COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Rooms UL4 and 5 of the Judicial Education and Conference Center 2011-D Commerce Park Drive, Annapolis, Maryland on January 5, 2018.

Members present:

Hon. Alan M. Wilner, Chair

H. Kenneth Armstrong, Esq.
Hon. Yvette M. Bryant
James E. Carbine, Esq.
Mary Anne Day, Esq.
Hon. Angela M. Eaves
Alvin I. Frederick, Esq.
Ms. Pamela Q. Harris
Bruce L. Marcus, Esq.
Donna Ellen McBride, Esq.
Hon. Danielle M. Mosley
Hon. Douglas R. M. Nazarian
Sen. H. Wayne Norman
Scott D. Shellenberger, Esq.
Steven M. Sullivan, Esq.
Dennis J. Weaver, Clerk
Gregory K. Wells, Esq.
Hon. Dorothy J. Wilson
Thurman W. Zollicoffer, Esq.

In attendance:

Heather L. Akehurst-Krause, Esq., Family Administration, Administrative Office of the Courts
Hon. Cynthia Callahan, Circuit Court for Montgomery County
Nisa C. Subasinghe, Esq., Juvenile and Family Services, Administrative Office of the Courts
Ms. Sidonie Becton, Law Clerk
Hon. W. Michel Pierson, Circuit Court for Baltimore City
Colby Schmidt, Esq., Office of the Attorney General
Hon. Laura S. Kiessling, Circuit Court for Anne Arundel County
Ronald M. Naditch, Esq., Examiner, Anne Arundel County
Nancy L.Faulkner, Esq., Circuit Court for Anne Arundel County
Erin E. McCarthy, Esq., Circuit Court for Anne Arundel County
Andrew Cantor, Esq., Law Office of Peter Angelos, P.C.
Jeffrey Shipley, Esq., Secretary and Director, State Board of Law Examiners
JaCina Stanton, Esq., Legal Affairs, Administrative Office of the Courts
Hon. John Morrissey, Chief Judge, District Court of Maryland
Lydia Lawless, Esq., Bar Counsel, Attorney Grievance Commission
Marianne I. Lee, Esq., Attorney Grievance Commission
Thomas J. Dolina, Esq., Bodie, Dolina, Hoggs, Friddell &

Grenzer, P.C.
Frank Ford Loker, Jr., Esq., Miles & Stockbridge, P.C.

The Chair convened the meeting. He welcomed everyone and wished them a happy new year. He said that he had some announcements. He announced with regret the death of Leo William Dunn, Esq., who was the father of Christopher Dunn, a member of the Rules Committee. Leo Dunn had served on the Rules Committee from 1972 to 1981. He was a nice person and an excellent attorney. He had been a real asset to the Committee.

The Chair told the Committee that Judge Davey had taken a fall. He suffered from a concussion but is otherwise fine. However, he cannot drive for a while.

The Chair announced the retirement from the Committee of the Honorable Margaret Schweitzer. Her tenure on the Committee may have been one of the shortest ever. The reason is that she has been appointed to the Circuit Court for Montgomery County and is being sworn in today. The new appointment as a District Court replacement for Judge Schweitzer is the Honorable Dorothy Jean Wilson, District Court judge in Baltimore County. The Chair welcomed Judge Wilson to the Committee.

The Chair said that one housekeeping change was in the offing. It will have to be sent to the Court of Appeals very quickly. The 178th Report contained the entire revision of Title 16, except for the Rules that applied to judges. The Rules in the 178th Report had not been revised very much.

Because Title 16 was being repealed in its entirety, the Rules that applied to judges were put into a new Title 18, without many changes, except for modifying cross references. One minor change had been requested by the Court of Appeals, but otherwise the Rules remained as they had been and were simply renumbered.

The Chair noted that in the 191st Report, those Rules were revised and reorganized and then sent to the Court. By the time that the Court had held its hearing on these Rules, the Court had granted a writ in the case involving the Honorable Pamela White. There was some concern as to how the Court would decide that case and whether that might impact the Rules. The Committee asked that the Court defer consideration of the Rules, not remand them, but keep them pending until the Court decided the *White* case.

The Chair remarked that the Court now has another judicial disabilities case involving the Honorable Mary C. Reese. He said that he has no idea what issues will be raised in that case. The Rules applying to judges are pending. In the 193rd Report, the only change made to the Rules applying to judges was to substitute the term "senior judge" for the term "retired judge." One of the Rules in which that change had been made was Rule 18-401, Commission on Judicial Disabilities, Definitions. When that change was being prepared, the Rules Committee staff person who was drafting it asked for the most recent version of the Rule to use to make the amendments. The person was given

the most recent version, but it was the one that had not yet been adopted. In that version, the term "senior judge" was added, but the term "formal complaint" was shown as deleted. The Chair remarked that he had no idea whether this will be an issue in the *White* case or the *Reese* case, but he had alerted the Honorable Mary Ellen Barbera, Chief Judge of the Court of Appeals, to it.

The Chair explained that the change that must be made is purely a "housekeeping" measure, because the error was totally inadvertent. The definition of the term "formal complaint" and any other minor changes that appeared in the version in the 191st Report must be restored to Rule 18-401. This is an information item. The Reporter added that the substitution of the term "senior judge" for the term "retired judge" will also be made in Rule 18-401. Other than that, the Rule will be restored exactly as it appeared in the 178th Report.

Agenda Item 1. Consideration of proposed amendments to Rule 2-541 (Magistrates), Rule 2-542 (Examiners), Rule 2-543 (Auditors), and Rule 9-208 (Referral of Matters to Magistrates)

---

The Chair presented Rules 2-541, Magistrates; 2-542, Examiners; 2-543, Auditors; and 9-208, Referral of Matters to Magistrates, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 – CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 500 – TRIAL

AMEND Rule 2-541 to clarify that the court does not prescribe the compensation, fees, and costs of a magistrate who is compensated by the State or a county; and to exclude from assessed costs in an action the compensation, fees, and costs of a magistrate to the extent covered by State or county funds, 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~~ If the magistrate is not compensated by the State or a county, the court 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~~ If the magistrate is not compensated by the State or a county, the court 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.

. . .

(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.

Two amendments to Rule 2-541 are proposed.

An amendment to section (a) clarifies that the court does not prescribe the compensation, fees, and costs of a magistrate who is compensated by the State or a county.

An amendment to section (i) excludes from assessed costs in an action the compensation, fees, and costs of a magistrate to the extent covered by State or county funds.

MARYLAND RULES OF PROCEDURE

TITLE 2 – CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 500 – TRIAL

AMEND Rule 2-542 to clarify that the court does not prescribe the compensation, fees, and costs of an examiner who is compensated by the State or a county; to prohibit referral to an examiner of a matter

referable to a magistrate under Rule 9-208; and to exclude from assessed costs in an action the compensation, fees, and costs of an examiner to the extent covered by State or county funds, 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~~ If the examiner is not compensated by the State or a county, the court 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~~ If the examiner is not compensated by the State or a county, the court 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.

(b) Referral by Order

On motion of any party or on its own initiative, the court may refer to an examiner, for the taking of evidence, issues in uncontested proceedings not triable of right before a jury or referable to a 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.

Three amendments to Rule 2-542 are proposed.

An amendment to section (a) clarifies that the court does not prescribe the compensation, fees, and costs of an examiner who is compensated by the State or a county.

An amendment to section (b) prohibits referral to an examiner of any matter referable to a magistrate under Rule 9-208.

An amendment to section (i) excludes from assessed costs in an action the compensation, fees, and costs of an examiner to the extent covered by State or county funds.

TITLE 2 – CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 500 – TRIAL

AMEND Rule 2-543 to clarify that the court does not prescribe the compensation, fees, and costs of an auditor who is compensated by the State or a county; and to exclude from assessed costs in an action the compensation, fees, and costs of an auditor to the extent covered by State or county funds, 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~~ If the auditor is not compensated by the State or a county, the court 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~~ If the auditor is not compensated by the State or a county, the court 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.

. . .

(i) Costs

Payment of the compensation, fees, and costs of an auditor, 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 2-543 was accompanied by the following Reporter's note.

Two amendments to Rule 2-543 are proposed.

An amendment to section (a) clarifies that the court does not prescribe the compensation, fees, and costs of an auditor who is compensated by the State or a county.

An amendment to section (i) excludes from assessed costs in an action the compensation, fees, and costs of an auditor to the extent covered by State or county funds.

MARYLAND RULES OF PROCEDURE

TITLE 9 – FAMILY LAW ACTIONS

CHAPTER 200 – DIVORCE, ANNULMENT, ALIMONY,

CHILD SUPPORT, AND CHILD CUSTODY

AMEND Rule 9-208 by correcting an internal reference in the Committee note

following subsection (a)(1) and adding clarifying language to the Committee note, by deleting the Committee note following section (j), and by transferring the substance of the deleted Committee note to the text of section (j), as follows:

Rule 9-208. REFERRAL OF MATTERS TO 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 magistrate as of course unless the court directs otherwise in a specific case:

(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).

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 (1) the compensation, fees, and costs of the magistrate if the magistrate is not compensated by the State or a county, and (2) the cost 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.

Proposed amendments to Rule 9-208 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 the Committee note following section (j) and transfer the substance of the deleted Committee note to the text of section (j).

The Chair told the Committee that amendments to Rules 2-541, 2-542, 2-543, and 9-208 have been proposed and supported by the Administrative Office of the Courts ("AOC") through the State Court Administrator. A letter from Chief Judge Barbera pertaining to this issue is included in the meeting materials. The Chair said that he expected that there would be some opposition to these proposals or at least to one aspect of them. Everyone at the meeting will have an opportunity to weigh in.

The Chair commented that he would try to frame the issues by giving some background to the proposed changes. Two core issues are associated with this. The first is whether the circuit courts should continue to be able to assess the costs relating to a magistrate among the parties when the magistrate is a court employee whose compensation is paid by the State through the State budget. If the answer to this question is negative, the second issue is whether the court should be able to circumvent that prohibition by referring uncontested, domestic cases to a special examiner who is not a court employee but a private attorney appointed on a "fee for service" basis, rather than to a magistrate who is a court employee.

The Chair remarked that currently, there does not seem to be any issue at all with respect to court auditors. An issue could arise in the future if the State were to assume the costs of compensation of auditors as well, but that has not happened yet. The crux of the first issue is indicated in the letter that is in the meeting materials from Ms. Harris to the Honorable Raymond G. Strubin, the Circuit Court judge in Garrett County, and Timothy W. Miller, Clerk of the Circuit Court of Garrett County. See Exhibit 1. All standing magistrates are court employees paid either by the State or by the county. All standing magistrates employed since July 2002 are paid by the State, and their compensation is set by the State. Magistrates who were in office prior to that date were county employees and

were offered the option of remaining as such. Nine chose to do so. As they retire, their replacements will be State employees.

As of now, the State does not pay the compensation of examiners or auditors. Rules 2-541, 2-542, and 2-543 continue to provide that the court may prescribe the compensation, fees, and costs of those officials, as well as enforce the payment thereof by court order. The three Rules are all identical in that sense.

The Chair noted that with the support of Chief Judge Barbera, the State Court Administrator believes that because the compensation of magistrates is now set and provided for in the State budget, the court no longer has the authority to set that compensation, and should not be assessing the parties for that cost. It is no different than assessing the parties for the compensation of a judge or jurors. This is the easy part and is dealt with by amendments to sections (a) and (i) of those three Rules.

The Chair said that the controversy seems to be over the amendments to Rules 2-542 (b) and 9-208 (j). This arises from the fact that some of the circuit courts have been referring uncontested divorce cases not to a magistrate, but to private attorneys appointed as examiner who are not compensated by the State or the county. The courts have been requiring the parties to pay as costs the amount charged by the examiner, plus the cost of preparing a transcript. The compensation cost varies

from county to county. The counties that are doing this charge from $50 up to $200. Under the Rule, the parties do have the option of having their case heard by the court. Even if the court automatically refers the case to an examiner, the party can request that the case be heard by a judge, but there appears to be a significantly longer delay in getting a case before a judge than before an examiner.

The Chair pointed out that the practice that is currently permissible under Rule 9-208 is that the court can refer the uncontested divorce cases to a magistrate or an examiner. This has raised three concerns. The first is that it confuses or conflates the different roles of magistrates and examiners.

The Chair noted that the second concern that was pointed out in Chief Judge Barbera's letter is that it is unfair and poor judicial policy to, in effect, favor the wealthier who can afford to pay for the expeditious treatment by referring these theoretically uncontested cases to an examiner. See Exhibit 2. The less fortunate may not be able to pay for this. This is not good judicial policy and is, in effect, the selling of justice. It is asserted that upon a showing of poverty, costs can be waived, and this is true under the Rules. But the issue still remains whether the policy itself should be continued.

The Chair commented that there is a third concern that is more administrative in nature and is noted in Chief Judge Barbera's letter. It is that the use of examiners misrepresents

the statistically reported workload of judges, because, at least in Anne Arundel County, judges are getting credit for handling these cases when, in fact, they are not. This presents an inflation of judicial workload, which is not right.

The Chair referred to the first concern – the conflating of the different roles of examiners and magistrates. He noted that the Honorable Marvin Smith, in an opinion of the Court of Special Appeals (*Nnoli v. Nnoli*, 101 Md. App 243 (1994)) had described the difference between masters and examiners. Judge Smith had explained that an examiner merely swears witnesses, records their testimony, and submits it to the court. The examiner does not have the power to decide upon the competency, materiality, or relevance of any question proposed or evidence elicited, nor to decide as to the competency or privilege of any witness offered. All that the examiner does is to record testimony.

The Chair commented that Judge Smith had been absolutely correct. The history of examiners indicates that what Judge Smith had stated is what they did. They simply recorded testimony and sent it to the court. They did not rule on evidentiary issues or make findings of fact. Judge Smith pointed out that the master [now magistrate] is an officer of the court who acts as an assistant to the judge. He or she is an advisor of the court as to matters of jurisdiction, parties, pleading, proof, and in other respects where he or she may be of

assistance to the court. The magistrate reports to the court the results of his or her examination of the proceedings with the suggestion of the propriety of the court passing a decree.

The Chair noted that Judge Smith had also stated that the report of the master, in the absence of exceptions, is usually received by the court as correct, and the court passes such a decree as the master may certify to be proper. This is also borne out by case law. The Chair added that even in uncontested cases, the magistrate must determine whether the court has jurisdiction, that any required time limits have been observed, and that a necessary ground for the divorce has been pled and proved. The magistrate makes findings of fact to which the court generally must defer if there is any evidence to support them and also makes proposed conclusions of law.

The Chair stated that during a 1981 Rules Committee meeting at which the Rule pertaining to examiners had been considered, the late Melvin Sykes, Esq., a long-time member of the Committee, had recommended that all examiners be called "masters." The Honorable John McAuliffe, who was the Chair of the Committee at that time, confirmed that historically, the difference was that examiners had no power to rule on objections. They were employed simply to take testimony in domestic cases. The Honorable Kenneth Proctor, another member of the Committee in 1981, proposed after about two hours of

debate, that the Rule pertaining to examiners be repealed as unnecessary. That did not happen.

The Chair told the Committee that Rule 9-208 permits the court to refer uncontested divorce, annulment, and alimony cases either to a magistrate or to an examiner. Given the unfairness to the parties that by choosing the examiner to hear the case they would have to pay, but they would not have to pay if the case was heard by a magistrate, the AOC would like an amendment to Rules 2-542 and 9-208 to prohibit that. Ms. Harris said that she agreed with the Chair's summary of the issues.

The Chair asked the members of the audience for any comments. The Honorable Cynthia Callahan told the Committee that she was a circuit court judge in Montgomery County and the Chair of the Domestic Law Committee of the AOC. As part of the Domestic Law Committee's charge, they have tried to look at the situation that the Chair of the Rules Committee had described very clearly and accurately about the dichotomy between the use of standing magistrates and the use of standing examiners. Judge Callahan remarked that the document pertaining to standing examiners in domestic cases that she had just distributed had information that is somewhat out of date, because it is from 2015. Montgomery County had been on this list but no longer uses examiners for that purpose.

Judge Callahan pointed that 15 jurisdictions currently use some form of standing examiner. The cost runs from $75 to $200.

By the hour it can be $150 or $160, so there is no consistency as far as what is charged. Six jurisdictions have fewer than 50 cases in a year. Thirteen of the jurisdictions accounted for 764 of the cases. Two jurisdictions, Anne Arundel and Frederick Counties, accounted for the remaining 2,300 cases. Judge Callahan said that she had done an informal poll just to make sure that she was clear about the situation. Anne Arundel County still makes referrals to examiners, and Judge Callahan had confirmed last night that Frederick County does, also. Some of the jurisdictions on this list have stopped using examiners. This is anecdotal. Judge Callahan had spoken with several judges, but the information on the list had not been updated.

Judge Callahan said that the biggest concern is access to justice and equal justice. She added that she did not mean to criticize, but this is what happens when the judicial system has evolved, and some procedures are no longer applicable. If someone has to wait for justice or have it available only if the person pays for it, this is not an indication of how justice is dispensed in the court system. The system has to be designed so that the playing field is level for the people who need these services. There is no question that there has to be a protocol and a timeline for Anne Arundel and Frederick Counties to phase out the use of examiners. Asking people to wait in line for their case to be heard if they do not have the resources to pay for it to be heard immediately is not how the judicial system

should work. This is based on the evaluation by the National Center for State Courts that Chief Judge Barbera had referred to in her letter.

Judge Kiessling expressed her agreement with what Judge Callahan had said. She told the Committee that she is the Administrative Judge in Anne Arundel County and is on the Judicial Council and the Conference of Circuit Court Judges. She is aware of the issues regarding examiners. She remarked that she was representing herself along with the 13 circuit court judges in Anne Arundel County. They had discussed this issue at great length. At the last Judicial Council meeting, it appeared that the decision was for the Domestic Law Committee to investigate this topic further, and Anne Arundel County was going to have an opportunity to lay out its procedures.

Judge Kiessling commented that she and her colleagues feel that having examiners is very beneficial. The topic landed in front of the Rules Committee, so it seems that Anne Arundel County had not been able to explain its procedures to the Judicial Council. The Chair said that this topic had been set in for the Rules Committee in November of 2017, and, as a result of learning that Judge Kiessling and her colleagues were still dealing with the Judicial Council, the matter was deferred.

Judge Kiessling noted that they had never addressed the issue again, because it was the understanding of both Judge Callahan and her that the issue was now before the Rules

Committee. Judge Kiessling remarked that she appreciated the fact that the issue was moved from the last Rules Committee meeting to the meeting today, because this enabled her to be present. She told the Committee that accompanying her was Ronald Naditch, Esq., who is one of Anne Arundel County's standing examiners. Judge Kiessling said that Mr. Naditch could answer any questions anyone might have about this process. Also with her was Nancy Faulkner, Director of Court Operations, and Erin McCartney, the Family Law Administrator in Anne Arundel County.

Judge Kiessling noted that Anne Arundel County is the jurisdiction that uses standing examiners to a significant extent. The view of Judge Kiessling and her colleagues is that they have broadened access to justice rather than limited it. In Anne Arundel County, uncontested divorce and child access cases can be referred to a standing examiner. The cases are pre-screened by a judge, who determines whether the case is appropriate to be sent to a standing examiner. The judge does not look at the ability of the parties to pay at that point in time. If the judge determines that the case is appropriate for hearing by a standing examiner, an information packet that includes how to request a fee waiver is sent to the parties who can opt out. They may have already received a fee waiver by the court date, so they automatically get a fee waiver by the standing examiner. If they have not gotten a waiver, but they

believe that they may be eligible, they can request a fee waiver from the examiner. Standing examiners are required to review requests for fee waivers and very routinely grant them.

Judge Kiessling said that it is her understanding that the way that this process works is that the party can call the office of the examiner and set up a meeting at which the party determines whether he or she would like the examiner or the court to hear the case. There is an initial screening on the telephone. If it appears that the party may be eligible for a fee waiver, the party comes to the examiner's office to arrange the waiver. Then the hearing takes place.

Judge Kiessling noted that parties who wish to go to court can opt out of the examiner hearing. An examiner hearing in Anne Arundel County is $200. Judge Kiessling did not know what the other jurisdictions charge. The parties are immediately scheduled to go before the standing examiner. There is no waiting period. In Anne Arundel County, the average wait for a court hearing would be 30 to 50 days. The case can be heard by a standing examiner right away.

Judge Kiessling noted that her county is unique in some ways, including having a relatively large military community, because of Fort Meade, which is located in Anne Arundel County. Sometimes the schedules for military parties have to be adjusted, because their time in Maryland is limited. The standing examiners are available after hours, on the weekends,

and sometimes on snow days. They can hold a hearing on short notice and are very accommodating. At times, the parties come to Fort Meade and then are shipped out very soon thereafter, so the hearing has to be held quickly. Judge Kiessling said that she had spoken to each one of the standing examiners in Anne Arundel County individually, and they had referred to the situation of accommodating parties in the military.

Judge Kiessling had also spoken with hourly workers in her county. An hourly worker who has a case set in at 9 a.m. in court may have to take off the rest of the day to wait for his or her case to be heard. The court docket is full, and many cases are set in at the same time. The worker would likely lose his or her pay for that day. If a standing examiner hears the case, it can be heard at the time it has been scheduled for. The anecdotal information is that this is better for parties from a financial perspective whether or not they had received a fee waiver.

Judge Kiessling pointed out that college students who are litigants may have classes during the day and would be accommodated by a standing examiner. If a party with a scheduled hearing lets the examiner know that the party cannot make the hearing because he or she cannot leave work, the hearing can be rescheduled. If a case is to be heard in court, pleadings have to be filed, and the hearing probably will not be held for at least 30 days.

Judge Kiessling commented that in many jurisdictions, standing examiners were chosen very particularly so that they are situated throughout the county and can be easily accessed by county residents. Some litigants may be uneasy about coming to court whether it is because they have had bad experiences previously, or because they might have immigration issues that cause them to be concerned. Attending a hearing with an examiner may alleviate some of those concerns. Someone had asked Judge Kiessling about the availability of interpreters, and she said that she wanted to assure everyone that interpreters are available in examiner hearings.

Judge Kiessling told the Committee that she wanted to address how magistrates and standing examiners are selected. In the last five years, a State's Attorney was elected using the same process. The court publishes a notice, in both electronic and paper form, which goes out to the bar. Applicants have to fill out a lengthy application that is based on the judicial application. The judges receive the applications and review them in advance of a special meeting of the bench. They have a very specific voting process that is fair and unbiased. The process results in the county getting the best of the best for examiners and magistrates. Judge Kiessling told the Committee that she would be happy to answer any questions.

Senator Norman inquired how many magistrates and examiners are in Anne Arundel County. Judge Kiessling answered that the

county has five standing examiners and six magistrates. Senator Norman asked whether all of the contested cases go to the magistrates. Judge Kiessling responded that contested cases go to the magistrates or judges. It depends on the nature of the case. Senator Norman remarked that a litigant may not want to pay for a magistrate but only pay for an examiner. The cost is approximately $120,000 at $150 a case. Does that go to the court, the State, or the examiner? Judge Kiessling answered that the standing examiner is not paid by the court. The examiners pay their staff.

Senator Norman asked whether the examiners conduct the hearings in their own offices. Judge Kiessling answered affirmatively. They have to pay for any expenses, such as staff, mailings, and stationery. This is all covered by the fee unless there has been a fee waiver in which case the examiner has to pay for everything.

Senator Norman asked about post-judgment and supplemental proceedings. Judge Kiessling answered that these are handled by examiners in a very limited way. Some other jurisdictions do this for free. Mr. Shellenberger inquired whether Judge Kiessling had any statistics regarding how many fee waivers there are in Anne Arundel County. Judge Kiessling responded that she did not have those numbers but could find out.

Ms. McBride noted that the examiners would be paid only if they charged a fee. It might be unusual for an examiner to be

willing to waive a fee. Judge Kiessling said that the examiners use the same guidelines for fee waivers that the judges use. She added that Mr. Naditch, who has been an examiner for 25 years, had told her that he makes more money practicing law, but he really likes being an examiner. All of the examiners have been doing this for a very long time. They are not acting as examiners for financial gain. They are doing so to help the public. Judge Eaves asked whether the examiners are required to follow the Maryland Legal Services guidelines to determine fee waivers. Judge Kiessling answered affirmatively.

Mr. Naditch told the Committee that he is one of the standing examiners in Anne Arundel County, and he and his colleagues do not hear cases for personal enrichment. Anne Arundel County charges $200 for a hearing, which sounds like a large amount of money, but he calculated that an examiner makes about $75 for each hearing. This does not count the time the examiner spends, only the secretary's time and all of the administrative time.

Mr. Naditch remarked that the issue of why someone would waive a fee had been previously raised. Mr. Naditch said that he thought that the examiners go beyond following the rules. If it is apparent to him that someone who would like his or her case heard by Mr. Naditch cannot afford to pay, he will not charge for the hearing. If someone does not meet the criteria for a waiver, and it is clear that the person cannot afford to

pay, the examiners do not charge the person. The Chair asked whether this is optional with Mr. Naditch. He responded that it is optional with him, but this is over and above what is required. Sometimes, people come in to see him and when he finds out how limited their income is, he tears up the check that he has been given. It is a system that has a heart.

Mr. Naditch noted that the issue of whether it is fair for people to pay for a service that they can get free elsewhere had been referred to earlier. To address this, it is necessary to look at the total cost to the person. People often have to pay to park, especially at the courthouse. Going to an examiner requires less time off from work. If parties come in to Mr. Naditch's office with an attorney, the case is usually completed within 15 to 30 minutes, so the attorney's fees are kept to a minimum. The judgment of divorce goes directly to the court, the court can evaluate, and there is no waiting time. Whether people are wealthy or not, they do want their cases to be completed promptly. The examiners can get the cases done promptly, because they prepare the reports and judgments of divorce in advance. When the parties are finished with the hearing, Mr. Naditch will hand them the report and judgment of divorce. He will ask them to look over the documents. If any problems are found, they can be corrected.

Mr. Naditch said that cases can be heard at lunchtime. He will come in at 7:30 or 8:00 in the morning to hear cases. He

will take a case at a time that will prevent a party from missing work. If the case is before a magistrate, there may be 25 or 30 hearings set in at the same time, and someone's case may not be called for many hours. A party who has an attorney will have to pay for the attorney's time while he or she waits for the case to be called. The person who has an attorney in a case before an examiner will save enough money by not waiting for the case to be heard to make up for the cost of the examiner.

Mr. Naditch commented that the Chair had said that all that the examiners do is to hear the testimony. This sounds like examiners are robots who turn on a recording device. Nothing could be further from the truth. The examiners are serving people with limited means. Parties are required to give one week's notice about needing a hearing. A party may appear and tell the examiner that he or she did not know about giving the notice. The way the examiner would handle this is to ask the party whether his or her spouse is cooperative. The party is told to have the spouse write to the examiner that he or she was aware of the hearing and that he or she is waiving the notice for the hearing. Consequently, the examiner can expedite the hearing as opposed to a court proceeding that would require a show cause order and would have to be more formal.

Mr. Naditch observed that people may be of limited means but sometimes, Qualified Domestic Relations Orders (QUADRO's)

have to be done. The examiners will refer them to the professionals who do the QUADRO's. Often, the examiner will try to locate the professionals who are convenient to the parties. Mr. Naditch remarked that often people who are self-represented come to the hearing with vague custodial provisions. The examiner finds out during the hearing what the actual agreements of the parties are. The examiner can fill in the custodial agreements reflecting the agreements of the parties.

The Chair said that it appeared that what the examiners are doing is the proper role of the magistrate. The history indicated that according to a 1785 statute, an examiner's role was only to take testimony. In the early days, it was on written interrogatories. The examiners are not only taking testimony but ruling on whatever needs to be ruled on and making a recommendation to the court which has to sign off on it.

Mr. Naditch responded that the role of the examiner has evolved. The evolution of the examiner system has inured to the benefit of the people, because of the fact that when parties go before the examiners, they can come in when they would like to and where it is convenient, and they can be heard by the examiner that they prefer. Also, the time that they save is a benefit. With the genesis of the role being changed, the concern is equal access to justice. If the examiners can give equal access, better service, less formality, and most

importantly, free service if the parties cannot afford to pay, it is a great benefit to the public.

Mr. Naditch remarked that Judge Kiessling had referred to the issue of how many people elect to have their cases heard by the magistrates as opposed to the convenience of being able to call an examiner's office and schedule a hearing that is convenient. One week's notice is required, so the examiner can set the hearing accordingly. If the party is unable to make that date, the party does not have to file a motion. If the party does not appear, no show cause order is filed. The person does not have to be put into a queue and wait until a later time for the hearing. Mr. Naditch said that the examiners give better service at the exact same cost or probably at a much lesser cost, because of all the factors he had mentioned. The system "ain't broke," so it does not need to be fixed.

The Chair commented that 30 years ago, there was a proposal, which may have come from the Judiciary, to permit uncontested divorces where no children were involved to be resolved with a summary judgment. Why did this not happen? The reason was that the masters went to the legislature and convinced them that it would be disastrous if this ever took place. Now, if a married couple has no children, someone can get a divorce very quickly, and no corroboration is required.

Mr. Naditch said that the difference is that when people come in to see an examiner, if there is a problem, the examiner

will handle it. A summary judgment is only on paper. Mr. Naditch commented that he had seen some statistics in Chief Judge Barbera's letter, which indicated that the average hearing lasts about 34 minutes. He disagreed with this statement, stating that the average hearing is much longer than that. Judge Kiessling noted that in fairness to both Chief Judge Barbera and Mr. Naditch, he was only referring to hearings conducted by standing examiners. Mr. Naditch observed that examiners can also handle custody cases, and in some of those, attorneys want to put on the entire case.

Ms. Harris remarked that the majority of cases go to examiners outside the Judiciary. If, in all of the large jurisdictions and even the mid-size ones, each one of these cases were handled outside of the Judiciary, including uncontested divorce, custody, and other types of domestic cases at $200 a case, this could be problematic. As the State Court Administrator, she has to go before the Board of Public Works to get fees for cases established and published. The fee for examiners is not established and published in Anne Arundel County or at the Board of Public Works in the Judiciary's fee schedule.

Ms. Harris noted that when someone files for a divorce, it is for a certain amount of money. Everything is public through the statutes and through the Board of Public Works, so it is known that there is an additional fee for this. The Rule

allows for it. However, it was never intended that a majority of the cases would be sent outside of the Judiciary. They are part of the Judiciary's caseload. As far as the convenience to college students, military personnel, and hourly workers, the bar knows that the differentiated case management plans (DCM's) are designed to address those needs. The District Court has DCM plans now. Emergency cases can be handled in a convenient jurisdiction.

Judge Callahan commented that over the last 10 years, but even more accelerated over the last five years, the Judiciary has become much more tech-friendly, and as a result of this, there are many ways to get hearings done, such as video hearings. When MDEC is finally in effect throughout the State, it will allow the Judiciary to do many things in the courthouse that do not require a person to physically be in the courthouse. This is currently true with witnesses from all over the country.

Judge Callahan said that she did not mean any disrespect to Anne Arundel County, but the goal is for the Judiciary to be organized differently than the system in that county. The government of Maryland gives money to run the court system. The money is distributed based on the information available as to what each individual court needs to serve the population. The way this is structured right now is that in Anne Arundel County, the Judiciary is paying for half the time of a magistrate who is not performing the work inside of the courthouse. The money is

not being used for its intended purpose. Governments give out money for purposes determined by the legislature, and the hope is that the money is given out appropriately. This is not what is happening with Anne Arundel County.

Judge Callahan remarked that she did not think that this was because of a nefarious purpose, but these matters should be conducted in the courthouses. When she was in practice, she had attended several hearings at Mr. Naditch's office, and the hearings were conducted very appropriately. Making these kind of changes is always difficult, but the goal can be accomplished.

Judge Kiessling clarified that the standing examiners are not hearing contested custody cases; they are hearing uncontested matters. Mr. Naditch had made the point that the court hearings take longer than might be expected. Anne Arundel County has some of the best case time standards in Maryland for completing cases. The standing examiner system frees up the judges in Anne Arundel County to hear more complicated, contested matters. Those cases can be heard more quickly.

Judge Eaves commented that Judge Callahan had said that the statistics on the chart that was distributed are the most recent data available. The chart indicates that there are about 1,600 uncontested cases and consent hearings. Judge Eaves asked what the total number of uncontested cases are, including those handled by magistrates and judges. Judge Callahan responded

that this number was correct in 2015. The 1,600 cases comprised about 60% of the uncontested cases in Anne Arundel County. Judge Eaves inquired if there were other domestic cases, and Judge Callahan replied affirmatively.

Ms. Harris moved to approve Rules 2-541, 2-542, 2-543, and 9-208 as presented. The motion was seconded, and it carried on a majority vote. The Chair thanked the guests who had attended for this matter.

Agenda Item 2. Consideration of proposed amendments to Rule 16-306 (Special Inactive Pretrial Docket for Asbestos Actions) and proposed new Rule 16-306.1 (Special Inactive Bankruptcy Docket for Asbestos Actions)

---

The Chair presented Rule 16-306, Special Inactive Pretrial Docket for Asbestos Actions, and proposed new Rule 16-306.1, Special Inactive Bankruptcy Docket for Asbestos Actions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 – COURT ADMINISTRATION

CHAPTER 300 – CIRCUIT COURTS –

ADMINISTRATION AND CASE MANAGEMENT

AMEND Rule 16-306 by renaming the special docket for asbestos cases to the special inactive pretrial docket for asbestos actions ("SIPD"); by substituting the word "action" for the word "case" throughout, including plurals; by revising in subsection (c)(3) the process for re-

transferring an action to the court in which it was originally filed after the action's removal from the SIPD; and by making a stylistic change in the Committee note following section (e), as follows:

Rule 16-306. SPECIAL INACTIVE PRETRIAL DOCKET FOR ASBESTOS CASES ACTIONS

(a) Definition

In this Rule,:

(1) Asbestos Action

"Asbestos case action" means an action seeking money damages for personal injury or death allegedly caused by exposure to asbestos or products containing asbestos. It does not include an action seeking principally equitable relief or seeking principally damages for injury to property or for removal of asbestos or products containing asbestos from property.

(2) SIPD

"SIPD" means the special inactive pretrial docket established pursuant to this Rule.

(b) Special Inactive Pretrial Docket

The Administrative Judge of the Circuit Court for Baltimore City may establish and maintain a special inactive pretrial docket (SIPD) for asbestos cases actions filed in or transferred to that court. The order:

(1) shall specify the criteria and procedures for placement of an asbestos case action on the inactive docket SIPD and for removal of a case such an action from the that docket;

(2) may permit an asbestos case action meeting the criteria for placement on the SIPD inactive docket to be placed on that docket at any time prior to trial; and

(3) with respect to any case action placed on the SIPD inactive docket, may stay the time for filing responses to the complaint, discovery, and other proceedings until the case action is removed from the docket.

(c) Transfer of Cases Actions from Other Counties

(1) The Circuit Administrative Judge for any other judicial circuit, by order, may:

(A) adopt the criteria established in an order entered by the Administrative Judge of the Circuit Court for Baltimore City pursuant to section (b) of this Rule for placement of an asbestos case action on the inactive docket SIPD for asbestos cases actions;

(B) provide for the transfer to the Circuit Court for Baltimore City, for placement on the inactive docket SIPD, of any asbestos case action filed in a circuit court in that other circuit for which venue would lie in Baltimore City; and

(C) establish procedures for the prompt disposition in the circuit court where the action was filed of any dispute as to whether venue would lie in Baltimore City.

(2) If an action is transferred pursuant to this Rule, the clerk of the circuit court where the action was filed shall transmit the record to the clerk of the Circuit Court for Baltimore City, and, except as provided in subsection (c)(3) of this Rule, the action shall thereafter proceed as if initially filed in the Circuit Court for Baltimore City.

(3) Unless otherwise ordered by the Circuit Court, any action transferred pursuant to section (c) of this Rule, upon removal from the inactive docket, shall be re-transferred Upon removal of an action from the SIPD, the Administrative Judge of the Circuit Court for Baltimore City, with the concurrence of the County Administrative Judge of the circuit court in which the action originally was filed, may re-transfer the action to the circuit court in which it was originally filed and all further proceedings shall take place in that court.

(d) Exemption from Rule 2-507

Any action placed on the SIPD an inactive docket pursuant to this Rule shall not be subject to Rule 2-507 until the action is removed from that docket.

(e) Effect on Rule 2-327 (d)

To the extent of any inconsistency with Rule 2-327 (d), this Rule shall prevail.

Committee note: Section (e) of this Rule does not preclude a transfer under Rule 2-327 upon retransfer re-transfer of an action under subsection (c)(3) of this Rule.

(f) Applicability of Rule

This Rule shall apply only to actions filed on or after December 8, 1992.

Source: This Rule is derived from former Rule 16-203 (2016).

Rule 16-306 was accompanied by the following Reporter's note.

Amendments to Rule 16-306 and proposed Rule 16-306.1 were requested by the Circuit Court for Baltimore City, which oversees the majority of asbestos actions in the State,

including some actions originally filed in other circuit courts. Rule 16-306 and new Rule 16-306.1 recognize the unique nature of asbestos actions, including a plaintiff's need to file an action to preserve a claim before active litigation is ripe, as well as the fluid status of defendants that are in bankruptcy or leaving bankruptcy.

Proposed amendments to Rule 16-306 (a) and (b) rename the docket established by this Rule to the special inactive pretrial docket for asbestos actions ("SIPD"). This change is necessary for clarification, in light of the new docket proposed by Rule 16-306.1.

The word "action" is substituted for the word "case" throughout the Rule, including plural forms. Action is a broader term encompassing "all the steps by which a party seeks to enforce any right in a court." See Rule 1-202.

Subsection (c)(3) revises the process for re-transferring an action to the circuit court in which it was originally filed once it has been removed from the SIPD. The amendment provides that the Administrative Judge of the Circuit Court for Baltimore City may re-transfer an action to its original venue, with the concurrence of the County Administrative Judge of the circuit court in which it was originally filed, after the action is removed from the SIPD.

A stylistic change is made to the Committee note following section (e).

ADMINISTRATION AND CASE MANAGEMENT

ADD new Rule 16-306.1, as follows:

Rule 16-306.1. SPECIAL INACTIVE BANKRUPTCY DOCKET FOR ASBESTOS ACTIONS

(a) Definitions

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

(1) Asbestos Action

"Asbestos action" has the meaning set forth in Rule 16-306 (a);

(2) Bankrupt Defendant

"Bankrupt defendant" means a defendant in an asbestos action who is in bankruptcy and, as a result, is subject to the protection of a stay of proceedings under 11 U.S.C. §362 or by order of the Bankruptcy Court.

(3) SIBD

"SIBD" means the special inactive bankruptcy docket created pursuant to this Rule.

(b) Applicability

This Rule applies only to asbestos actions in which (1) all claims by all plaintiffs against all non-bankrupt defendants and all claims by non-bankrupt defendants against other non-bankrupt defendants have been fully resolved or abandoned and, (2) but for open claims by or against a bankrupt defendant, final judgment could be entered with respect to the

plaintiffs' claims against the non-bankrupt defendants and claims by non-bankrupt defendants against other non-bankrupt defendants.

(c) Notice of Resolution

(1) Any party to an asbestos action who has reason to believe that the action falls within the ambit of this Rule may file a Notice of Resolution.

(2) To the extent feasible, the Notice shall

(A) include an affirmation by counsel that all claims by all plaintiffs against all non-bankrupt defendants and all claims by non-bankrupt defendants against other non-bankrupt defendants have been, or pursuant to section (e) of this Rule, will be, fully resolved, and

(B) identify all bankrupt defendants by or against whom claims are still pending but cannot be adjudicated because proceedings against those defendants are stayed under Federal bankruptcy law.

(3) The Notice shall be served on all other parties, other than a bankrupt defendant, in accordance with the procedures for service applicable to asbestos actions.

(4) Upon the filing of a Notice of Resolution, the Administrative Judge may cancel or postpone any pending events in the action that may be unnecessary in light of the Notice.

(d) Objection

Any party may contest the Notice of Resolution by filing and serving on all other parties, other than a bankrupt defendant, an objection within 15 days after service of the Notice. If an objection is filed, the court, after an opportunity for a hearing if one is requested, shall determine whether the Notice is valid and further

proceedings under section (e) of this Rule should occur.

(e) Ruling; Severance; Transfer

(1) If the court concludes that an objection has merit and that the action does not fall within the ambit of this Rule, the court shall reject the Notice and state the basis for the rejection.

(2) If no objection to the Notice is timely filed or if, upon the filing of an objection, the court determines that the objection is without merit, the court may (A) cancel pending events in the action, (B) sever all claims by or against the bankrupt defendants and transfer those claims to the SIBD created pursuant to section (f) of this Rule, and (C) enter appropriate judgments with respect to all existing claims (i) by all plaintiffs against all non-bankrupt defendants and (ii) by all non-bankrupt defendants against other non-bankrupt defendants **[**or against any of the plaintiffs**]**.

(f) Creation of Special Inactive Bankruptcy Docket (SIBD)

(1) By administrative order, the Administrative Judge of the Circuit Court for Baltimore City shall establish a Special Inactive Bankruptcy Docket for Asbestos Actions (SIBD) in accordance with this Rule. The docket shall consist of all claims severed and transferred to it pursuant to section (e) of this Rule.

(2) The severance and transfer of claims to the SIBD shall not affect the substantive status or validity of any claim by or against the bankrupt defendant or any defense to such a claim, whether existing at the time of severance and transfer or filed or raised upon termination of the bankruptcy stay. The purpose of the severance and transfer is solely to permit judgments to be

entered on resolved claims against the non-bankrupt defendants.

(3) The plaintiffs are responsible for monitoring periodically the status of the bankruptcy actions and notifying the court upon (A) any lifting of a stay that would permit the action to proceed against the bankrupt defendant or successor that emerges from the bankruptcy, or (B) a discharge or other resolution in the bankruptcy proceeding that would permanently preclude any relief in the circuit court against that defendant or successor. Upon the lifting of a stay or upon a permanent preclusion of relief in the circuit court against all bankrupt defendants and their successors, the action shall be removed from the SIBD in accordance with an appropriate order of the Administrative Judge or a designee of that judge.

(4) Because no proceedings are permissible with respect to any claims by or against a bankrupt defendant while the bankruptcy stay is in effect, actions on the SIBD shall not be subject to Rule 2-507 and shall be deemed to be administratively closed for statistical purposes, including any otherwise applicable time standards, subject to being reopened upon removal from that docket.

Source: This Rule is new.

Rule 16-306.1 was accompanied by the following Reporter's note.

Amendments to Rule 16-306 and proposed Rule 16-306.1 were requested by the Circuit Court for Baltimore City, which oversees the majority of asbestos actions in the State, including some actions originally filed in other circuit courts. Rule 16-306 and new Rule 16-306.1 recognize the unique nature of asbestos actions, including a plaintiff's need to file an action to preserve a claim before active litigation is ripe, as well as

the fluid status of defendants that are in bankruptcy or leaving bankruptcy.

Statistically, thousands of open asbestos actions in the Circuit Court for Baltimore City, as well as other circuit courts, have some claims, but not all, litigated to finality. Those actions, however, cannot be closed because of other claims that are stayed against defendants in bankruptcy—itself a lengthy process that may take years. The proposed Rules changes seek to address the need to close claims that are fully litigated, while preserving the ability of a plaintiff to proceed in the future on other claims against defendants currently in bankruptcy.

Proposed Rule 16-306.1 establishes a special inactive bankruptcy docket for asbestos actions ("SIBD"). This docket permits a court to sever claims in an action, closing those that have been litigated to finality and placing those stayed under federal bankruptcy law on a special inactive docket that is not subject to Rule 2-507.

Section (a) defines terms used in the Rule.

Section (b) specifies the actions to which the Rule applies. Those actions must have all claims by all plaintiffs against all non-bankrupt defendants, and all claims by non-bankrupt defendants against other non-bankrupt defendants, fully resolved or abandoned, with the only open claims being those by or against a bankrupt defendant.

Section (c) permits any party to an asbestos action who believes that this Rule applies to the action to file a Notice of Resolution. The Notice must include, to the extent feasible, an affirmation by counsel of the fully resolved status of all claims by or against all parties that are not in bankruptcy and an identification of the bankrupt defendants by or against whom

claims cannot be adjudicated. The Notice must be served on all other parties, other than a bankrupt defendant. Once the Notice is filed, the Administrative Judge may cancel or postpone pending events in the action that are unnecessary in light of the Notice.

Section (d) permits any party who wishes to contest the Notice of Resolution to do so by filing an objection and serving it on all other parties, except bankrupt defendants. After an opportunity for a hearing, if one is requested, the court determines whether the Notice is valid.

If the court determines that an objection under section (d) has merit and an action does not fall within the ambit of Rule 16-306.1, the court must reject, under section (e), the Notice of Resolution and state its basis for doing so. If there is no objection to a Notice, or the court determines that any objection is without merit, the court may proceed with the cancellation of any pending events in the action, sever all claims by or against bankrupt defendants and transfer those claims to the SIBD, and enter appropriate judgments in the fully litigated claims.

Subsection (f)(1) requires the Administrative Judge of the Circuit Court for Baltimore City to establish the SIBD by administrative order. Subsection (f)(2) states that the severance and transfer of claims to the SIBD does not affect the substantive status or validity of any claim by or against a bankrupt defendant. Under subsection (f)(3), plaintiffs are responsible for monitoring the status of bankruptcy actions and updating the court if a relevant stay is lifted or a discharge or other final resolution occurs in a defendant's bankruptcy proceeding. Upon the lifting of a stay or permanent preclusion of relief in the circuit court against all bankrupt defendants and their successors, the action shall be removed from the SIBD by

> order of the Administrative Judge or a designee. Finally, subsection (f)(4) affirms that actions on the SIBD are not subject to Rule 2-507 because no proceedings are permissible with respect to any claims by or against a bankrupt defendant while a bankruptcy stay is in effect.

The Chair told the Committee that some explanation for the proposed changes to Rule 16-306 and for proposed new Rule 16-306.1 would be helpful. Rule 16-306 was first adopted in 1992 as Rule 1211 a. The purpose was to address a massive influx of personal injury asbestos cases filed predominantly in Baltimore City, but also in some of the counties. The great majority of those cases involved situations in which the plaintiff suffered some physiological change allegedly due to the exposure to asbestos products but had not yet developed any symptoms from it. The plaintiffs needed to file their case to avoid limitations problems, but it was understood at the time that a great majority of these cases would not be ready for trial for years and possibly decades. That is what has happened.

The Chair noted that this presented a problem because of Rule 2-507, Dismissal for Lack of Jurisdiction or Prosecution. To address the dilemma of limitations on the one hand and Rule 2-507 on the other, Rule 16-306 provides for the creation of a special inactive docket just for those asbestos cases. Under that Rule, all new personal injury asbestos filings would be placed on that inactive docket and would remain there until

pulled off. Cases on that docket are exempt from Rule 2-507. It is not necessary to come back every year and explain why the case is not being tried.

The Chair observed that Rule 16-306 also provides for the transfer to Baltimore City of cases that had been filed in the counties, assuming that Baltimore City was a permissible venue for the case. Now, somewhere between 25,000 and 35,000 cases are still on that docket. The exact number is not known. Efforts are being made to deal with this situation. All of this is background. These are not the issues being discussed today.

The Chair said that with one exception, the only proposed changes to Rule 16-306 are to conform the Rule to proposed new Rule 16-306.1. The one exception is to modify the provision in subsection (c)(3)dealing with the retransfer of cases that were initially filed in a county and transferred to Baltimore City once the case is pulled off the inactive docket. With respect to Rule 16-306, this is the only substantive change, and it is only partly substantive.

The Chair pointed out that proposed new Rule 16-306.1 addresses a separate problem. There appears to be somewhere between 1,000 and 3,000 personal injury asbestos cases that were removed from the inactive docket and largely, but not completely, resolved. What is incomplete is that one or more defendants in those cases went into bankruptcy after the action was filed, and, as a result, no proceedings are permissible with

respect to those defendants in bankruptcy. The claims by or against all of the other defendants have been resolved, but no final judgment can be entered because of the pending claims by or against the bankrupt defendants. The plaintiffs are unwilling to dismiss their claims against the bankrupt defendants, because the claims may become viable once those defendants emerge from bankruptcy. All of the settled claims just sit. Nothing can be done with them. They are clogging up the docket as well as creating harm both to the plaintiffs and to the settling defendants.

The Chair explained that proposed new Rule 16-306.1 attempts to deal with that problem by permitting the claims against the defendants in bankruptcy to be severed from the case and placed on a new, separate, inactive bankruptcy docket. The new Rule necessarily makes clear that the severance does not in any way affect the validity or the status of any claim by or against those bankrupt defendants nor could it under federal bankruptcy law. It preserves all rights and liabilities regarding those claims that exist. The only purpose of the severance and the transfer to the inactive bankruptcy docket is to permit judgments to be entered with respect to the non-bankrupt defendants in cases that had already been settled or otherwise disposed of.

The Chair noted that the procedure for accomplishing this is set forth in sections (c) through (f) of proposed Rule 16-

306.1. This proposal, the concept of it, and the Rules themselves had been discussed at some length on several occasions with the Honorable W. Michel Pierson, Administrative Judge for the Circuit Court for Baltimore City, and on two occasions with the attorneys representing both the plaintiffs and the defendants in the cases on the asbestos docket in Baltimore City.

Judge Pierson commented that he was at the meeting in case anyone had any questions about the background of the handling of asbestos cases. As the Chair had said, it had been discussed extensively with both sides of the bar. They had the assent of all the parties. It is essential to case management to be able to determine how many of these cases there are. One of the problems is that these cases would never be closed, and it is necessary to find a way to close them. The procedure in Rules 16-306 and 16-306.1 is the vehicle that has been developed for that purpose. It will help with the cases that should have been closed, and, in the future, it will provide a way to close cases when they are resolved prior to trial or by trial but with bankrupt defendants remaining in the case.

The Chair said that he had worked with the State Court Administrator on addressing the situation where there is an inactive case, and some issue is alive and cannot be closed. This is a unique situation because these cases cannot be closed due to federal bankruptcy law. The State, the parties, and the

court cannot do anything. At least for statistical purposes, the cases can be regarded as closed, subject to their being reopened if and when any of these bankrupt defendants emerge from bankruptcy. Then that last missing piece of the case can be resolved.

Ms. Harris asked about the effective date of December 8, 1992 that is in section (f) of Rule 16-306. The Reporter clarified that this is the date for the existing docket, but the date for the new docket will be whatever the effective date is for new Rule 16-306.1 when the Court of Appeals sets an effective date in the Rules Order. The new Rule will go into effect on and after that date, and it is not necessary to add it to Rule 16-306.

The Chair referred to the bracketed language in section (e) of Rule 16-306.1, which has been in the Rule since the first draft. The language is "or against any of the plaintiffs." The Chair said that he did not know whether any of the defendants in asbestos cases had ever filed a counterclaim against the plaintiff. Mr. Loker told the Committee that he is an attorney with Miles and Stockbridge and has been doing asbestos defense work since 1981. He said that he could not recall a single case where a defendant had filed a counterclaim against a plaintiff. Mr. Cantor said that he is an attorney in the Office of Peter Angelos and also has been doing this kind of work for a long

time. He could not recall a case where the defendant had filed a counterclaim against a plaintiff.

The Chair asked whether the bracketed language in section (e) was necessary. Mr. Loker responded that since no one knew of a counterclaim against a plaintiff that had ever been filed, the language was not needed. By consensus, the Committee agreed to delete the bracketed language.

Mr. Weaver questioned whether proposed new Rule 16-306.1 might not go far enough. He described a hypothetical case where there are three defendants in bankruptcy, and one emerges. The Chair said that this would go into whatever proceedings are permissible at the time. Mr. Weaver noted that the Rule provides in subsection (f)(3) that the plaintiff monitors the status of the bankruptcy actions and notifies the court (1) if a stay is lifted permitting the action to proceed or (2) if a discharge or other resolution in the bankruptcy proceeding would permanently preclude any relief in the circuit court. The assumption is that the court will issue some order transferring the part of the case related to that defendant back to the active docket.

Judge Pierson said that it would be removed from the special bankruptcy docket. The Chair added that it would be removed as to that defendant. Judge Pierson commented that there are defendants who have either come out of bankruptcy or have come out of bankruptcy in the form of a bankruptcy trust,

and those claims have returned to active adjudication. However, there may be another defendant who is still in bankruptcy.

Mr. Weaver remarked that three defendants may have been severed from a case, and one emerges. Is this a new case on the active docket? The Chair replied that it is the same case, but if it has been closed statistically, it would be reopened as to that defendant and put on a trial docket. Discovery would be needed, as well as any other trial preparations. Mr. Weaver asked whether Rule 16-306.1 should go a step further and state how this happens. The Reporter pointed out that the second sentence of subsection (f) (3) of Rule 16-306.1 reads, as follows: "Upon the lifting of a stay or upon a permanent preclusion of relief in the circuit court against all bankrupt defendants and their successors, the action shall be removed from the SIBD [Special Inactive Bankruptcy Docket for Asbestos Actions] in accordance with an appropriate order of the Administrative Judge or a designee of that judge."

The Reporter noted that if the stay is lifted, the case is removed, and then the judge orders where it goes. If it is lifted, it can be set in for trial, but if the action against all bankrupt defendants is permanently precluded, then the order of the judge would state that the case is over, because everything has been resolved. As long as at least one bankrupt defendant is still in limbo, then as to that defendant, the case stays on the special docket.

The Chair suggested that the wording should be: "Upon the lifting of a stay ... against a bankrupt defendant...". Mr. Loker expressed the opinion that it makes sense to use the language "a defendant" instead of the language "all defendants." There is already a process that works for the transfer of a case from the inactive docket to the active docket. It is just another form of an inactive docket, and the same mechanism would likely apply. About once a month, the judge overseeing the asbestos docket publishes a list of cases, which may be as many as 50 or 60 cases that have qualified for coming off of the existing inactive docket, because the plaintiff's medical condition has worsened, because the plaintiff has died, or for some other reason that justifies activation. The cases move from the pool of inactive cases to the pool of active cases. They are not assigned for trial. That is a separate situation, but the inactive bankrupt docket should operate the same way. Periodically, there will just be a list, and the adjustment will be made.

The Chair commented that the change from the language "all defendants" to the language "a defendant" will make it apply to the individual bankrupt defendant and its successors. Mr. Loker agreed.

Mr. Loker noted that there is a proposed change to Rule 16-306, and he asked whether this would be addressed separately. The Chair inquired whether Mr. Loker was referring to the

retransfer provision in subsection (c)(3) of Rule 6-306. Mr. Loker replied affirmatively. He expressed the view that the Rule as it exists today without the amendment works. This is a situation where a plaintiff determines to file his or her case in a particular county other than in Baltimore City. This decision may result in the case being transferred to Baltimore City for management on the inactive docket, but as soon as it qualifies for activation, the plaintiff's choice of venue should be honored. The proposed amendment to the Rule would provide that the Administrative Judge of Baltimore City can make the decision to send the case back to the original county, but the County Administrative Judge has to agree to it. This may be setting up a kind of limbo situation where the County Administrative Judge refuses to take the case back.

Judge Pierson remarked that the concurrence of the County Administrative Judge was not the focus of the change. Its purpose was to conform Rule 16-306 to actual practice. The Rule currently states that the action shall be retransferred. The Chair added that this is unless the court orders otherwise. Judge Pierson noted that these cases are never retransferred. He did not think that there had been any transfers since 1995. Cases are not being transferred to Baltimore City currently, because the cases all get filed in Baltimore City. The Chair pointed out that the current Rule allows Judge Pierson, as the

Administrative Judge, to transfer a case back. It does not matter whether the county wants it back.

The Chair said that his recollection was that when Rule 16-306 was adopted, a special expertise was going to be developed in Baltimore City for trial of the asbestos cases. The first one consolidated 8,500 cases for trial. It took six months to try the case, and there have been efforts since then to replicate this. The thought was that in these county cases, instead of having some of them in other counties, where the judges trying the cases would have to learn about this kind of case, it was easier to leave them in Baltimore City. At the time, the cases were going to go back automatically to the original county.

Judge Pierson commented that he did not envision a "wrestling match" with the County Administrative Judge of the other court. He did not see a problem with the wording of subsection (c)(3) of Rule 16-306. The Chair asked Judge Pierson what his recommendation was. Judge Pierson responded that subsection (c)(3) should be left as it appears in the meeting materials for today. Mr. Cantor agreed. The Chair said that the thought was that in an asbestos case, the attorney could call the Administrative Judge from the original county and ask whether the judge would take the case back. Judge Pierson remarked that consulting with the County Administrative Judge is the common practice with other transfers.

Judge Eaves asked whether subsection (f)(3) of Rule 16-306.1 could be discussed again. She said that she wanted to make sure that if the automatic stay is lifted against one bankruptcy defendant, that case can be reactivated. Should subsection (f)(3)(A) read: "any lifting of a stay that would permit the action to proceed against a bankrupt defendant or successor...?" This particular provision goes on to clarify later, as follows: "Upon the lifting of a stay or upon a permanent preclusion of relief in the circuit court against all bankrupt defendants...". The Chair responded that the change would be made in the second sentence of subsection (f)(3). It would read: "Upon the lifting of a stay or upon a permanent preclusion of relief in the circuit court against a bankrupt defendant and its successors, the action by or against that defendant shall be removed ...". Judge Eaves explained that this is why she had suggested that subsection (f)(3)(A) be changed, also. The Chair noted that subsection (f)(3)(A) should read "... against the bankrupt defendant ...". By consensus, the Committee approved the suggested changes to subsection (f)(3) of Rule 16-306.1.

The Chair said that the proposed changes to Rules 16-306 and 16-306.1 are a Subcommittee recommendation, but since a change was made to Rule 16-306.1, a motion was necessary to approve the Rules. Mr. Frederick moved to approve both Rules,

Rule 16-306 as presented, and Rule 16-306.1 as amended. The motion was seconded, and it passed on a majority vote.

Agenda Item 3. Consideration of proposed amendments to Rule 20-106 (When Electronic Filing Required; Exceptions)

---

The Chair presented Rule 20-106, When Electronic Filing Required; Exceptions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 20 – ELECTRONIC FILING AND CASE MANAGEMENT

CHAPTER 100 – GENERAL PROVISIONS

AMEND Rule 20-106 by adding a Committee note following subsection (a)(1)(A), by providing an alternative method of handling of a paper document offered in open court by a registered user for inclusion in the record but not as an exhibit, and by making stylistic changes, as follows:

Rule 20-106. WHEN ELECTRONIC FILING REQUIRED; EXCEPTIONS

. . .

(e) Exhibits and Other Documents Offered in Open Court

(1) Generally Exhibits

(A) Generally

Unless otherwise approved by the court, a document offered into evidence or otherwise for inclusion in the record in open court shall be offered in paper form.

If the document is offered as an exhibit, it The document shall be appropriately marked.

Committee note: In a document-laden action, if practicable, the court and the parties are encouraged to agree to electronically prefiling documents to be offered into evidence, instead of offering them in paper form.

(2) (B) Scanning and Return of Document

As soon as practicable, the clerk shall scan the document into the MDEC system and return the document to the party who offered it at the conclusion of the proceeding, unless the court orders otherwise. If immediate scanning is not feasible, the clerk shall scan the document as soon as practicable and notify the person who offered it when and where the document may be retrieved.

(2) Documents Other than Exhibits

(A) Generally

Except as otherwise provided in subsection (e)(2)(B) of this Rule, if a document in paper form is offered in open court for inclusion in the record, but not as an exhibit, the court shall accept the document, and the clerk shall follow the procedure set forth in subsection (e)(1)(B) of this Rule.

(B) If Offered by Registered User

If a registered user offers a document in open court for inclusion in the record, but not as an exhibit, the court may accept the document conditionally subject to it being electronically filed by the registered user before the end of the day. If the registered user fails to file by the end of the day, the court may strike the document.

Committee note: Examples of documents other than exhibits offered for inclusion in the record are written motions made in open court, proposed voir dire questions, proposed jury instructions, communications from a jury, and special verdict sheets.

Source: This Rule is new.

Rule 20-106 was accompanied by the following Reporter's note.

Under current Rule 20-106 (e), all documents in paper form offered in open court for inclusion in the record are scanned into the MDEC system by the clerk. Scanning backlogs can develop, especially when large, nonevidentiary documents are submitted. Additionally, the current practice is problematic when a fee is attendant to the filing or when service on a party not present in court is required.

To address these concerns, proposed amendments to the Rule give the court an alternative method of handling a paper document offered by a registered user in open court for inclusion in the record, but not as an exhibit. In that situation, the court may either follow the current procedure, or conditionally accept the document and require that the registered user electronically file it before the end of the day.

A Committee note is added following subsection (e)(1)(A), encouraging the parties and the court to agree to the electronic prefiling of documents to be offered into evidence.

Additionally, stylistic changes are made.

The Chair said that the proposed change to Rule 20-106 was a recommendation that emanated from the Honorable John P. Morrissey, Chief Judge of the District Court. It is presented in the context of an attorney coming into court with an appearance that had never been entered prior to that. In a county that has the Maryland Electronic Courts system ("MDEC"), this creates a problem. The Chair asked Judge Morrissey to explain the proposed change to Rule 20-106.

Judge Morrissey explained that the MDEC system has two parts. One is the "File and Serve" part, which is what the attorneys use to file papers in the court. The case management system that is known as "Odyssey" is what the court uses. When an attorney files something through the "File and Serve" system, the system will take certain actions, such as to automatically put the attorney's contacts into the court system so that when the defendant or other party goes to electronically serve the person, the contacts will come up. It will also account for any fee owed for that electronic filing.

Judge Morrissey said that the problem is that if the attorney comes into court with a line entering his or her appearance, or with a filing for which a fee is required, the clerk cannot go into the attorney's "File and Serve" account and enter that line or other filing in this account. Therefore, the connection to the attorney's contacts is not made, and the fee is not adjusted in the court's system. It creates a larger

problem too, as to the date by which a case has to be tried pursuant to *State v. Hicks* 285 Md. 310 (1979).

Judge Morrissey remarked that the Chair, Ms. Harris, and several other people had helped draft the proposed change to Rule 20-106, and it seems to be the most logical approach. In District Court, if the attorney does not want to enter his or her line of appearance, because the client has not yet paid the fee, the attorney could meet the client at the courthouse. The attorney could let the court know that he or she is representing the client, then leave the courthouse, and later electronically file his or her line of appearance.

The Chair commented that this could apply to other procedures besides entering an appearance. Judge Morrissey agreed. The Chair noted that Rule 20-106 makes the distinction between exhibits and everything else. Mr. Carbine said that he understood the concern about entries of appearance. He added that he is not opposed to the change to Rule 20-106. He pointed out that in a multi-day trial, at 3 o'clock in the afternoon, a judge could ask the attorneys for an in-depth memorandum on an issue in the case to be ready the next morning at 9:30 a.m. An attorney in the case would have to find the time to file the memorandum electronically. This may not be that easy in a multi-day trial. The Chair asked whether there would be no problem if the Rule was not changed. Mr. Carbine responded that an attorney would not have to electronically file. It has to be

understood that the scenario that he had described would be a side effect of the proposed change.

Judge Morrissey pointed out that Rule 20-106 provides for this situation. Based on subsection (e)(2)(A), it gives the judge the leeway to say that the document is allowed to be filed if it is offered in open court. It targets the line of appearance more than anything else. There have been occasions where attorneys take the opportunity at a hearing to file anything that they have currently. This is not the intent of the proposed change. The Chair said that the intent is that an attorney or other registered user needs to file electronically, so that the clerk does not have to keep track of the papers filed, taking into account the exceptions noted in the Rule.

Mr. Shellenberger referred to the Committee note after subsection (e)(1)(A) of Rule 20-106, commenting that it seemed to include exhibits. How would this be handled in a jury trial? Can the exhibits be pre-marked by number? This would have to correspond with the exhibits that go to the jury room. Judge Morrissey answered that the Committee note was added in case people wanted to prefile documents that would be offered into evidence. When the documents are entered electronically, they can be characterized by the clerk as confidential or not confidential.

Mr. Shellenberger remarked that, as a practical matter, he could have a major trial that lasts several days. He might

prefile 300 exhibits. The judge admits some but not all of them. Mr. Shellenberger would have to hand jurors some of the exhibits and make sure that they match up with what he prefiled. Would the numbers have to be exactly the same?

The Chair answered that this is not the intent of the Committee note. The intent is that in complex civil litigation, attorneys can pre-mark their exhibits for trial, and they would not have to be scanned in by the clerk. Those exhibits can be filed electronically and not admitted, but just offered. On the day of trial, the exhibits are already there. The clerk does not have to scan them. If there is an objection to any of them, the judge will decide it. The idea is that the attorneys can do this if they so choose to expedite the trial. It is not intended for the routine civil case.

Mr. Marcus commented that in a federal trial some time ago, the entire case was done electronically. There were essentially no paper exhibits. It was a major case with thousands of exhibits. Mr. Shellenberger asked what had been sent back to the jury room. Mr. Marcus replied that ultimately what the jury had received had been images on a computer monitor, because the jury used monitors to view the images as the trial proceeded. Mr. Shellenberger said that he would have to embrace the new technology just as federal courts have done.

Judge Nazarian pointed out that in federal court, all the exhibits have to be prefiled and pre-marked. They have another

innovation where if anyone refers to the exhibit that has been marked, it is admitted unless someone objects. The exhibits are numbered and marked and are taken in whatever order they come in. Mr. Shellenberger said that he has gotten questions from the jury asking for exhibits 5, 6, and 7, because they only had exhibits 1, 2, 3, 4, and 8. It can be complicated.

Mr. Frederick said that although he understands the proposed changes to Rule 20-106, what concerns him is the language in subsection (e)(2)(B) that reads: "... the court may accept the document conditionally subject to it being electronically filed by the registered user before the end of the day. If the registered user fails to file by the end of the day, the court may strike the document." Mr. Frederick noted that because his practice involves representing attorneys, he sees this language as a possible trap for them. Problems arise in complicated jury trials. It is an incredible burden for the trial attorney to have to file the document electronically by the end of the day. If an attorney is in a multi-day jury trial, this would be something that the attorney might not be thinking about.

Mr. Frederick asked whether it would it be better to draft some other language that would allow some flexibility. He remarked that he realized that the court may strike the document. He inquired about a reasonable time period to file, such as seven days from the date it was proposed, or five days

from the conclusion of the defendant's case. He asked Judge Morrissey whether there is some language that would solve the problem but at the same time avoid the potential trap for an attorney.

Mr. Armstrong agreed with Mr. Frederick. Mr. Armstrong observed that he could be in a county other than his home county trying a case, and he would need the ability as a registered user to be able to file something, which may be somewhat difficult. Mr. Frederick noted that for a law firm made up of one or two attorneys, one of the attorneys might practice all over the State and need some flexibility. Judge Morrissey commented that the reason why the language "by the end of the day" was put in the Rule was because of the *Hicks* issue. A delay could trigger the *Hicks* problem. It is a case management issue as to when the timer starts to run.

Mr. Frederick asked whether the requirement of filing by the end of the day could be added to the criminal Rule, but the civil Rule could be more flexible. Although he noted that he did not practice criminal defense work, he expressed the view that the criminal defense attorney could benefit from a more flexible rule.

The Reporter asked Judge Morrissey to confirm that the main problem of why the electronic filing of a document would have to be by the end of the day is because of the entry of appearance

issue and to confirm that it might be possible to expand the time for other procedures. Judge Morrissey confirmed both.

The Chair inquired whether there was anything else that requires a fee, other than the fee for filing an appearance. If it is brought into court, that fee might not be in the system. Judge Morrissey replied that this had been an issue, although it is not limited to the issue of filing by the end of the day. The attorney would just have to enter his or her appearance, and the fee would be collected at that point. Ms. Harris noted that there are two systems. If the clerk files a document in the system, an attorney does not go through File and Serve, and no fee is collected by doing it that way.

Mr. Shellenberger questioned whether the idea is to have two separate Rules, one for civil cases and one for criminal cases. He expressed his appreciation for drafting the Rule to avoid the *Hicks* problem. One day could make a huge difference in the time calculation. He hypothesized that an attorney in a multi-day civil trial finishes one of the days at 5 o'clock p.m. and now has to get something filed by the end of the day. What if the document was not filed on time and then stricken, and the expert's testimony depended on that document? This is somewhat harsh. Mr. Frederick noted that it could be a question from the jury, or an attorney may want to preserve the denial of a motion that he or she had made.

Judge Nazarian remarked that there may be value in having the Rule default to a specific period of time to get the electronic filing done. However, to change this to the language "as soon as practicable" or something similar would lead to attorneys taking advantage of this. What if the failure to file by the end of the day could be excused for good cause, so that it is harder to strike the document? If the wording is not "filed by the end of the day," it turns into "as soon as possible" with no end in sight. Judge Morrissey agreed with Judge Nazarian. This would leave something open, and the clerk would have to manually review to see what is still open. Judge Morrissey had already come before the Rules Committee to get a 10-day provision added, but it was not being honored. This had provided an endpoint for electronic filing.

Mr. Zollicoffer suggested that there could be one rule for the entry of an attorney's appearance and another rule for the entry of evidence. He agreed with Mr. Shellenberger that a multi-day trial becomes very complicated. The attorney may be offering 15 to 150 documents in a day. If he or she forgets to electronically scan a document after it has been introduced, it may be a problem. The Reporter pointed out that Rule 20-106 (e) applies to documents other than exhibits that are offered into evidence. It applies to motions and entries of appearance.

Mr. Frederick noted that this is a difference without a distinction, because an attorney may need something in the

record so that an appellate court can look at it, whether it is an exhibit or something else. If there is a question from the jury and an issue about how the court treated it, and that is not part of the record, there is a risk of an appellate challenge. He agreed with Judge Nazarian that it would be useful to have a specific number of days included in section (e) of Rule 20-106, such as "within the next three business days" or maybe five days.

Ms. McBride asked whether there is a practical problem with not treating exhibits as they have always been treated. The procedure for exhibits is that they are scanned in by the clerk. If an attorney has a motion, there is no reason that the clerk cannot scan that in. Mr. Carbine remarked that the items practitioners are worried about do not have a fee attached.

The Chair said that he had had a question about fees. Is there something other than an entry of appearance that has a fee attached to it? Mr. Weaver responded that the only thing that he could think of was that in a domestic case, a motion to modify custody or visitation or a petition for contempt all have a $25 fee. The Reporter asked whether this is filed in open court. Mr. Weaver answered that it is not filed in open court normally, but conceivably it could be. Someone may come to court for a change of custody, and the other side files a petition for contempt for non-compliance with the visitation arrangement, for example.

The Reporter asked whether there is a backlog on scanning non-fee items. If the issue is non-fee items, and the Rule stays the way it is, which is that the clerk scans the documents, is it a problem? Mr. Weaver replied that at the Subcommittee meeting, he had been opposed to this. He had not thought about the fee issue. Ms. Harris had said that one clerk had complained that it was a burden to scan all of the items that are not exhibits. Mr. Weaver added that in Washington County, this has not been a burden. The county has only been on MDEC for three months. Ms. Harris remarked that it depends on the local, legal culture. In some jurisdictions, the documents can be very lengthy. Mr. Weaver noted that Judge Morrissey had said that in some instances, attorneys are filing many documents in open court that are not related to the hearing at all. They are doing this in open court, because it can be filed in paper.

The Chair pointed out that one compromise would be to limit this to entry of appearance or any other filing that requires prepayment of a fee. He asked whether this would be helpful. Judge Morrissey answered affirmatively. The line entry of appearance is the biggest issue. The Chair said that there is a fee issue, and Judge Morrissey agreed. Mr. Shellenberger inquired whether the clerk would still be making an independent docket entry in the courtroom. Judge Morrissey answered that the clerk accepts a filing as received but non-docketed, but

then the clerk waits until a report is run. Then it would be accepted as the actual record.

Mr. Armstrong suggested that Rule 20-106 (e) could cover the filing of papers that require a fee. Judge Mosley said that in District Court, the entry of an appearance does not require a fee. Mr. Shellenberger pointed out that the *Hicks* time limitation does not apply in District Court. Judge Mosley noted that sometimes an attorney will enter an appearance and for some reason is not notified about the next appearance, because the entry has not come through. Mr. Armstrong commented that the Rule could apply to entry of a line appearance and any other filing requiring a fee.

Judge Morrissey remarked that it would be ideal if every judge would ensure that an attorney has entered his or her appearance in a case, but this does not always happen. Judge Morrissey added that he had had a negative experience with this and said that he always makes sure that the attorney in a case has entered his or her appearance.

The Reporter asked what happens in a criminal case. In the circuit court, the attorney comes into court and may ask for a postponement but never follows up on entering an appearance. How does the *Hicks* time limitation affect this if the attorney never physically files the entry of appearance in the MDEC system? Mr. Shellenberger responded that if an attorney stands up in open court and states that he or she is entering an

appearance, *Hicks* would start to run that day. The Reporter noted that subsection (e)(2)(B) of Rule 20-106 states that the court can strike the document, and she expressed her concern about this.

The Chair said that an issue had arisen at the Subcommittee about the situation where an attorney enters his or her appearance in open court but does not file anything. How will the other party know where to find this? How does the clerk know where to find it for purposes of service on the attorney? There is nothing in the file showing the entry of that appearance. The only record of it is on a disk somewhere. Mr. Shellenberger commented that the defendant will get notice and can call the attorney to inform him or her about the court date. The Chair pointed out that this issue does not apply to only criminal cases. How does the attorney get served?

Mr. Weaver responded that before MDEC, the policy in some courts was that if an attorney filed a line of appearance in a civil case without the $10 fee, the clerk would docket the notice of appearance but would not enter the name of the attorney in the Uniform Court System (UCS) as counsel. The attorney would not get a notice of a hearing or any other notice until the attorney paid the fee. The Chair observed that this is a recipe for malpractice.

The Chair said that the Committee has three choices. One is to take no action, one is to approve the proposed change in

Rule 20-106, and the third is to do something else. So far, the only other suggestion made was that the Rule should apply to entry of appearance and any other filing of a document that requires a fee. The judge can accept it, but the attorney will have to then e-file it as he or she should have done. Judge Morrissey urged the Committee not to choose the option of taking no action. If nothing is done, each jurisdiction develops its own business process of how to handle this. The court in Anne Arundel County is doing this differently than the court in Dorchester County. One of the benefits of this new system is that it standardizes the process, so the attorneys know what is expected in all counties.

Mr. Frederick asked Judge Morrissey whether the last alternative that had been proposed would be the best. Judge Morrissey answered affirmatively. The Chair clarified that Rule 20-106 (e) would apply to entry of appearance by an attorney and the filing of any other document that requires the payment of a fee. Mr. Frederick suggested that the word used should be "submission," and the Chair agreed. The Reporter added that the sanction would be the same as drafted, which is that if the registered user fails to file by the end of the day, the court may strike the document. Is this acceptable, or will it create more problems?

Mr. Frederick remarked that an attorney should be expected to enter his or her appearance. Mr. Marcus noted that someone

may not be able to pay the fee if it is after 4:30 p.m. The Chair pointed out that if the attorney is going to e-file the appearance, it can be done using a credit card. Judge Morrissey responded that someone could step out of the courtroom, and using a laptop, could then scan the line entry of appearance from an e-mail into the MDEC system. The credit card number is already on file. It should take less than four or five minutes. By consensus, the Committee approved the change to section (e) of Rule 20-106.

Mr. Marcus said that he had an amendment to suggest in place of the language that already had been suggested for subsection (e)(2)(B) of Rule 20-106, which was "the next business day" for payment. Not all of the courthouses are set up in a way that Wi-Fi can be used. In some courthouses, it is impossible to use Wi-Fi. Judge Morrissey inquired whether this is true in MDEC counties. Mr. Marcus responded that the county that he was referring to is not an MDEC county.

Judge Morrissey commented that as part of the rollout of MDEC, every court is equipped with Wi-Fi. This includes zones within the courthouse where the public can use the Wi-Fi. Judge Morrissey added that he would like to see Wi-Fi in every courthouse. That is the goal. However, it requires an extensive amount of work. Soon, seventeen counties will have Wi-Fi.

The Chair asked whether Mr. Marcus would accept the language: "If the registered user fails to file a notice of appearance by the end of the day in criminal cases ...". Civil cases would be by "the next business day." Mr. Marcus agreed to this language. By consensus, the Committee approved the changed language. Judge Morrissey thanked the Committee for its attention to this matter.

By consensus, the Committee approved Rule 20-106 as amended.

Agenda Item 4. Consideration of proposed amendments to: Rule 19-105 (Confidentiality), Rule 19-212 (Eligibility of Out-of-State Attorneys for Admission by Attorney Examination), and Rule 17-206 (Qualifications of Court-Designated ADR Practitioners Other than Mediators)

---

Mr. Frederick presented Rules 19-105, Confidentiality; 19-212, Eligibility of Out-of-State Attorneys for Admission by Attorney Examination; and 17-206, Qualifications of Court-Designated ADR Practitioners Other than Mediators, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

STATE BOARD OF LAW EXAMINERS AND CHARACTER COMMITTEES

AMEND Rule 19-105 to change the term "Law School Admission Council number" to "NCBE number," as follows:

Rule 19-105. CONFIDENTIALITY

. . .

(c) When Disclosure Authorized

The Board may disclose:

. . .

(9) to the National Conference of Bar Examiners, the following information regarding individuals who have filed applications for admission pursuant to Rule 19-202 or petitions to take the attorney's examination pursuant to Rule 19-213: the applicant's name and any aliases, applicant number, birthdate, ~~Law School Admission Council number~~ NCBE number, law school, date that a juris doctor or equivalent degree was conferred, bar examination results and pass/fail status, and the number of bar examination attempts;

. . .

Rule 19-105 was accompanied by the following Reporter's note.

The Attorneys and Judges Subcommittee is advised that the term "Law School Admission Council Number" is obsolete. A proposed amendment to Rule 19-105 replaces the obsolete term with the current term, "NCBE number."

MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

CHAPTER 200 – ADMISSION TO THE BAR

AMEND Rule 19-212 by replacing the word "accredited" with the word "approved" in subsection (a)(1) and section (b), as follows:

Rule 19-212. ELIGIBILITY OF OUT-OF-STATE ATTORNEYS FOR ADMISSION BY ATTORNEY EXAMINATION

(a) Generally

An individual is eligible for admission to the Bar of this State under this Rule if the individual:

(1) is a member in good standing of the Bar of a state;

(2) has passed a written bar examination in a state or is admitted to a state bar by diploma privilege after graduating from a law school ~~accredited~~ approved by the American Bar Association;

(3) has the professional experience required by this Rule;

(4) successfully completes the attorney examination prescribed by Rule 19-213; and

(5) possesses the good moral character and fitness necessary for the practice of law.

(b) Required Professional Experience

The professional experience required for admission under this Rule shall be on a full time basis as (1) a practitioner of law as provided in section (c) of this Rule; (2) a teacher of law at a law school ~~accredited~~ approved by the American Bar Association; (3) a judge of a court of record in a state; or (4) a combination thereof.

. . .

Rule 19-212 was accompanied by the following Reporter's note.

The Attorneys and Judges Subcommittee is advised that the American Bar Association no longer "accredits" law schools; rather, it currently "approves" them. Proposed amendments to Rule 19-212 (a)(2) and (b) conform the Rule to the current terminology.

MARYLAND RULES OF PROCEDURE

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 200 – PROCEEDINGS IN CIRCUIT COURT

AMEND Rule 17-206 by replacing the word "accredited" with the word "approved" in subsection (a)(4), as follows:

Rule 17-206. QUALIFICATIONS OF COURT-DESIGNATED ADR PRACTITIONERS OTHER THAN MEDIATORS

(a) Generally

Except as provided in section (b) of this Rule, an ADR practitioner designated by the court to conduct ADR other than mediation shall, unless the parties agree otherwise:

(1) abide by any applicable standards adopted by the Court of Appeals;

(2) submit to periodic monitoring of court-ordered ADR proceedings by a qualified

person designated by the county administrative judge;

(3) comply with procedures and requirements prescribed in the court's case management plan filed under Rule 16-302 (b) relating to diligence, quality assurance, and a willingness, upon request by the court, to accept a reasonable number of referrals at a reduced-fee or pro bono;

(4) either (A) be a member in good standing of the Maryland bar and have at least five years experience as (i) a judge, (ii) a practitioner in the active practice of law, (iii) a full-time teacher of law at a law school ~~accredited~~ approved by the American Bar Association, or (iv) a Federal or Maryland administrative law judge, or (B) have equivalent or specialized knowledge and experience in dealing with the issues in dispute; and

(5) have completed any training program required by the court.

. . .

Rule 17-206 was accompanied by the following Reporter's note.

The Attorneys and Judges Subcommittee is advised that the American Bar Association no longer "accredits" law schools; rather, it currently "approves" them. A proposed amendment to Rule 17-206 (a)(4) conforms the Rule to the current terminology.

Mr. Frederick explained that the proposed changes to Rules 19-105 and 19-212 had been generated from Jeffrey C. Shipley, Esq., Secretary and Director of the State Board of Law Examiners. The Attorneys and Judges Subcommittee has proposed a

change that is a difference without a distinction because of the nomenclature and the terminology being used.

The Chair asked whether anyone had a comment on the Rules. Mr. Shipley noted that the acronym "NCBE" stands for the National Conference of Bar Examiners. That organization promulgates the multi-state part of the bar exam. It is defined in section (i) of Rule 19-101, Definitions. The NCBE has a number assigned to each person who takes a bar exam anywhere in the United States. Mr. Frederick observed that Rule 17-206 has a conforming amendment to Rule 19-212.

By consensus, the Committee approved Rules 19-105, 19-212, and 17-206 as presented.

Agenda Item 5. Consideration of proposed amendments to Rule 19-726 (Discovery)

---

Mr. Frederick presented Rule 19-726, Discovery, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

CHAPTER 700 – DISCIPLINE, INACTIVE STATUS, RESIGNATION

AMEND Rule 19-726 by designating the existing Rule language as section (a) and by adding a new section (b) to provide that the Attorney Grievance Commission is not subject to an organizational designee deposition in an attorney disciplinary matter, as follows:

Rule 19-726. DISCOVERY

(a) Except as provided in section (b) of this Rule, ~~After~~ after a Petition for Disciplinary or Remedial Action has been filed, discovery is governed by Title 2, Chapter 400, subject to any scheduling order entered pursuant to Rule 19-722.

(b) The Attorney Grievance Commission shall not be subject to an organizational designee deposition, pursuant to Rule 2-412 (d), in an attorney disciplinary matter.

Source: This Rule is in part derived from former Rule 16-756 (2016) and in part new.

Rule 19-726 was accompanied by the following Reporter's note.

The Attorneys and Judges Subcommittee was advised that the Attorney Grievance Commission ("AGC") has been the subject of organizational designee deposition subpoenas issued pursuant to Rule 2-412 (d). Bar Counsel and the Office of the Attorney General have moved to quash such subpoenas and sought protective orders from the circuit courts for privileged and confidential materials of the AGC, including attorney-client communications and attorney work product.

The AGC requested a Rule change in response to its receipt of organizational designee deposition subpoenas, citing the negative impact the subpoenas have had on the AGC's resources, the accelerated schedule of attorney disciplinary cases, and the absence of relevant, case-specific knowledge of non-privileged information on the part of the organizational designee. In opposition to the AGC's request, some attorneys expressed the view that a fact-based motions practice, with a case-by-case

> determination, is preferable to a blanket prohibition.
>
> In considering the AGC's request and the opposition to it, the Attorneys and Judges Subcommittee noted that nothing in the proposed amendment prevents an individual from being deposed, as a witness or a non-party witness, as appropriate. The Subcommittee, therefore, recommends an amendment to Rule 19-726 stating that the Attorney Grievance Commission is not subject to the organizational designee deposition provision contained in Rule 2-412 (d).

Mr. Frederick told the Committee that with regard to the Attorney Grievance Commission ("AGC"), this proposal had been the subject of a spirited and extensive debate in the Subcommittee. To understand the proposed change, Mr. Frederick said that he would give an explanation of the attorney disciplinary system. There is a public and a private portion of the system in Maryland. The private portion involves Bar Counsel putting the attorney on notice of a complaint. If the complaint is such that Bar Counsel cannot make the determination as to whether the attorney's conduct violated a rule, Bar Counsel gives the attorney an opportunity to respond. For the vast majority of the responses, the process ends at this point. On the other hand, if it is something that Bar Counsel decides would be an ethical violation, if true, the complaint is docketed and goes to the private portion of the disciplinary system.

Mr. Frederick noted that at the end of the private portion, which can include a peer review, the AGC makes a determination as to whether to dismiss the matter, dismiss the matter with a warning (which by rule is not discipline), give the attorney a reprimand, which the attorney has to agree to take; offer the attorney a conditional diversion agreement, which the attorney has to agree to take; or vote that charges be filed in the Court of Appeals. That ends the private part of the system.

Mr. Frederick commented that if the attorney either rejects one of those actions that the attorney has the opportunity to take, or the Commission votes to file charges, charges are then filed in the Court of Appeals of Maryland captioned "Attorney Grievance Commission, Petitioner vs. _____,Respondent." Whatever the Attorney Grievance Commission knows or does not know about the case as a result of reports provided to it at its regular monthly meeting by Bar Counsel or whatever else Bar Counsel does is not necessarily known at this time.

Mr. Frederick observed that in two cases that he was aware of, attorney-respondents defending themselves without the benefit of being represented by another attorney have moved to take the deposition of the corporate designee of the AGC. Nothing in Rule 19-726 prohibits this at present, but Rule 19-724 (b)(2) provides that if there was a procedural deficit in the private portion of the disciplinary process, it is waived. It cannot be used as a defense. The Court of Appeals has cited

that Rule with approval. Two attorneys have convinced circuit court judges that they should be allowed to depose the corporate representative of the AGC. The Commission is the named party, and if the corporate representative misspeaks, he or she can bind the party. This is a unique situation. The Commission may be the named party, but in reality, Bar Counsel is bringing to the Court of Appeals the issue of whether the public needs to be protected from the acts or omissions of the respondent. The attorney disciplinary cases proceed when they are in trial on a very tight window. The case must be tried within 120 days after the date of service. This includes the full panoply of discovery available to the respondent.

Mr. Frederick said that pragmatically what happens when someone notes the deposition of the designee of the AGC is that it can cause problems for the attorney who is charged with the responsibility for the AGC, and it can cause problems for the 12 volunteers who serve without compensation as members of the AGC. At least two or three work days are spent preparing the person to be deposed, and it is usually a full seven hours for the deposition. Linda Lamone, Esq., Chair of the AGC, asked for some protection on this.

Mr. Frederick commented that the automatic reaction when anyone sees language such as "you shall not ever be able to depose a designee" is very negative. However, there is a practical side. Mr. Frederick noted that he has been defending

attorneys for 42 years and has never thought about deposing the AGC, because that would not help in the defense. The attorney either did or did not do what was alleged, did it with a different sphere of facts around it, or there is some explanation or a disability. None of this would remotely relate to the AGC.

Mr. Frederick remarked that on the other hand, anyone can have a bad side. Someone could be biased or being bribed. Rule 19-726 in no way prohibits someone from deposing all of the members of the AGC individually. It does not stop anyone from getting documents. It only stops someone from taking a deposition of the corporate representative of the AGC. Some of Mr. Frederick's colleagues had come up with a proposed alternative that included a requirement of good cause as a condition of allowing the corporate representative of the AGC to be deposed.

Mr. Frederick remarked that it is important to consider how attorney disciplinary cases are tried. A case is filed in the Court of Appeals, which refers it to the circuit court for the county where the attorney has his or her business address or lives. The administrative judge in that county assigns a judge to handle the case. Most of the judges in a multi-judge jurisdiction will handle only one or two of these cases while they are on the bench. They may have had no prior experience with this kind of case. If an attorney whose livelihood is

threatened comes before a judge and asks to take the deposition of the AGC whether there is good cause or not, the reaction from the trial court may be that there is no harm in allowing this. The judge would be likely to give the attorney every opportunity to defend himself or herself.

Mr. Frederick noted that the Subcommittee had an extensive debate, and everyone on the Subcommittee had spoken. Guests representing all sides of this issue had been present. The proposal to amend Rule 19-726 was what the Subcommittee had come up with. Because it is a Subcommittee proposal, it would take a motion to reject it.

By consensus, the Committee approved Rule 19-726 as presented.

Agenda Item 6. Reconsideration of proposed amendments to Rule 19-304.4 (Respect for Rights of Third Persons)

---

Mr. Frederick presented Rule 19-304.4, Respect for Rights of Third Persons (4.4), for the Committee's consideration.

**194th Report – proposed amendments (deferred)**
**(with additional proposed cross reference in boldface type)**

MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

CHAPTER 300 – MARYLAND ATTORNEYS' RULES OF PROFESSIONAL CONDUCT

AMEND Rule 19-304.4 by adding a new section (c) pertaining to obtaining information from third parties, by adding a Committee note **and a cross reference** following section (c), and by adding a new Comment [4], as follows:

Rule 19-304.4. RESPECT FOR RIGHTS OF THIRD PERSONS (4.4)

(a) In representing a client, an attorney shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that the attorney knows violate the legal rights of such a person.

(b) An attorney who receives a document, electronically stored information, or other property relating to the representation of the attorney's client and knows or reasonably should know that the document, electronically stored information, or other property was inadvertently sent shall promptly notify the sender.

(c) In communicating with third persons, an attorney representing a client in a matter shall not seek information relating to the matter that the attorney knows or reasonably should know is protected from disclosure by statute or by an established evidentiary privilege, unless the protection has been waived. An attorney who receives information that is protected from disclosure shall (1) terminate the communication immediately and (2) give notice of the disclosure to any tribunal in which the matter is pending and to the person entitled to enforce the protection against disclosure.

Committee note: If the person entitled to enforce the protection against disclosure is represented by an attorney, the notice required by this Rule shall be given to the person's attorney. See Rules 1-331 and 19-304.2 (4.2).

**Cross reference: To compare generally the duties of a party who receives inadvertently sent materials during discovery in a civil action in a circuit court, see Rule 2-402. See also Rules 2-510 and 2-510.1 to compare the duties of a party who receives inadvertently sent materials in answer to a subpoena.**

COMMENT

[1] Responsibility to a client requires an attorney to subordinate the interests of others to those of the client, but that responsibility does not imply that an attorney may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-attorney relationship.

[2] Section (b) recognizes that attorneys sometimes receive a document, electronically stored information, or other property that was inadvertently sent or produced by opposing parties or their attorneys. A document, electronically stored information, or other property is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document, electronically stored information, or other property is accidentally included with information that was intentionally transmitted. If an attorney knows or reasonably should know that such a document, electronically stored information, or other property was sent inadvertently, this Rule requires the attorney promptly to notify the sender in order to permit that person to take protective measures. Whether the attorney is required to take additional steps, such as returning the document, electronically stored information, or other property, is a matter of law beyond the

scope of these Rules, as is the question of whether the privileged status of a document, electronically stored information, or other property has been waived. Similarly, this Rule does not address the legal duties of an attorney who receives a document, electronically stored information, or other property that the attorney knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document, electronically stored information, or other property" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving attorney knows or reasonably should know that the metadata was inadvertently sent to the receiving attorney.

[3] Some attorneys may choose to return a document or delete electronically stored information unread, for example, when the attorney learns before receiving it that it was inadvertently sent. Where an attorney is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the attorney. See Rules 19-301.2 and 19-301.4.

[4] Third persons may possess information that is confidential to another person under an evidentiary privilege or under a law providing specific confidentiality protection, such as trademark, copyright, or patent law. For example, present or former organizational employees or agents may have information that is protected as a privileged attorney-client communication or as work product. An attorney may not knowingly seek to obtain confidential information from a person who has no authority to waive the privilege.

Regarding current employees of a represented organization, see also Rule 19-304.2 (4.2).

**Model Rules Comparison.** - Sections (a) and (b) of Rule 19-304.4 ~~is~~ are substantially similar to the language of Model Rule 4.4 of the Ethics 2000 amendments to the ABA Model Rules of Professional Conduct. Section (c) substantially restores to the Rule Maryland language as it existed prior to a 2017 amendment.

Rule 19-304.4 was accompanied by the following Reporter's note.

Amendments to Rule 19-304.4, effective April 1, 2017, conformed it to Model Rule 4.4 of the Ethics 2000 amendments to the ABA Model Rules of Professional Conduct. The amendments deleted language from former section (b) that addressed certain responsibilities of an attorney when obtaining information from third persons, without adding comparable language elsewhere.

Proposed amendments to Rule 19-304.4 substantially restore the deleted language by adding a new section (c), a Committee note following section (c), and Comment [4].

**Additionally, a cross reference to Rules 2-402, 2-510, and 2-510.1 is added following the new Committee note.**

A conforming amendment to Rule 19-304.2 also is proposed.

Mr. Frederick told the Committee that the proposed changes to Rule 19-304.4 resulted from an inadvertent error. The issue had arisen as to how an attorney deals with an unintended communication, such as an e-mail received by the attorney that had not been intended for him or her. The Rules Committee had

come up with a solution, but somehow in making that change, a part of the existing Rule had been deleted. The deleted language addressed certain responsibilities of an attorney when obtaining information from third persons. That needs to be restored. It is helpful and appropriate. This was brought to the attention of the Committee by the Ethics Committee of the Montgomery County Bar Association.

Mr. Frederick noted that since this proposal did not come out of the Subcommittee, it would require a motion to approve it. He moved to approve Rule 19-304.4, the motion was seconded, and it carried on a majority vote.

The Reporter pointed out that Rule 19-304.4 had been in the 194th Report to the Court with a suggested change to try to fix the Rule, but it was sent back because one of the judges had some questions about the interplay between the Title 2 Rules and Rule 19-304.4. Reinstating the formerly deleted language is part of the change, and a cross reference previously discussed by the Subcommittee that showed the interplay between the Title 2 Rules and Rule 19-304.4 has been added. Mr. Frederick remarked that this makes it more user-friendly and helpful to attorneys.

The Chair commented that there had been a concern about Rule 2-422, Discovery of Documents, Electronically Stored Information, and Property – From Party, as to what happens when the attorney gets information that he or she should not have

gotten. There are procedures for this. A violation of Rule 2-422 could be a cause for discipline under the Rules of Professional Conduct.

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