultural equivalent.)

(6) What formal interpreter training have you undertaken?

(7) Are you certified? By whom? What is your certification called? (For ASL interpreters, ask whether they are certified by the Registry of Interpreters for the Deaf (RID) or by the National Association of the Deaf (NAD)).

(8) Have you spent time in a country where the spoken language is used?

(9) Are you active in any professional organization?

(10) How many times have you interpreted in court and in what kinds of situations?

(11) What process would you use to inform the Court of an error in your interpretation?

(12) Do you have, in a state or federal court of record, a pending criminal charge or criminal conviction on a charge punishable by a fine of more than $500 or imprisonment for more than 6 months for which you have not been pardoned or for which the charge or conviction has not been expunged?

Appendix: Court Interpreter Inquiry Questions, was accompanied by the following Reporter's note.

REPORTER'S NOTE

> Currently reprinted as an Appendix in the Rules of Procedure are Interpreter Voir Dire questions, together with explanations of responses to those questions, that were in the October 20, 1998 Report of the Maryland Judicial Conference Advisory Committee on Interpreters and were adapted from the 1981 Legal Interpreting Workshop of the William Mitchell School of Law (St. Paul, Minnesota). After the authors revised them in 1986, the Maryland Judicial Conference's Task Force on Interpreters revised them further in 1994. In May 1997, the Subcommittee on Court Interpreter Fees, Qualification Standards, and Usage, which was a part of the Advisory Committee on Interpreters, revised the Interpreter Voir Dire Questions.
>
> In March 2018, the Court Access and Community Relations Committee of the Judicial Council submitted a substantially streamlined revision of the Court Interpreter Inquiry Questions, which the General Court Administration Subcommittee approved. If the revised Questions are approved by the Rules Committee and adopted by the Court of Appeals, they will be placed in an Appendix to the Rules.

The Chair said that this emanated from a proposal by the Judicial Council. The Honorable Pamela White, of the Circuit Court for Baltimore City, chaired the Court Access and Community Relations Committee of the Judicial Council that worked on this.

Judge White told the Committee that the source of the request for the amended Rule and the revised Court Interpreter Inquiry Questions was the Judiciary's Committee on Court Access. The genesis of the revision is the remarkable work of the Access

to Justice Language Access group and its Subcommittee. The registry of interpreters for court proceedings throughout the State contains interpreters for 74 different languages. This speaks to the experience of Pamela Ortiz, Esq., Director of the Access to Justice Department of the Administrative Office of the Courts, and her co-workers.

Ms. Ortiz remarked that the Language Access Subcommittee looked at the current version of the Court Interpreters' Voir Dire questions, which are the questions that the judges are required to ask of interpreters, to make certain they are skilled enough to interpret. This is not the current practice.

The Maryland Court Interpreter Registry program is a strong program. Ms. Ortiz's staff works with interpreters to qualify them and make sure that they are eligible to serve and then tests them to ensure that they are skilled enough to be placed on the Court Interpreters Registry. Interpreters who so choose may sit for certification exams for which they will earn a higher rate of pay if they pass the exam. Interpreters on the Registry now are classified as "qualified" and "certified." When a Registry Interpreter comes to a judge's courtroom, it is not necessary for the judge to ask 35 questions of the interpreter. This is too time-consuming. The Subcommittee has recommended a streamlined set of questions to clarify whether the interpreter has a conflict, whether he or she is capable of

being an interpreter, and whether he or she is listed on the Registry. A lengthier set of questions is available in the revised voir dire for those who are non-registry interpreters.

Ms. Ortiz said that although many people are on the Registry, there are times when an interpreter is needed for languages that are not spoken by the registry interpreters. The court may have to get an interpreter from an agency, and this may be the time when the court may prefer to qualify the interpreter. The Subcommittee has recommended streamlining the Rule and simplifying the Interpreter Voir Dire questions.

Ms. Ortiz commented that during the discussion of this topic by the General Court Administration Subcommittee, a question arose as to the timing of taking the oath that is required of interpreters. New subsection (c)(3)(B) of Rule 1-333 addresses this issue. There are 21 staff interpreters who are court employees. They are all Spanish speakers who are located in the courthouses. Subsection (c)(3)(B) provides that they can take their oath when they are employed, and it is not necessary for them to be resworn each time they act as an interpreter for a court proceeding.

Ms. Ortiz requested one stylistic change. Her office has been working with the Judiciary Internal Affairs Department and legal counsel on a revised handbook for interpreters. This will include an acknowledgment that the interpreters will sign, so

that the court will have some assurance that the interpreters will follow the policies set out in the handbook. Ms. Ortiz and her colleagues determined that it would be better to use the term "qualified," rather than "eligible."

The Chair asked where those changes would be made. Ms. Ortiz replied that this change would be made three or four places in Rule 1-333. It does not change the structure of the Rule. The Chair inquired whether anyone had an objection to this change. No one had an objection.

There being no comments, by consensus, the Committee approved Rule 1-333 and Appendix: Court Interpreter Inquiry Questions as amended.

Agenda Item 9. Consideration of proposed new Rule 16-807 (Appointment, Compensation, Duties of Magistrates), Rule 16-808 (Appointment, Compensation, Duties of Examiners), Rule 16-809 (Appointment, Compensation, Duties of Auditors, and proposed amendments to Rule 2-541 (Magistrates), Rule 2-542 (Examiners), Rule 2-543 (Auditors) and Rule 9-208 (Referral of Matters to Standing Magistrates)

The Chair presented new Rules 16-807, Appointment, Compensation, Duties of Magistrates; 16-808, Appointment, Compensation, Duties of Examiners; and 16-809, Appointment, Compensation, and Duties of Auditors as well as Rules 2-541, Magistrates; 2-542, Examiners; 2-543, Auditors; and 9-208, Referral of Matters to Standing Magistrates, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 – COURT ADMINISTRATION

CHAPTER 800 – MISCELLANEOUS COURT ADMINISTRATION MATTERS

ADD new Rule 16-807, as follows:

Rule 16-807. APPOINTMENT, COMPENSATION, DUTIES OF MAGISTRATES

(a) Standing Magistrates

(1) Application of Section

Section (a) of this Rule applies to standing magistrates identified as such by the State Court Administrator.

Cross reference: See Code, Courts Article, §2-501(e)(2), directing that the Administrative Office of the Courts shall identify the standing circuit court magistrates.

(2) Appointment; Compensation

A majority of the judges of the circuit court of a county may appoint full-time and part-time standing magistrates, provided that there is included in the State budget for the Judicial Branch an appropriation of an amount necessary to pay the salary and benefits of each magistrate. The salary and benefits of a standing magistrate may not be assessed as costs against a party to an action.

Cross reference: See Code, Courts Article, §2-501(e)(1) and (5), requiring that a standing circuit court magistrate hired on or after July 1, 2002, be a State employee and that the salary and benefits of the magistrate be included in the State budget.

Magistrates who were in office at the time were given the option to remain as county employees, and some did so.

(3) Duties; Procedures

The duties of a standing magistrate and the procedures relating to matters referred to a standing magistrate shall be as set forth in the Maryland Rules or by other State law.

Cross reference: See Rules 2-541 and 11-111.

Committee note: Magistrates have authority only over matters properly referred to them by the court. Their function is to conduct a hearing (unless one is waived), take evidence, and, based on the evidence, file a report with the court containing proposed findings of fact, conclusions of law, and a recommended disposition of the matter referred.

(b) Special Magistrates

(1) Appointment; Compensation

The circuit court of a county may appoint a special magistrate for a particular action, except proceedings on matters referable to a standing magistrate under Rule 9-208 or Rule 11-111. Unless the compensation of a special magistrate is paid with public funds, the court (A) shall prescribe the compensation of the special magistrate, (B) may tax the compensation as costs, and (C) may assess the costs among the parties.

Cross reference: See Code, Courts Article, § 2-102(b)(4) and (c)and § 2-501(b).

(2) Duties

The order of appointment of a special magistrate shall specify the powers

and duties of the magistrate and may contain special directions. Those powers, duties, and directions shall be consistent with the traditional function of magistrates.

Cross reference: See Committee note to subsection (a)(3) of this Rule.

(c) Officer of the Court; Tenure

A magistrate is an officer of the court in which the referred action is pending and serves at the pleasure of the court.

(d) Transcript

The costs of any transcript required to be prepared in connection with the referral of a matter to a magistrate may be included in the costs of the action and assessed among the parties as the court may direct.

Rule 16-807 was accompanied by the following Reporter's note.

REPORTER'S NOTE

New Rules 16-807, 16-808, and 16-809 are proposed. They include provisions relating to the appointment and compensation of magistrates, examiners, and auditors that have been transferred, with amendments, from Rules 2-541, 2-542, and 2-543, in part because the provisions relate to court administration. In addition, many magistrates handle not just domestic or general civil cases but juvenile cases as well.

TITLE 16 – COURT ADMINISTRATION

CHAPTER 800 – MISCELLANEOUS COURT ADMINISTRATION MATTERS

ADD new Rule 16-808, as follows:

Rule 16-808. APPOINTMENT, COMPENSATION, DUTIES OF EXAMINERS

(a) Standing Examiners

(1) Appointment; Compensation

A majority of the judges of the circuit court of a county may appoint [full-time and part-time] standing examiners. The compensation of an examiner who is an employee of the court shall be as determined in the appropriate budget and may not be assessed as costs against a party to an action. Otherwise, the court shall prescribe the compensation, fees, and costs of the examiner and may assess them among the parties.

Cross reference: See Code, Courts Article, §2-501 (b)(1) requiring that each employee of a circuit court, including examiners, is entitled to compensation "as provided in the appropriate budget."

(2) Duties

The duties of a standing examiner shall be as set forth in the Maryland Rules or by other State law.
Cross reference: See Rule 2-542.

Committee note: Examiners have authority only over matters properly referred to them by the court. Their function is solely to take testimony and report that testimony to the court. Unlike magistrates, they do not

make proposed findings of fact or conclusions of law and do not recommend a disposition of the matter referred. See *Nnoli v. Nnoli*, 101 Md. App. 243, 261, n.5 (1994)

(b) Special Examiners

(1) Appointment; Compensation

The circuit court of a county may appoint a special examiner to take testimony in a particular action. Unless the compensation of a special examiner is paid with public funds, the court (A) shall prescribe the compensation of the special examiner, (B) may tax the compensation as costs, and (C) may assess the costs among the parties.

(2) Powers and Duties

The order of appointment of a special examiner shall specify the powers and duties of the special examiner and may contain special directions. Those powers, duties, and directions shall be consistent with and limited to the traditional role of examiners.

Cross reference: See the Committee note to subsection (a)(2) of this Rule.

(c) Officer of the Court; Tenure

An examiner is an officer of the court in which the referred action is pending and serves at the pleasure of the court.

(d) Transcript

The cost of any transcript required to be prepared in connection with the referral of a matter to an examiner may be included in the costs of the action and assessed among the parties as the court may direct.

Rule 16-808 was accompanied by the following Reporter's note.

REPORTER'S NOTE

See Reporter's Note to Rule 16-807.

MARYLAND RULES OF PROCEDURE

TITLE 16 – COURT ADMINISTRATION

CHAPTER 800 – MISCELLANEOUS COURT ADMINISTRATION MATTERS

ADD new Rule 16-809, as follows:

Rule 16-809. APPOINTMENT, COMPENSATION, DUTIES OF AUDITORS

(a) Standing Auditors

(1) Appointment; Compensation

A majority of the judges of the circuit court of a county may appoint standing auditors. The compensation of an auditor who is an employee of the court shall be as determined in the appropriate budget and may not be assessed as costs against a party to the action. Otherwise, subject to Code, Courts Article, § 2-102 (b)(1), the court shall prescribe the compensation, fees, and costs of the auditor and may assess them among the parties.

Cross references: Code, Courts Article, § 2-501(b)(1) provides that each employee of a circuit court, including auditors, is entitled to compensation as provided in the

appropriate budget.

(2) Duties

The duties of a standing auditor and the procedures relating to matters referred to a standing auditor shall be as set forth in the Maryland Rules or by other State law. Cross reference: See Rules 2-543, 13-502, 14-305.

Committee note: Auditors have been described as "the calculator and accountant of the court, and when any calculations or statements are required, all the pleadings, exhibits and proofs are referred to him [or her], so that he [or she] be enabled to investigate and put the whole matter in proper order, for the action of the court." *German Luth. Church v. Heise*, 44 Md. 453, 64-65 (1876).

Cross reference: Section 2-102 (b) provides that a special auditor is entitled to reasonable compensation as set by the court but not less than $15 for stating an account and that the fee may be taxed as costs or paid by the county.

(b) Special Auditor

(1) Appointment; Compensation

The circuit court of a county may appoint a special auditor for a particular action. Unless the special auditor is paid with public funds, the court shall prescribe the compensation, fees, and costs of the auditor and assess them against the parties.

(2) Powers and Duties

The order of appointment may specify or limit the powers of a special auditor and may contain special directions. Those powers shall be consistent with the traditional role of auditors.

Cross reference: See the Committee Note to subsection (a)(2) of this Rule.

(c) Officer of the Court; Tenure

An auditor is an officer of the court in which the referred action is pending and serves at the pleasure of the court.

(d) Transcript

The cost of any transcript required to be prepared in connection with the referral of a matter to an auditor may be included in the costs of the action and assessed among the parties as the court may direct.

Rule 16-809 was accompanied by the following Reporter's note.

REPORTER'S NOTE

See Reporter's Note to Rule 16-807.

MARYLAND RULES OF PROCEDURE

TITLE 2 – CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 500 – TRIAL

AMEND Rule 2-541 to delete provisions relating to the appointment, compensation, fees, and costs of magistrates that have been transferred to Rule 16-807, as follows:

Rule 2-541. MAGISTRATES

(a) Appointment – Compensation

~~(1) Standing Magistrate~~

~~A majority of the judges of the circuit court of a county may appoint a full time or part time standing magistrate and shall prescribe the compensation, fees, and costs of the magistrate.~~

~~(2) Special Magistrate~~

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

~~(3) Officer of the Court~~

~~A magistrate serves at the pleasure of the appointing court and is an officer of the court in which the referred matter is pending.~~

The appointment and compensation of standing and special magistrates shall be governed by Rule 16-807.

. . .

~~(i) Costs~~

~~Payment of the compensation, fees, and costs of a magistrate, to the extent not covered by State or county funds, may be compelled by order of court. The costs of any transcript may be included in the costs of the action and assessed among the parties as the court may direct.~~

Rule 2-541 was accompanied by the following Reporter's note.

REPORTER'S NOTE

The provisions relating to the appointment and compensation of magistrates have been transferred, with amendments, to Rule 16-807, in part because they relate to court administration and in part because many of the magistrates handle not just domestic or general civil cases but juvenile cases as well.

Provisions relating to the appointment and compensation of examiners and auditors currently in Rules 2-542 and 2-543 are transferred to Rules 16-808 and 16-809, respectively.

MARYLAND RULES OF PROCEDURE

TITLE 2 – CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 500 – TRIAL

AMEND Rule 2-542 to delete provisions relating to the appointment, compensation, fees, and costs of examiners that have been transferred to Rule 16-808; to prohibit referral to an examiner of a matter referable to a standing magistrate under Rule 9-208; and to make stylistic changes as follows:

Rule 2-542. EXAMINERS

(a) Appointment – Compensation

~~(1) Standing Examiner~~

~~A majority of the judges of the circuit court of a county may appoint a~~

~~standing examiner and shall prescribe the compensation, fees, and costs of the examiner.~~

~~(2) Special Examiner~~

~~The court may appoint a special examiner for a particular action and shall prescribe the compensation, fees, and costs of the special examiner and assess them among the parties. The order of appointment may specify or limit the powers of a special examiner and may contain special directions.~~

~~(3) Officer of the Court~~

~~An examiner serves at the pleasure of the appointing court and is an officer of the court in which the referred matter is pending.~~

The appointment and compensation of examiners shall be governed by Rule 16-808.

(b) Referral by Order

On motion of any party or on its own initiative, the court may refer to an examiner, for the purpose of taking ~~of~~ evidence~~, issues~~ in proceedings held in execution of judgment pursuant to Rule 2-633 and in uncontested proceedings ~~not~~ other than proceedings triable of right before a jury or referable to a standing magistrate under Rule 9-208 ~~and proceedings held in aid of execution of judgment pursuant to Rule 2-633~~. The order of reference may prescribe the manner in which the examination is to be conducted and may set time limits for the completion of the taking of evidence and the submission of the record of the examination.

. . .

~~(i) Costs~~

~~Payment of the compensation, fees, and costs of an examiner~~, to the extent not ~~covered by State or county funds,~~ ~~may be compelled by order of court. The costs of the transcript may be included in the costs of the action and assessed among the parties as the court may direct.~~

Rule 2-542 was accompanied by the following Reporter's note.

REPORTER'S NOTE

See Reporter's Note to Rule 2-541.

Section (b) is restyled and a provision is added prohibiting referral of any matter that is referable to a standing magistrate under Rule 9-208.

MARYLAND RULES OF PROCEDURE

TITLE 2 – CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 500 – TRIAL

AMEND Rule 2-543 to delete provisions relating to the appointment, compensation, fees, and costs of auditors that have been transferred to Rule 16-809, as follows:

Rule 2-543. AUDITORS

(a) Appointment – Compensation

~~(1) Standing Auditor~~

~~A majority of the judges of the circuit court of a county may appoint a standing auditor and shall prescribe the compensation, fees, and costs of the auditor.~~

~~(2) Special Auditor~~

~~The court may appoint a special auditor for a particular action and shall prescribe the compensation, fees, and costs of the special auditor and assess them among the parties. The order of appointment may specify or limit the powers of a special auditor and may contain special directions.~~

~~(3) Officer of the Court~~

~~An auditor serves at the pleasure of the appointing court and is an officer of the court in which the referred matter is pending.~~

The appointment and compensation of auditors shall be governed by Rule 16-809.

. . .

~~(i) Costs~~

~~Payment of the compensation, fees, and costs of an auditor may be compelled by order of court. The costs of any transcript may be included in the costs of the action and assessed among the parties as the court may direct.~~

Rule 2-543 was accompanied by the following Reporter's note.

REPORTER'S NOTE

See Reporter's Note to Rule 2-541.

MARYLAND RULES OF PROCEDURE

TITLE 9 – FAMILY LAW ACTIONS

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

AMEND Rule 9-208 by adding the word "standing" to subsection (a)(1), by adding language to subsection (a)(1) to clarify that the court may direct that a matter be heard by a judge, by correcting an internal reference in the Committee note following subsection (a)(1) and adding clarifying language to the Committee note, by deleting section (j) and the Committee note following section (j), as follows:

Rule 9-208. REFERRAL OF MATTERS TO STANDING MAGISTRATES

(a) Referral

(1) As of Course

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

(A) uncontested divorce, annulment, or alimony;

(B) alimony pendente lite;

(C) child support pendente lite;

(D) support of dependents;

(E) preliminary or pendente lite possession or use of the family home or family-use personal property;

(F) subject to Rule 9-205, pendente lite custody of or visitation with children or modification of an existing order or judgment as to custody or visitation;

(G) subject to Rule 9-205 as to child access disputes, constructive civil contempt by reason of noncompliance with an order or judgment relating to custody of or visitation with a minor child, the payment of alimony or support, or the possession or use of the family home or family-use personal property, following service of a show cause order upon the person alleged to be in contempt;

(H) modification of an existing order or judgment as to the payment of alimony or support or as to the possession or use of the family home or family-use personal property;

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

(J) stay of an earnings withholding order; and

(K) such other matters arising under this Chapter and set forth in the court's case management plan filed pursuant to Rule 16-302 (b).

Cross reference: See Rule 16-807.

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

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

(2) By Order on Agreement of the Parties

By agreement of the parties, any other matter or issue arising under this Chapter may be referred to the magistrate by order of the court.

. . .

~~(j) Costs~~

~~The court, by order, may assess among the parties the compensation, fees, and costs of the magistrate and of any transcript.~~

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

Cross reference: See, Code, Family Law Article, §10-131, prescribing certain time limits when a stay of an earnings withholding order is requested.

Source: This Rule is derived in part from Rule 2-541 and former Rule S74A and is in part new.

Rule 9-208 was accompanied by the following Reporter's note.

REPORTER'S NOTE

Proposed amendments to subsection (a)(1) of Rule 9-208 clarify that a matter ordinarily referable to a standing magistrate may, in a specific case, be heard

by a judge. The Rule does not authorize referral to a special magistrate, as new Rule 16-807(b)(1) expressly prohibits the appointment of a special magistrate for such matters.

The delineation between standing magistrates and special magistrates reflects respective funding sources: the salary and benefits of a standing magistrate are paid by the Judiciary through the State and may not be assessed as costs against a party to an action; compensation of a special magistrate may be taxed as costs and may be assessed against the parties. Thus, parties might be assessed costs if a matter is referred to a special magistrate, but parties could not be assessed costs if the same matter is instead referred to a standing magistrate.

Proposed amendments also correct and clarify the Committee note following subsection (a)(1) by changing an internal reference from "subsection (a)(1)(J)" to "subsection (a)(1)(K)" and adding the word "uncontested" to the description of matters listed in subsection (a)(1)(A).

The amendments also delete section (j) and the Committee note following section (j). Provisions pertaining to the assessment among the parties of the compensation, fees, and costs of a standing magistrate are deleted in their entirety. The substance of the other deletions is transferred to new Rule 16-807.

The Chair explained that these Rules had been considered by the Rules Committee at the meetings in November 2017 and January 2018. The overall purpose of the proposals is (1) to make clear the different roles of magistrates and examiners and (2) to stop

the practice of permitting circuit courts to allow litigants to obtain expedited treatment in domestic cases by referring those cases to private attorneys appointed as examiners who are charging fees of up to $200 per case plus the cost of transcripts to the litigants.

The General Court Administration Subcommittee and then the Rules Committee heard rather extensive presentations from interested persons on both sides of the issue. Judges, examiners, and court administrators appeared and made presentations. In the end, the Committee approved the proposed Rules changes with some amendments.

The Chair said that it turned out that the problem was broader than first thought. One court was appointing private attorneys as special magistrates to handle settlement conferences that could have been conducted under the Alternative Dispute Resolution ("ADR") Rules. The ADR Rules have limits on what court-appointed ADR practitioners can charge and how many sessions can be required. Other courts were referring cases to special magistrates that were referable under the Rules to standing magistrates. The difference is that standing magistrates are court employees who are paid by the State or by the county. As court employees, they are not permitted to charge fees. Both of these approaches, at least to some extent, were regarded as end runs around what the changes to the Rules

that were considered in November and January were trying to achieve. The proposals in Item 9 are intended to rein that in. Most of what is before the Committee today already has been approved. It is important to concentrate on the changes, but it is all before the Committee.

The Chair noted that the first change made was to strip out of Rule 2-541, which pertains to magistrates, Rule 2-542, which pertains to examiners, and Rule 2-543, which pertains to auditors, all of the provisions addressing the appointment of these officials. That is a matter of court administration, and Rules relating to the appointment of these officials seem to belong in Title 16.

Rule 16-807 pertains to the appointment of magistrates. The first change is the addition of a Committee note after subsection (a)(3) that explains the traditional role of magistrates. They are the officials who hold hearings and make proposed findings of fact and proposed conclusions of law and who recommend an actual disposition to the court. This is what masters did before their title was changed to "magistrate." The Committee note was added to make clear the role of the magistrate. Their job goes beyond only recording testimony.

The Chair pointed out that the second change is the "except" clause in the second and third lines of subsection (b)(1) that addresses special magistrates. Code, Courts Article,

§§ 2-102 (b)(4) and (c), permits a circuit court to appoint a special magistrate for a particular action. The Rules change excepts proceedings on matters referable to a standing magistrate under Rule 9-208. This is intended to preclude the end run of sending to a special magistrate, whose fees can be assessed against the parties, those matters that are referable to a standing magistrate, whose fees are not charged to the parties.

The Chair said that a third change to Rule 16-807 is in subsection (b)(2) addressing the duties of special magistrates. It reads as follows: "Those powers, duties, and directions shall be consistent with the traditional function of magistrates."

Ms. Faulkner told the Committee that she is the Director of Court Operations for Anne Arundel County. She referred to section (b) of Rule 16-807, particularly as to attorneys who are employees of the court. Anne Arundel County has special magistrates who are court employees. They handle scheduling conferences, for which the parties do not have to pay. Ms. Faulkner wanted to make sure that those special magistrates will continue to be able to hear uncontested matters. The Chair cautioned that the parties cannot be charged for this. Ms. Faulkner reiterated that no fee is charged to the parties.

By consensus, the Committee approved Rule 16-807 as presented.

The Chair told the Committee that Rule 16-808 pertains to examiners. The Committee note after subsection (a)(2) explains what the traditional role of an examiner is. This is not a new concept. The role of examiner goes back centuries both in England and in Maryland. The role of examiner has been merged in some instances with that of a magistrate, and the goal is to try to separate them. The second sentence of subsection (b)(2) adds that the powers, duties, and directions of the special examiner shall be consistent with and limited to the traditional role of examiners. Examiners cannot be appointed for purposes beyond their limited role.

By consensus, the Committee approved Rule 16-808 as presented.

The Chair said that Rule 16-809 deals with auditors. There is no change from what currently is in Rule 5-243. The role of the auditor has not been an issue. Auditors have a specific function, and they are limited to that.

By consensus, the Committee approved Rule 16-809 as presented.

The Chair remarked that conforming amendments have been made in Rules 2-541, 2-542, and 2-543. The language in those Rules relating to the appointment of magistrates, examiners, and auditors has been moved to the Title 16 Rules.

By consensus, the Committee approved the changes to Rules 2-541, 2-542, and 2-543 as presented.

The Chair commented that the amendments to Rule 9-208, a domestic relations Rule, are conforming. Matters that are referable to a standing magistrate cannot be sent to an examiner.

Mr. Laws referred to section (a) of Rule 9-208 which provides that the court shall refer a domestic relations matter to a standing magistrate. Mr. Laws asked whether an uncontested divorce case can be referred to a standing examiner, or whether this change means that an uncontested divorce must go to a standing magistrate. The Chair responded that domestic relations cases go to a standing magistrate. The intent of the change for special magistrates is to comply with the statute. Special Magistrate's can be used for particular proceedings where fees can be charged if the magistrate is not a court employee. For example, they can be used in partition cases or general equity cases, such as receiverships. The intent of the Rules is to limit the use of special examiners and special magistrates to particular cases. Mr. Laws asked whether this means that the circuit courts cannot make widespread use of their examiners. It would be a change in policy. The Chair said that it would be a change, because those examiners are not court employees. Special examiners usually are not court

employees, and the statute and the Rule permit them to charge fees to the parties.

Mr. Laws remarked that ADR can be quite expensive, but the litigants can choose to go to mediation. He asked whether examiners will not be able to be used even in the counties that make widespread use of examiners currently. The Chair said that there is an issue with respect to examiners. They are used occasionally in enforcement of judgments. This was considered, and in the District Court, the use of examiners is very rare, because the Court does not appoint them. The matters are handled by judges. The Chair commented that he does not know whether in the circuit courts, examiners are used more frequently, but he believes that they may be. This is allowed in some particular cases. However, in domestic relations cases, uncontested cases are to be sent to magistrates.

One impact on this is new Title 2, Chapter 800, adopted by the Court of Appeals a few months ago. With the greater availability of remote electronic participation in judicial proceedings, magistrates and judges can handle matters without the parties having to come to court. Additionally, Chapter 849, Laws of 2018, (Senate Bill 96) provides that for a divorce on the grounds of mutual consent where no children are involved, the matter can be heard without both parties having to appear. If a matter can be done by remote access, these cases will be

handled much more quickly without transcript costs and without fees. The idea that examiners can hear a case at a specific time can be done now in uncontested domestic cases.

Mr. Laws commented that litigants have the option to pay for ADR in the circuit courts. Why should a similar option for parties to pay for an examiner be taken away? The Chair responded that nothing is being taken away. Litigants may pay for private arbitration under the Uniform Arbitration Act, and the court ADR Rules are still in place. They have limits, and the parties can opt out, except in child access cases. But even in those, there are limits as to what the mediator can charge and limits on the number of sessions required. If the circumvention of the Rules for the examiners is allowed, those limits do not apply.

Senator Cassilly observed that this is mostly used in domestic relations cases. With the volume of cases, he asked what the practical ramifications would be of taking away the option of using an examiner. Is this used widely? The Chair answered that it is being used mostly in Anne Arundel County, but not exclusively. Some of the circuit courts have stopped doing this, but there are some that do.

Ms. Krask said that she is an examiner in Frederick County. Many counties have examiners. The Chair pointed out that statistics were available at the last meeting from a survey that

was done through 2016 indicating that most counties do not have examiners doing uncontested divorce cases, and in those that still do, very few cases are referred. Five or six counties refer more cases to examiners, and Frederick is one. Anne Arundel refers the most. They are sending almost all uncontested domestic cases to examiners, and the cost is $200 per case. Ms. Krask remarked that she had sent in an explanatory letter about the background of using examiners. To follow up on the concerns expressed, she commented that often it only takes about a half hour to do the hearing. She said that she understands the goal of equal access, but eliminating the option of using examiners is missing the mark. A large population can be served by using examiners. In Frederick County, the magistrates hear cases involving the use of the family home and property and issues of custody and alimony. The examiners only hear less complex matters. The examiners are in private offices. If there is an error in the parties' papers, she, as an examiner, can correct it quickly.

The Chair noted that the problem is that examiners are not supposed to be doing what they are doing. An examiner is supposed to just be taking testimony. Ms. Krask responded that the reality is that if the paperwork for the case is improper or there are other problems, 75% of the parties are not represented by counsel, and the parties cannot solve these problems. There

are not enough pro bono attorneys to handle these cases. A magistrate cannot say from the bench that he or she will correct the problems with the cases. Uneducated people are at a disadvantage. They cannot do the paperwork on their own. The examiners keep the cases flowing. A magistrate in an open courtroom cannot cure the issues unrepresented parties often face. The examiners have the ability to do this. The Chair reiterated that this is not what examiners are supposed to be doing. Ms. Krask said that she could not argue that, but in her 22 years of practice, this is how it has been done.

Ms. Harris said that she is the State Court Administrator. The legislature has required that the Judiciary provide them statistics yearly. To staff magistrates, a PIN number is required for each. To get judgeships, a report is required on a number of factors, including the population of the jurisdiction and the caseloads of the current judges. The caseloads are weighted by an elaborate process which is difficult to do. The Judiciary certifies needs of judges and magistrates. In every county, the number of people examiners are seeing, who they should not be seeing, are considered part of the workload that should be handled by the Judiciary. If one county sends out 2000 cases to examiners, this takes the workload off the bench. It would mean that no judge is needed.

Ms. Krask noted that if a case is heard by a judge, it is scheduled and given a case number but it is not sent out. Ms. Harris reiterated that the cases are weighted. When that case goes to an examiner, the weight of the case is taken away. Ms. Harris added that this results in an inappropriate certification of the needs of judges and magistrates in some jurisdictions. The judges and magistrates are not doing that work.

The Chair remarked that all of this was considered by the Rules Committee earlier. The history is that about 30 to 40 years ago, some courts, particularly Baltimore City which was the first one, began having masters hear uncontested cases as well as some *pendente lite* cases. This spread throughout the State. Neither judges nor examiners were hearing the cases, but masters were. The masters were court employees. The parties were not paying for the services of the masters. It was simply a court employee other than a judge. What has changed, and it grew without any basis in law, was the use of attorneys to hear divorce cases as examiners. This also began in Baltimore City. The attorneys charged about $75 to hear the case, but they were really acting as masters. When the State took over the masters (now "magistrates"), the masters became court employees. They were the ones who were supposed to handle these cases and not charge the parties. The State was paying for most of them, but nine were left as county employees at their choice. Ms. Harris

added that the State reimburses the counties for those county employees.

The Chair said that the issue arose whether this kind of court proceeding, which was always in-house, should be outsourced to private attorneys at the parties' expense when court employees are available to do this. When this matter was discussed at a previous Committee meeting, the argument had been made that the examiners provide better service. They said that they could hear the case at the parties' leisure, and the parties are not constrained by dockets, etc. It was stated that it is a huge benefit to the parties, because they do not have to lose time from work. This justified the $200 plus the transcript cost. The Committee did not agree. The only new issue today is the other cases that are outliers, such as appointing special magistrates to hear ADR cases. This is what is before the Committee.

Senator Cassilly said that he had looked at the notes from the previous meeting on this issue. It seems to be an equal access to justice issue. Is this a matter of whether these examiners are not needed? If this is a matter of equal access to justice, he had a problem with that. If parties have to wait in line for a hearing before a magistrate, and a case is sent to the examiner, the line may have gotten shorter for the other parties. The Chair responded that it was presented somewhat in

that way. That was one of the questions to be answered. It was not the ability to have the case heard; it was the ability to get special treatment and to get the case heard more quickly. Instead of waiting several months, a party could get his or her case heard right away. The benefit to the parties of this, and the fact that costs could be waived if the parties could not afford to pay the examiner, showed better access to justice.

Senator Cassilly said that if charging for the examiners is the reason to do away with them, then the same argument could be made for ADR. If someone is willing to pay money for their case to be heard, which shortens the wait for others, why is this not a good idea? The Chair explained that there are court employees who do this, and so an outside source is not needed. Mr. Shellenberger added that the State is paying for this, and the numbers count in the statistics being kept. The Chair noted that the argument for keeping the examiners was that they are providing a better service and providing it quicker. Mr. Zollicoffer commented that he thought that the problem was that the examiners do not have the authority to hear cases. If that is the case, it does not matter whether it is equal access to justice or it is being weighted in other ways. By law, the examiners are only supposed to take testimony.

The Chair said that the problem was that in Rule 16-808, the Rule pertaining to examiners, there is the ability to refer

cases to an examiner. The Administrative Office of the Courts and the Chief Judge wanted this stopped, because it was not necessary, and the Judiciary was not buying into the notion of people being able to purchase expedition of the cases. Mr. Zollicoffer remarked that Baltimore City has expedited dockets.

The Chair reiterated that the changes from what the Committee approved in January are before the Committee.

Judge Price said that her county has examiners who take testimony in uncontested divorces. This is all that they do. Under Rule 16-808, would the majority of circuit court judges not appoint that person and dictate what the compensation is? The Chair noted that they can set the compensation of special examiners. The history of examiners is that formerly, the hearing was like a deposition, except the examiner took the testimony. The attorneys would file interrogatories that the witness would answer. The testimony was taken down and sent to the court. No decision was made. No rulings on evidence were made, and no rulings on any other legal issue were made. No report or recommendation was filed with the court. The examiner would superintend the taking of the testimony, and if a transcript was required, the examiner would take care of that. He or she would then certify it to the court. The court would have that testimony. This is what examiners had been doing until the situation changed. Now they are acting as

magistrates. They are hearing testimony; they are ruling on objections. The Committee was told that they are looking at whether someone has stated a ground for divorce.

Ms. Krask noted that the examiners have a form complaint and a form answer. The Chair asked what would result if an examiner found that the plaintiff filed too quickly. Ms. Krask replied that she has caught problems that the clerk missed. The Chair responded that she had made a ruling on an issue of law. Senator Cassilly asked whether the examiner is simply providing pro bono advice. It is not a ruling; it is providing a pro bono service. The Chair pointed out that the presentations at the last meeting made it clear that examiners were doing what magistrates do. Ms. Krask acknowledged that this may be true, but what they do is have the parties swear under oath that the testimony is true. The examiners confirm the address of the parties. The Chair said that this is what magistrates do. Ms. Krask disagreed, noting that magistrates handle issues that examiners are not supposed to, such as child support and alimony. The Chair commented that the magistrates mostly handle uncontested divorce cases.

Judge Sandy told the Committee that one day in Frederick County had been devoted to uncontested divorce cases. The difference in the transcripts was that magistrates made findings and recommendations, but the examiners simply made a transcript

of the hearings. The judge still has to review the transcript. Ms. Krask remarked that she merely signs and dates the transcript. The Chair asked what is the benefit of only taking testimony and sending a transcript, which the party has to pay for, and the party has to pay the examiner's fee? Ms. Krask replied that there are several benefits. The parties call her and instead of having to appear for trial, they can choose a date that is convenient for them. Many of these people have no exposure to the legal process, and they need help filling out the forms. The examiner can help with this. Ms. Krask said that she tries to send cases to pro bono clinics, but because of the large volume of cases, many of them cannot move forward. If the cases only go to judges or magistrates, there will be a substantial backup.

Mr. Shellenberger noted that this discussion had already taken place at a prior meeting. He recalled that there had been a very robust and extensive conversation on the topic, and the decision was made that is indicated in the Rules before the Committee today. His understanding of the purpose of today's discussion is simply to make some minor changes to the Rules. Ms. Krask said that she and her colleagues had not gotten notice of the prior discussion. The Chair responded that the arguments Ms. Krask were making today were before the Rules Committee in November and January. Notice of the meeting and the material to

be discussed were posted on the Judiciary website. Rules Committee meetings are open, and the open meeting requirements are complied with. Mr. Shellenberger added that the comments made by Ms. Krask had been heard at the November and January Rules Committee meetings. The Committee then made a decision.

Judge Nazarian remarked that Ms. Krask had referred to uncontested cases several times. He asked what happens when someone is referred to her, and the matter does not stay uncontested. People who are getting divorced often disagree on many subjects. Judge Nazarian said that the examiner's job appears to be not only to do paperwork but also to talk with the parties. He added that the examiners seem to be performing more of an ADR function rather than a judicial function. The people are coming to the examiners involuntarily, because the court ordered it. They come before the examiner, but what happens if there is something about which they cannot agree? He asked Ms. Krask what she would do at that point. Does she send them to a magistrate, or does she negotiate with them to try to reach an agreement?

Ms. Krask responded that she does not interfere if the parties cannot agree. Someone may file a complaint that provides that the person has been separated for 12 months. Ms. Krask may tell him or her when the person calls that the person needs to see a magistrate or judge. If there is any

aspect of the case that the parties are not agreeing on, she does not handle the case. She makes the determination from what is in the pleadings. Judge Nazarian commented that he could not see the point of having an examiner, and he agreed with the prior decision.

The Chair asked if anyone had a motion to reject the Rules. Mr. Laws remarked that due to illness, he had missed the meetings when examiners were discussed. He expressed the view that this is a solution in search of a problem. Examiners can be beneficial if they are limited to hearing uncontested cases. The point of the law and rules is to help people.

Mr. Carbine inquired whether there was a motion. The Chair said that it would take a motion to reject the Rules that were proposed today, including what the Committee had approved previously.

Mr. Laws noted that he would like an amendment made to Rule 9-208. It seemed to him that Rule 9-208 could provide a quick solution with a narrow focus. Courts that chose to do so could include in their case management plans a standing examiner to hear certain cases. Section (k) of Rule 9-208 has the loophole to allow for other matters. The Chair pointed out that this is what was intended to be forbidden. He asked Mr. Laws if he was suggesting rejecting all of the proposed new Rules and the proposed amendments.

Mr. Laws moved to revise subsection (a)(1)(K) of Rule 9-208 to broaden it to provide that courts could have the option through their case management plans to continue to refer uncontested matters to standing examiners. Senator Cassilly seconded the motion. The Chair observed that this motion rejects the amendments to the other Rules which would prohibit that. Mr. Laws expressed the opinion that the change to subsection (a)(1)(K) of Rule 9-208 is the only change that would need to be made. The Reporter disagreed, noting that all of the Rules are intertwined. Mr. Laws said that it did not strike him that way. This is a laundry list of what the court can refer. The Reporter pointed out that the Rule pertains to referral to magistrates, rather than to examiners.

Mr. Laws amended his motion to provide that the Rules be rejected and sent back so that they can be redrafted to include a provision where the court can send uncontested matters to a standing examiner. Senator Cassilly noted that an amendment to Rule 16-808 would be necessary. The Chair commented that this would involve Rules 16-808, 16-909, 9-208, and 2-542. It would not work to amend only one Rule. Senator Cassilly pointed out that in section (b) of Rule 2-542 the language: "uncontested divorces" could be added after the language: "or referable to a standing magistrate under Rule 9-208." The Chair responded that this could not be the only amendment, because other Rules would

have to be amended. Otherwise, this would be inconsistent. To make a change, all of the Rules proposals in Agenda Item 9 would have to be rejected.

Mr. Laws clarified that his motion was to reject the Rules in Agenda Item 9 so that they can be narrowed to permit the circuit court to be able to refer uncontested divorce to standing examiners. The Chair said that this is what is being changed in the Rules as they appear in the meeting materials. Judge Eaves commented that there was a point in time where there were part-time masters who could maintain a private practice. This changed so that masters could not do so. This led to consistency in processing the cases. Administratively, Judge Eaves said that she understood Ms. Harris's point about knowing how much work is to be weighted to be able to qualify for an additional judge. There also is an Access to Justice perspective. If someone who is indigent files for a waiver, but the person is then referred to a standing examiner, someone has to pay for that transcript. How can those costs be waived without waiving the examiners' fees? The changed Rules result in more consistency in terms of the processing of uncontested matters.

Judge Price inquired whether the Conference of Circuit Judges was in favor of the proposed Rules. The Chair replied affirmatively. Ms. Day asked whether the Conference was in

favor of doing away with the standing examiners. The Chair explained that they are not being eliminated, they are just being limited to their purpose. The value of the standing examiners is that if the court would like one, it can appoint one to take testimony. Ms. Lindsey commented that from the clerks' perspective, it is more efficient to have standing examiners only for a limited purpose.

The Chair asked whether there was a second to the motion to reject the Rules and send them back for amendments. No one seconded the motion.

By consensus, the Committee approved Rule 9-208.

Agenda Item 10. Consideration of proposed amendments to Rule 16-208 (Cell Phones; Other Electronic Devices; Cameras)

The Chair presented Rule 16-208, Cell Phones; Other Electronic Devices; Cameras, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 – COURT ADMINISTRATION

CHAPTER 200 – GENERAL PROVISIONS – CIRCUIT AND DISTRICT COURTS

AMEND Rule 16-208(b)(2)(D) to add language clarifying that electronic devices may not be brought into a jury deliberation room after deliberations have begun, as follows:

...

(b) Possession and Use of Electronic Devices

(1) Generally

Subject to inspection by court security personnel and the restrictions and prohibitions set forth in section (b) of this Rule, a person may (A) bring an electronic device into a court facility and (B) use the electronic device for the purpose of sending and receiving phone calls and electronic messages and for any other lawful purpose not otherwise prohibited.

(2) Restrictions and Prohibitions

(A) Rule 5-615 Order

An electronic device may not be used to facilitate or achieve a violation of an order entered pursuant to Rule 5-615 (d).

(B) Photographs and Video

Except as permitted in accordance with this Rule, Rules 16-502, 16-503, 16-504, or 16-603, or as expressly permitted by the Local Administrative Judge, a person may not (i) take or record a photograph, video, or other visual image in a court facility, or (ii) transmit a photograph, video, or other visual image from or within a court facility.

Committee note: The prohibition set forth in subsection (b(2)(B) of this Rule includes still photography and moving visual images. It is anticipated that permission will be granted for the taking of photographs at ceremonial functions.

(C) Interference with Court Proceedings or Work

An electronic device shall not be used in a manner that interferes with court proceedings or the work of court personnel.

Committee note: An example of a use prohibited by subsection (b)(2)(C) of this Rule is a loud conversation on a cell phone near a court employee's work station or in a hall way near the door to a courtroom.

(D) Jury Deliberation Room

An electronic device may not be brought into a jury deliberation room after deliberations have begun.

(E) Courtroom

(i) Except with the express permission of the presiding judge or as otherwise permitted by this Rule, Rules 16-502, 16-503, 16-504, or 16-603, all electronic devices inside a courtroom shall remain off and no electronic device may be used to receive, transmit, or record sound, visual images, data, or other information.

...

Rule 16-208 was accompanied by the following Reporter's note.

REPORTER'S NOTE

A circuit court judge suggested that Rule 16-208 (b)(2)(D) be clarified. The subsection could be read to mean that anyone in a room used for jury deliberations may not have an electronic device, even if the jury is not deliberating. The General Court Administration Subcommittee proposes adding language to subsection (b)(2)(D) stating that electronic devices may not be brought into a jury deliberation room after deliberations have begun.

The Chair told the Committee that the request to amend Rule 16-208 came from the Honorable Lenore Gelfman, of the Circuit Court for Howard County. When the Rule pertaining to cell phones in the courthouse was drafted, the Committee recommended and the Court of Appeals decided that people could not take cell phones into a jury room. The concern was recording what was said in the jury room and use of the phones for prohibited communications and investigations by the jurors. Judge Gelfman pointed out, and Judge Kathleen Cox of the Circuit Court for Baltimore County had agreed, that the Rule was drafted too broadly. Judges send jurors into the jury room not always to deliberate. The judge may have to decide a motion out of the jury's hearing. There is no reason to prohibit having cell phones in the jury room other than when the jury is deliberating.

Mr. Marcus remarked that the problem with across-the-board prohibitions is that there are going to be circumstances that are exceptions, such as where a juror has a child who is ill, etc. A blanket rule does not always work. The Rule is definitely meritorious, but it has to be discretionary. The Chair noted that Judge Cox does not take the cell phones away from the jurors until they go back to deliberate. Judge Eaves said that this is the policy in Harford County. If there is a

break in the deliberations, and someone needs to make a phone call, the person is allowed to use the phone. The decision is based on convenience and circumstances. Judge Bryant added that jurors are not shy about letting her know if there is a problem. Jurors can check their phones when deliberations are periodically stopped. The judges in Baltimore City offer their chambers phone numbers for jurors to receive messages when there is an emergency.

The Chair asked whether the jurors are allowed to keep their cell phones when there is a hiatus in the proceeding, and they go back to the jury room. Judge Bryant responded that they only collect the phones when deliberations start. The Chair asked whether anyone objected to the proposed amendment to Rule 16-208. Mr. Marcus asked whether a Committee note could be added to provide that the court should use discretion. Judge Eaves observed that there is an instruction to the jury about looking up information on an electronic device. Judge Bryant added that jurors are told that they cannot have their cell phones in the jury room during deliberations.

The Chair commented that Judge Gelfman has asked that the Rule be amended to prohibit cell phones in the jury room after the jury has been charged and commences deliberations but not otherwise. Judge Davey remarked that this has never been a problem. If there is ever an emergency, jurors let the court

know. If the jurors are going to stay longer than expected, they are given back their phones to let their families know. The Chair asked if the jurors are prohibited from taking the phones into the jury room when they are not deliberating, and Judge Davey answered that they are not. Judge Nazarian agreed that the procedures described by Judge Davey would be appropriate. Mr. Marcus added that one solution to this problem is judicial education.

Judge Bryant noted that usually if a juror has a problem, it would come out in the voir dire phase. The Chair pointed out that the Rule now provides that cell phones cannot be taken into the jury room at all ever. Judge Gelfman would like the Rule to provide that cell phones can be taken into the jury room, except when the jury is deliberating. This does not change what happens when they deliberate. Mr. Frederick suggested that a Committee note clarifying this be added. The Chair responded that more than a Committee note is necessary, because the Rule provides that cell phones cannot be taken into the jury room at all. Mr. Frederick remarked that the court always has the discretion to allow cell phone use if the circumstances require it. Judge Davey observed that the jury instruction provides that if there is a break in deliberations, the judge may decide that cell phones can be used. The Chair said that a Committee note on this point could be added, but this is not what Judge

Gelfman was asking for. She requested language stating that jurors can take the phones in the jury room except during deliberations. Judge Eaves commented that this conforms to practice.

The Chair asked whether the Committee wanted to add a Committee note providing that the judge needs to use common sense on cell phone use. By consensus, the Committee agreed that it did not want this.

By consensus, the Committee approved Rule 16-208 as presented.

Information Items

The Reporter stated that the last two items were informational, so that the Rules Committee would know that the Property Subcommittee took no action on the issues of adding Rules pertaining to (1) counterclaims filed in mortgage foreclosure proceedings and (2) declaration of a non-monetary trust. The Subcommittee decided that these may be more appropriate for the legislature to address. The memoranda should have been addressed to the Rules Committee from the Property Subcommittee. The Reporter noted that if anyone disagreed with the decision not to take action, it would require a motion to send the issues back to the Subcommittee. No motion was forthcoming.

The Chair and the Committee thanked Mr. Weaver for his service on the Committee. Mr. Weaver commented that he had enjoyed his time on the Committee, and he wished that it had taken place earlier in his career.

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