COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100A of the People's Resource Center, 100 Community Place, Crownsville, Maryland on April 11, 2003.

Members present:

Hon. Joseph F. Murphy, Jr., Chair
Linda M. Schuett, Esq., Vice Chair

Lowell R. Bowen, Esq.
Robert L. Dean, Esq.
Hon. James W. Dryden
Hon. Ellen M. Heller
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Hon. William D. Missouri
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Melvin J. Sykes, Esq.
Roger W. Titus, Esq.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Jonathan S. Rosenthal, Esq.
Hon. Albert J. Matricciani, Jr.
Albert "Buz" Winchester, III, Director, Legislative Relations
Jeff Welsh, Court Information Office
Jack L. B. Gohn, Esq.
Frank Broccolina, State Court Administrator
Michael C. Worsham, Esq.

The Chair convened the meeting. He asked if there were any additions or corrections to the Minutes of the Rules Committee meeting of November 15, 2002. There being none, the Vice Chair moved to approve the minutes as presented, the motion was seconded, and it passed unanimously.

Agenda Item 1. Consideration and reconsideration of certain rules changes pertaining to Alternative Dispute Resolution and the Business and Technology Case Management Program: Reconsideration of proposed amendments to: Rule 17-107 (Procedure for Approval) and Rule 17-108 (Fee Schedules); Consideration of a proposed amendment to Rule 16-108 (Conference of Circuit Judges)

The Vice Chair explained that these Rules had been before the Committee several times previously. The Vice Chair presented Rule 17-107, Procedure for Approval, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

AMEND Rule 17-107 to add a new section (b) concerning approval to conduct alternative dispute resolution proceedings in the Business and Technology Case Management Program, as follows:

Rule 17-107. PROCEDURE FOR APPROVAL

(a) Generally

(1) Applicability

This section applies to persons seeking designation to conduct alternative dispute resolution proceedings in actions other than those assigned to the Business and Technology Case Management Program.

~~(a)~~ (2) Filing Application

A person seeking designation to conduct alternative dispute resolution proceedings pursuant to Rule 2-504 in actions

other than those assigned to the Business and Technology Case Management Program shall file an application with the clerk of the circuit court from which the person is willing to accept referrals. The application shall be substantially in the form approved by the State Court Administrator and available from the clerk of each circuit court. A completed application shall be accompanied by documentation demonstrating that the applicant has the qualifications required by Rule 17-104, if the person is applying for designation as a mediator, or Rule 17-105 (a), if the person is applying for designation to conduct alternative dispute resolution proceedings other than mediation. The State Court Administrator may require the application and documentation to be in a form that can be stored in a computer.

~~(b)~~ (3) Approved Lists

After any investigation that the county administrative judge chooses to make, the county administrative judge shall notify each applicant of the approval or disapproval of the application and the reasons for a disapproval. The clerk shall prepare a list of mediators found by the county administrative judge to meet the qualifications required by Rule 17-104 and a separate list of persons found by the county administrative judge to meet the qualifications required by Rule 17-105 (a) for conducting other alternative dispute resolution proceedings. Those lists, together with the applications of the persons on the lists, shall be kept current by the clerk and be available in the clerk's office to the public.

~~(c)~~ (4) Removal from List

After notice and a reasonable opportunity to respond, the county administrative judge shall remove a person from a list if the person ceases to meet the applicable qualifications of Rule 17-104 or Rule 17-105 (a) and may remove a person for other good cause.

(b) Business and Technology Case Management Program

(1) Applicability

This section applies to persons seeking designation to conduct alternative dispute resolution proceedings in actions assigned to the Business and Technology Case Management Program.

(2) Filing Application

A person seeking designation to conduct alternative dispute resolution proceedings pursuant to Rule 2-504 in actions assigned to the Business and Technology Case Management Program shall file an application with the Administrative Office of the Courts, which shall transmit the application to the Committee of Program Judges appointed pursuant to Rule 16-108 b. 4. The application shall be substantially in the form approved by the State Court Administrator and available from the clerk of each circuit court. A completed application shall be accompanied by documentation demonstrating that the applicant has the qualifications required by Rule 17-104, if the person is applying for designation as a mediator, or Rule 17-105 (a), if the person is applying for designation to conduct alternative dispute resolution proceedings other than mediation. The State Court Administrator may require the application and documentation to be in a form that can be stored in a computer.

(3) Approved Lists

After any investigation that the Committee of Program Judges chooses to make, the Committee shall notify the Administrative Office of the Courts of the approval or disapproval of the application of each applicant and the reasons for a disapproval. The Administrative Office of the Courts shall (A) notify each applicant of the approval or disapproval of the application and the reasons for a disapproval; (B) prepare a list of mediators found by the Committee to meet

the qualifications required by Rule 17-104 and attach to the list such other information as the State Court Administrator specifies; (C) prepare a list of individuals found by the Committee to meet the qualifications required by Rule 17-105 (a) for conducting alternative dispute resolution proceedings other than mediation and attach to the list such other information as the State Court Administrator specifies; (D) keep the lists current; and (E) transmit a copy of each current list to the clerk of each circuit court, who shall make them available to the public.

Committee note: Examples of information that the State Court Administrator may specify as attachments to the lists made pursuant to this subsection include information about the individual's qualifications, experience, and background and any other information that would be helpful to litigants selecting an individual best qualified to conduct alternative dispute resolution proceedings in a specific case.

(4) Removal from List

After notice and a reasonable opportunity to respond, the Committee of Program Judges shall remove a person from a list if the person ceases to meet the applicable qualifications of Rule 17-104 or Rule 17-105 (a) and may remove a person for other good cause.

Source: This Rule is new.

Rule 17-107 was accompanied by the following Reporter's Note.

Proposed new section (b) adds to Rule 17-107 a procedure for approval of persons seeking to conduct alternative dispute resolution ("ADR") proceedings in actions assigned to the Business and Technology Case Management Program. Under this section, the ADR practitioner files an application with the Administrative Office of the Courts

> ("AOC"), and a Committee of Program Judges appointed pursuant to Rule 16-108 b. 4. approves or disapproves the application. The AOC maintains current lists of individuals who are approved for designation to conduct ADR proceedings in the Business and Technology Case Management Program. The AOC provides a copy of the current lists to the clerk of each circuit court, who makes the lists available to the public.

The Vice Chair said that the first two pages of the Rule contain stylistic changes. The first substantive change appears in section (b). Subsection (b)(2) provides that a person seeking designation to conduct alternative dispute resolution proceedings in actions assigned to the Business and Technology Case Management Program shall file an application with the Administrative Office of the Courts ("AOC"). There had been some discussion as to who should receive the applications. The consensus reached by the Style Subcommittee and the Conference of Circuit Court Judges was to file the applications with the AOC, which would then transmit the application to the Committee of Business and Technology Program Judges appointed pursuant to section (b) of Rule 16-108, Fee Schedules. Subsection (b)(3) provides that the Committee shall notify the AOC as to the approval or the disapproval of each applicant. The AOC then notifies the applicant of the decision. Subsection (b)(4) states that the Committee shall remove a person from the list of qualified individuals if the person ceases to meet the applicable qualifications of Rule 17-104, Qualifications and Selection of Mediators, or Rule 17-105, Qualifications and Selections of

Persons Other than Mediators.

Judge Missouri inquired as to whether subsection (b)(4) triggers a hearing, and if so, where the hearing is held. The Vice Chair responded that under the current rules, there is good cause removal of mediators, and this concept has been carried forward. Judge Missouri commented that if the Committee of Business and Technology Judges makes the decision to remove a mediator from the list instead of the administrative judge making the decision, it is not clear as to which jurisdiction would hold a hearing. The Chair commented that the Honorable Albert J. Matricciani, Jr. of the Circuit Court of Baltimore City, was present to discuss the two Rules. Judge Matricciani told the Rules Committee that he had not considered the issue raised by Judge Missouri. Judge Heller remarked that she had not considered this issue either. Taking someone off the list of mediators may be depriving that person of a property or liberty interest in that position. Judge Matricciani noted that the judges setting up the mediation program had discussed how to develop criteria to evaluate mediators to find out who is effective and who is not.

The Vice Chair commented that she did not think that the original language in subsection (a)(4) which reads, “a reasonable opportunity to respond” necessarily means that the person to be removed from the list of mediators has the right to present evidence. It could mean that the person can respond in writing. The Chair said that the person could request a hearing. The

Committee of Program Judges or the administrative judge can grant a hearing if it is necessary. The language seems to work well. Mr. Sykes questioned whether a hearing would tie up the entire Committee of Business and Technology Judges. Judge Matricciani answered that there are only three judges on the Committee. The Reporter observed that the person could be left on the list unless his or her actions were egregious, and the court that is assigning a mediator to a particular action can opt out of choosing someone who is marginal.

The Chair remarked that someone on the list could argue that he or she cannot be removed from the list without being given the opportunity to correct the problem that is the reason for the potential removal. The problem may be a matter of qualifications, such as the person has not taken certain necessary courses, and the person should be told of the problem. Mr. Titus noted that the mediators serve at the pleasure of the court, and there may be surplus mediators on the list who are never used. The Vice Chair expressed the view that the Rule does not have to be rewritten. Judge Kaplan added that a similar provision has been in the general Alternative Dispute Resolution ("ADR") Rules and has caused no problem.

The Vice Chair suggested that in the second sentence of subsection (b)(3), the language "...disapproval of his or her application..." should be changed to "...disapproval of the application...," and the Committee agreed by consensus to this change. The Committee approved the Rule as amended.

The Vice Chair presented Rule 17-108, Fee Schedules, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

AMEND Rule 17-108 to change "county administration judge" to "circuit administrative judge" and to add a certain Committee note, as follows:

Rule 17-108. FEE SCHEDULES

Subject to the approval of the Chief Judge of the Court of Appeals, the ~~county~~ circuit administrative judge of each circuit court may develop and adopt maximum fee schedules for persons conducting each type of alternative dispute resolution proceeding other than on a volunteer basis. In developing the fee schedules, the ~~county~~ circuit administrative judge shall take into account the availability of qualified persons willing to provide those services and the ability of litigants to pay for those services. A person designated by the court, other than on the agreement of the parties, to conduct an alternative dispute resolution proceeding under Rule 2-504 may not charge or accept a fee for that proceeding in excess of that allowed by the schedule. Violation of this Rule shall be cause for removal from all lists.

Committee note: A fee schedule may set a different maximum rate for each type of alternative dispute resolution ("ADR") proceeding and may include different rates for the same type of proceeding depending upon the complexity of the action and the qualifications required of the ADR practitioner who conducts the proceeding.

Source: This Rule is new.

Rule 17-108 was accompanied by the following Reporter's Note.

> Rule 17-108 currently gives authority to the county administrative judge to set fee schedules for persons conducting alternative dispute resolution ("ADR") proceedings, subject to the approval of the Chief Judge of the Court of Appeals. The Rules Committee recommends that fee schedules be set instead by the circuit administrative judge, subject to the Chief Judge's approval. The proposed change is intended to facilitate a uniform approach to fee schedules within each circuit, generally, and in particular with respect to ADR proceedings in cases assigned to the Business and Technology Case Management Program.
>
> A Committee note is proposed to be added to make clear that the rates in the fee schedule may be based not only on the type of ADR proceeding but also on the complexity of the action and the qualifications of the ADR practitioner.

The Vice Chair pointed out that there is a typographical error in the "amend" clause at the beginning of the Rule -– the word "administration" should be changed to the word "administrative." She noted that the Rule provides that the circuit administrative judge is involved in developing and adopting fee schedules. The proposed Committee note will clarify that the rates in the fee schedule are based not only on the type of ADR proceeding but also on the complexity of the action and the practitioner's qualifications. The Committee approved the Rule as presented, with the correction of the "amend" clause.

The Vice Chair presented Rule 16-108, Conference of Circuit

Judges, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 100 - COURT ADMINISTRATIVE STRUCTURE, JUDICIAL DUTIES, ETC.

AMEND Rule 16-108 to add a new subsection concerning the appointment of a Business and Technology Case Management Committee, as follows:

Rule 16-108. CONFERENCE OF CIRCUIT JUDGES

a. Purpose.

There shall be a Conference of Circuit Judges that represents the interests of the circuit courts and is a policy advisory body to the Chief Judge of the Court of Appeals, the Court of Appeals, and other judicial branch agencies in all circuit court matters.

b. Powers.

1. Administration Policies.

To fulfill its purpose, the Conference shall work collaboratively and in consultation with the Chief Judge of the Court of Appeals in developing policies affecting the administration of the circuit courts, including but not limited to:

(A) programs and practices that will enhance the administration of justice;

(B) the level of operational and judicial resources to be included in the Judiciary Budget;

(C) legislation that may affect the circuit courts; and

(D) the compensation and benefits of circuit court judges.

2. Consultants.

With the approval of the Chief Judge, the Conference may retain consultants in matters relating to the circuit courts.

3. Consultation with Chief Judge of the Court of Appeals.

The Conference shall consult with the Chief Judge of the Court of Appeals:

(A) on the appointment of circuit judges to committees of the Judicial Conference in accordance with Rule 16-802 f 2; and

(B) to recommend circuit judges for membership on other committees and bodies of interest to the circuit courts.

4. Business and Technology Case Management Committee of Program Judges.

The Conference shall appoint a committee of not less than three program judges to perform the duties required by Rule 17-107 (b) and to serve generally as a policy advisory body with respect to the Business and Technology Case Management Program.

Cross reference: For the definition of "program judge," see Rule 16-205 (a)(3).

~~4.~~ 5. Majority Vote.

The Conference and the Executive Committee of the Conference each shall exercise its powers and carry out its duties pursuant to a majority vote of its authorized membership.

c. Membership and Operation.

1. Composition.

The Conference shall comprise 16 members including the circuit administrative judge from each judicial circuit and one circuit judge from each judicial circuit who shall be

elected every two years by majority vote of the circuit judges then authorized in the circuit.

2. Chair and Vice-Chair.

The Conference shall elect from its members every two years a Chair and Vice-chair.

3. Quorum.

A majority of the authorized membership of the Conference shall constitute a quorum.

4. Meetings.

The Conference shall meet at least four times a year.

d. Executive Committee.

1. Power and Composition.

There shall be an Executive Committee of the Conference. It shall consist of the Conference Chair and Vice-Chair and such other members as may be designated by the Conference and shall be empowered to act with the full authority of the Conference when the Conference is not in session. The actions of the Executive Committee will be reported fully to the Conference at its next meeting.

2. Quorum.

A majority of the authorized membership of the Executive Committee shall constitute a quorum.

3. Convening the Executive Committee.

The Executive Committee shall convene at the call of the Conference Chair. In the absence of the Chair, the Vice-Chair is authorized to convene the Executive Committee.

e. Conference Staff.

The Administrative Office of the Courts shall serve as staff to the Conference and

its Executive Committee.

Source: This Rule is new.

Rule 16-108 was accompanied by the following Reporter's Note.

> The proposed amendment to Rule 16-108 requires that the Conference appoint a committee of program judges who will serve generally as a policy advisory body with respect to the Business and Technology Case Management Program and perform the specific duties set forth in Rule 17-107 (b).

The Vice Chair explained that a new subsection b 4 has been proposed for addition to Rule 16-108 providing for the Conference of Circuit Judges to appoint a Committee of Program Judges in the Business and Technology Case Management Program to serve generally as a policy advisory body and to perform the duties required by Rule 17-107 (b).

Judge Missouri commented that the Honorable Daniel M. Long, Administrative Judge of the First Judicial Circuit, had sent an e-mail letter to Frank Broccolina, State Court Administrator, asking why it is necessary to include subsection b 4, since the appointment authority already exists. Mr. Broccolina explained that Judge Long was not objecting to the addition of this provision but was simply asking a question. Judge Matricciani said that he had seen Judge Long's e-mail and noted that this provision had not seemed to cause any administrative problems. The Chair added that this conforms the Rule to current practice. The Committee approved the Rule as presented.

Agenda Item 2. Consideration of certain proposed rules changes pertaining to mandamus and certiorari: Amendments to: Rule 15-701 (Mandamus) and Rule 7-301 (Certiorari in the Circuit Court); New Rules: Rule 7-401 (General Provisions), Rule 7-402 (Procedures), and Rule 7-403 (Disposition)

Mr. Sykes told the Committee that the proposed changes to the Mandamus Rules have a long history. Previously, the Rules Committee had considered the question of whether to eliminate the Mandamus and Certiorari Rules, replacing them with injunctive relief. Other jurisdictions have taken this step. The Court of Appeals was resistant to this idea. The idea to change the Rules had been quiescent for a long time. Jack L. B. Gohn, Esq, wrote an editorial in The Daily Record suggesting that the Mandamus Rule should be modified, because it is so skeletal and does not fill in the necessary procedures. With Mr. Gohn's assistance, the Subcommittee decided to distinguish between general mandamus and mandamus applying to appeals from an administrative agency decision where there is no statutory appeal. In ordinary mandamus, no record is transmitted to the circuit court, but an appeal from an administrative agency is on the record. Title 7, Chapter 400 is modeled after circuit court appeals from decisions of administrative agencies.

Mr. Sykes presented Rules 15-701, Mandamus, 7-301, Certiorari in the Circuit Court, 7-401, General Provisions, 7-402, Procedures, 7-403, Disposition, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 - OTHER SPECIAL PROCEEDINGS

CHAPTER 700 - MANDAMUS

AMEND Rule 15-701 to add a Committee note after section (a), as follows:

Rule 15-701. MANDAMUS

(a) Commencement of Action

Except as provided in Rules 7-401 et seq., an action for a writ of mandamus shall be commenced by the filing of a verified complaint, the form and contents of which shall comply with Rules 2-303 through 2-305. The plaintiff shall have the right to claim and prove damages, but a demand for general relief shall not be permitted.

Committee note: Code, Courts Article, §3-8B-02 provides: "An action for a writ of mandamus shall be tried by a jury on request of either party." This has been judicially interpreted to apply to fact questions. See Cicala v. Disability Review Board for Prince George's County, 288 Md. 254 (1980).

For review of quasi-judicial rulings of administrative agencies where judicial review is not authorized by statute, see Rule 7-401.

(b) Defendant's Response

The defendant may respond to the complaint as provided in Rule 2-322 or Rule 2-323. An answer shall be verified and shall fully and specifically set forth all defenses upon which the defendant intends to rely, but the defendant shall not assert any defense that the defendant might have relied upon in an answer to a previous complaint for mandamus by the same plaintiff for the same relief.

(c) Amendment

Amendment of pleadings shall be in accordance with Rule 2-341.

(d) Ex Parte Action on Complaint

(1) Upon Default by Defendant

If the defendant is in default for failure to ~~appear~~ respond, the court, on motion of the plaintiff, shall hear the complaint ex parte~~. The~~ , and the plaintiff ~~shall be required to introduce~~ must support the complaint by evidence ~~in support of the complaint~~. If the ~~court finds that the facts and law authorize the granting of the writ, it~~ law authorizes the issuance of the writ under the circumstances proved by the evidence, the court shall order the writ to issue without delay. Otherwise, the court shall dismiss the complaint.

(2) Upon Striking of Defendant's Answer

If ~~the court grants~~ a motion to strike an answer filed pursuant to Rule 2-322 (e) is granted, and the court does not permit the ~~filing of an~~ answer to be amended ~~answer~~, the court may ~~enter an~~ order ~~authorizing~~ the writ to issue without requiring the plaintiff to introduce evidence in support of the complaint.

(e) Writ of Mandamus

(1) Contents and ~~Time for~~ Compliance

The writ shall be peremptory in form and shall require the defendant to perform immediately the duty sought to be enforced~~. For~~ , unless for good cause shown~~, however,~~ the court ~~may~~ extends the time for compliance. ~~It shall not be necessary for the writ to~~ The writ need not recite the reasons for its issuance.

(2) Certificate of Compliance

Immediately after compliance, the defendant shall file a certificate stating that all the acts commanded by the writ have been fully performed.

(3) Enforcement

Upon application by the plaintiff, the court may proceed under Rule 2-648 against a party who disobeys the writ.

(f) Adequate Remedy at Law

The existence of an adequate remedy in damages does not preclude the issuance of the writ unless the defendant establishes that property exists from which damages can be recovered or files a sufficient bond to cover all damages and costs.

Source: This Rule is derived from former Rules BE40, BE41, BE43, BE44, BE45, and BE46.

Rule 15-701 was accompanied by the following Reporter's Note.

The Specific Remedies Subcommittee proposes changes to Rule 15-701, Mandamus, including a reference to proposed new Rules 7-401 et seq., and the addition of a Committee note to section (a) referring to the case of Cicala v. Disability Review Board, 288 Md. 254 (1980) to clarify when a jury trial is appropriate in mandamus cases. The Subcommittee is also proposing style changes to sections (d) and (e).

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW

IN CIRCUIT COURT

CHAPTER 300 - CERTIORARI

AMEND Rule 7-301 to change the word "defendant" to "respondent," to add language to section (a) defining the word "party," to

add a Committee note after section (a), to add new language to section (d), and to eliminate the reference to a "show cause order" in section (e), as follows:

Rule 7-301. CERTIORARI IN THE CIRCUIT COURT

(a) Applicability; Definitions

This Rule governs applications in the circuit court for a writ of certiorari. As used in this Rule, ~~"defendant"~~ "respondent" means the ~~person or body~~ District Court or the orphans' court whose acts are sought to be reviewed. As used in this Rule, "party" means any party to a proceeding in the District Court or orphans' court other than the petitioner or petitioners in the circuit court.

Committee note: For review of quasi-judicial actions other than those involving a review of an action by the District Court or an orphans' court, a writ of mandamus is the appropriate remedy. See Rules 7-401 et seq.

(b) Petition

An application for a writ of certiorari shall be by petition filed in the circuit court for the county where the acts sought to be reviewed take, have taken, or would take effect. ~~and~~ The petition shall name as ~~defendant~~ respondent the ~~person or body~~ court whose acts are sought to be reviewed and the names and addresses of all known parties in the proceeding with respect to which the review by the circuit court is sought. The petition shall be under oath and shall contain (1) ~~a description~~ the name of the ~~defendant~~ respondent, ~~and of~~ (2) the matter sought to be reviewed, ~~(2)~~ (3) a statement of the interest of the ~~plaintiff~~ petitioner in the matter, and ~~(3)~~ (4) ~~a statement of~~ the facts relied on to show that the ~~defendant~~ respondent lacked jurisdiction or committed unconstitutional acts reviewable by writ of certiorari.

(c) Action on Petition; Bond

Upon the filing of a petition, the court shall (1) issue an order requiring the ~~defendant~~ respondent to file a response by a specified date ~~stated in the order~~ showing cause why the writ should not issue, or (2) issue a writ of certiorari to the ~~defendant~~ respondent, requiring the production by a specified date of all records of the ~~defendant~~ respondent in the matter by a date stated in the writ, or (3) dismiss the petition if the court determines from the petition that it lacks jurisdiction. Before issuing a writ of certiorari, the court may require the ~~plaintiff~~ petitioner to file a bond conditioned on the payment to any person of any damages sustained because of the issuance of the writ if the court ultimately determines that the writ should not have issued.

Cross reference: Title 1, Chapter 400.

(d) Service and Notice

~~A copy of the petition, any show cause order, and any writ of certiorari shall be served upon the defendant, or if the defendant is not an individual, upon an official of the defendant in the manner provided by Rule 2-121. Service of a writ of certiorari shall stay all further proceedings by the defendant. The court may require notice of the certiorari proceeding to be given to any other person.~~ Upon filing the petition, the petitioner shall deliver to the clerk one additional copy of the petition for the respondent and one additional copy for each party. The petitioner shall also notify the other parties in conformity with Rule 1-351 (b). The clerk shall promptly mail copies of the petition to the clerk of the respondent and to the parties, informing the respondent and the parties of the date the petition was filed and the civil action number assigned to the petition. Along with the copy to the respondent and to each party, the clerk of the circuit court shall give written notice that:

(1) a petition for certiorari has been filed, the date of the filing, the name of the court, and the civil action number; and

(2) a respondent or party wishing to oppose the petition must file a response within 30 days after the date the clerk's notice was mailed unless the court shortens or extends the time.

(e) Hearing

(1) When No Response is Filed

If no response to a petition is filed, the court may issue the writ without a hearing.

~~(1)~~ (2) When ~~Show Cause Order Issued~~ a Response is Filed

If the ~~defendant~~ respondent or a party files a response to a ~~show cause order~~ petition, the court shall hold a hearing to determine its own jurisdiction and whether to issue the writ. ~~If no response is filed, the court may issue the writ without a hearing.~~

~~(2)~~ (3) When Writ Issued

Upon the return of the writ and the production by the ~~defendant~~ respondent of its records, the court shall first determine if it has jurisdiction and, if so, shall review the jurisdiction and constitutionality of the acts of the ~~defendant~~ respondent.

(f) Motion to Intervene

Any person whose interest may be affected adversely by the certiorari proceeding may move to intervene pursuant to Rule 2-214.

Source: This Rule is derived from former Rules K41 through K48.

Rule 7-301 was accompanied by the following Reporter's Note.

Jack L. B. Gohn, Esq., proposed changes to the Rules governing certiorari and mandamus. After considering his thorough research and drafting, the Specific Remedies Subcommittee recommends narrowing the scope of certiorari so that it applies only to review of actions of a judicial rather than an administrative tribunal. The recommendation is that review of administrative agency actions where review is not authorized by statute, will be pursuant to a set of new rules proposed for addition to Title 7, Chapter 400, entitled Administrative Mandamus.

The Subcommittee is proposing to change the word "defendant" to "respondent" in Rule 7-301 since the Rule is proposed to apply to review of actions of the District Court or orphans' court only. Language has been added explaining that the term "party" will now be used in the Rule to mean someone involved in the proceeding other than the petitioners. A Committee note is being proposed which will direct the bar to the new Administrative Mandamus Rules for review of quasi-judicial actions other than those reviewing District Court or orphans' court actions.

Section (d) is being changed to set out in more detail the procedures for service and notice which are currently very limited and to eliminate a show cause order procedure.

In section (e) the Subcommittee proposes adding a new subsection (1) which provides that a court may issue the writ of certiorari without a hearing if no response to the petition is filed, using the language now in current subsection (e)(1). A provision for a hearing when a show cause order is issued is in the current rule. The Subcommittee recommends deleting the language referring to the show cause order, and substituting in its place a provision for a hearing when a response is filed consistent with the proposed changes to section (d).

The Subcommittee is also proposing style changes to sections (b) and (c).

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 400 - ADMINISTRATIVE MANDAMUS

ADD new Rule 7-401, as follows:

Rule 7-401. GENERAL PROVISIONS

(a) Applicability

The rules in this Chapter govern actions for judicial review of a quasi-judicial order or action of an administrative agency, where review is not authorized by statute or by local law.

Committee note: Where judicial review of an order or action of an administrative agency is authorized by statute, see Rule 7-201 et seq. For review of quasi-judicial actions other than those involving a review of an action by the District Court or an orphans' court, a writ of mandamus is the appropriate remedy.

(b) Definition

As used in this Chapter, "administrative agency" means any agency, board, department, district, commission, authority, Commissioner, official, or other unit of the State or of a political subdivision of the State.

Source: This Rule is new.

Rule 7-401 was accompanied by the following Reporter's Note.

Consistent with Jack L. B. Gohn's suggestions to improve the Mandamus Rules, the Subcommittee proposes creating a new set of Rules entitled "Administrative Mandamus" for review of quasi-judicial actions of

administrative agencies where review is not authorized by statute. Rule 7-401 is patterned after Rule 7-201 with the necessary distinctions. A Committee note explaining that mandamus is the appropriate remedy for review of quasi-judicial actions other than an action by the District Court or orphans' court has been added for clarity.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW

IN CIRCUIT COURT

CHAPTER 400 - ADMINISTRATIVE MANDAMUS

ADD new Rule 7-402, as follows:

Rule 7-402. PROCEDURES

(a) Complaint and Response

An action for a writ of administrative mandamus shall be commenced by the filing of a complaint, the form, contents, and timing of which shall comply with Rules 7-202 and 7-203. The response to the filing of the writ shall comply with the provisions of Rule 7-204.

(b) Stay

The filing of the writ does not stay the order or action of the administrative agency. The court may grant a stay pursuant to Rule 7-205.

Alternative A
(Subcommittee's Recommendation)

(c) Discovery

The court may permit discovery, in accordance with the provisions of Title 2, Chapter 400 that the court finds to be appropriate, but only in cases where the party challenging the agency action makes a strong showing of the existence of fraud or extreme circumstances which occurred outside the scope of the administrative record, and a remand to the agency is not a viable alternative.

Alternative B
(Recommendation of Jack L. B. Gohn, Esq.)

(c) Discovery

The court may within its discretion permit discovery in cases where there is a *prima facie* showing of the existence of an issue upon which any party may be unfairly prejudiced without discovery, including but not limited to: the nature and content of actions of the agency of which the plaintiff is not otherwise informed, the good faith of agency personnel, and the reasoning of agency decision-makers.

Committee note: The Committee recommends that judicial discretion to authorize discovery be specifically acknowledged because agency decision-makers whose actions are reviewed in an administrative mandamus proceeding may not have created a full and reviewable record. As in ordinary mandamus conducted pursuant to Rule 15-701, and depending on the nature of the allegations and of the extant agency record, a record sufficiently fair and complete to enable a court to rule on an administrative mandamus complaint may need to be established by facts best developed through discovery.

(d) Record and Memoranda

The record and memoranda shall be filed pursuant to Rules 7-206 and 7-207.

(e) Hearing

The court may hold a hearing pursuant to Rule 7-208.

Source: This Rule is new, except that subsection (c) codifies the decision in Montgomery County v. Stevens, 337 Md. 471 (1995).

Rule 7-402 was accompanied by the following Reporter's Note.

Rule 7-401 is designed to incorporate many of the procedures of Title 7, Chapter 200. The Subcommittee recommends adding a provision for discovery to be available only upon a showing of fraud or extreme circumstances which occurred outside the scope of the administrative record, and if a remand to the agency is not a viable alternative. This is consistent with the decision in Montgomery County v. Stevens, 337 Md. 471 (1995).

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW

IN CIRCUIT COURT

CHAPTER 400 - ADMINISTRATIVE MANDAMUS

ADD new Rule 7-403, as follows:

Rule 7-403. DISPOSITION

The court may issue an order denying the writ of mandamus, or may issue the writ (1) remanding the case for further proceedings, or (2) reversing or modifying the decision if any substantial right of the plaintiff may have been prejudiced because a finding, conclusion, or decision of the agency:

(A) is unconstitutional,

(B) exceeds the statutory authority or jurisdiction of the agency,

(C) results from an unlawful procedure,

(D) is affected by any error of law,

(E) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted,

(F) is arbitrary or capricious, or

(G) is an abuse of its discretion.

Source: This Rule is new.

Rule 7-403 was accompanied by the following Reporter's Note.

Rule 7-403 is patterned after Rule 7-209. The proposed Rule provides for the issuance of a writ of mandamus in place of the order issued pursuant to Rule 7-209. The language in subsections (A) through (F) is taken from the Administrative Procedure Act, State Government Article, §10-222 (h). The language of subsection (G) is taken from the concurring opinion by the Honorable Glenn T. Harrell, Jr. in the case MTA v. King, 369 Md. 274 (2002). The Subcommittee is in agreement with Judge Harrell that abuse of discretion should be added to the list of grounds for issuing the writ in judicial review of agency decisions.

Directing the Committee's attention to Rule 15-701, Mr. Sykes said that section (a) is similar to the current Rule except for the reference to "Rules 7-401 et seq." The new Committee note explains that jury trials are available for cases involving fact questions. Although the statute, Code, Courts Article, §3-8B-02, provides that an action for a writ of mandamus is tried by a jury, the case of Cicala v. Disability Review Board for

Prince George's County, 288 Md. 254 (1980) holds that a jury may decide only questions of fact, not questions of law. Section (b) provides that the general Title 2 Rules for responses are applicable, except that the Subcommittee has retained the provision that an answer shall be verified. Because there is no record transmitted to the Court in which the mandamus action is filed, something more than a bald statement of counsel is necessary.

Mr. Sykes pointed out that section (d) provides that if the defendant defaults, the court may issue the writ of mandamus. If an answer is stricken because the defense is legally inadequate, the court may order the writ to issue, and the plaintiff does not have to introduce evidence in support of the complaint. The Vice Chair commented that if the defendant is in default for failure to appear, the plaintiff must prove his or her entitlement to the writ. Why is the result different when an answer is stricken? Mr. Sykes replied that ordinarily the answer is stricken with the right to amend; however, an answer invalid on its face does not contest the facts alleged. The Chair asked if a late filed answer is stricken. Mr. Sykes responded that the case would be over if the answer is filed too late, subject to appeal for abuse of discretion.

The Chair pointed out that the language in subsection (d)(1) which reads: "If the law authorizes the issuance of the writ under the circumstances proved by the evidence, the court shall order the writ to issue without delay" is not correct, because

the decision of the court is discretionary. He suggested that the provision could read as follows: "If the defendant is in default for failure to respond or if a motion to strike an answer filed pursuant to Rule 2-332 (e) is granted, and the court does not permit the answer to be amended, the court shall order the writ to issue without delay if the law so authorizes." The Chair explained that the Court of Special Appeals gets cases from inmates requesting a writ of mandamus to order the circuit court to decide the inmate's post conviction petition. The Chair said that he does not want to be forced to issue the writ; the decision whether to issue it should be discretionary. Mr. Sykes commented that mandamus is a right. If someone proves that he or she is entitled to the writ, why should the decision to issue it be discretionary?

Judge Heller asked why the language in the existing Rule which reads "If the court finds that the facts and law authorize the granting of the writ..." is proposed to be deleted. Language could be added to section (d) to follow the language of section (f) of Rule 2-613, Default Judgment, which provides: "If, in order to enable the court to enter judgment, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any matter, the court may rely on affidavits, conduct hearings, or order references as appropriate...". The court would have the discretion to take evidence but would not be required to do so. The Vice Chair said that she agreed, but she

did not understand why the Rule would require a verified complaint and answer unless it is used for something. If evidence is to be presented in support of the complaint, verification need not be required. Judge Heller pointed out that if the words "must support" were removed from subsection (d)(1), that provision would be similar to Rule 2-613 (f). Mr. Zarnoch commented that the common law required verification. The statute may have intended that the common law be followed or may have intended to alter the common law. Mr. Sykes remarked that if the verification complaint is retained, there is no need to present evidence.

The Vice Chair said that she is currently working on the third edition of her book, Maryland Rules Commentary. One of the sections being revised pertains to injunctions and mandamus. The Honorable Paul V. Niemeyer, now a judge of the United States Court of Appeals for the Fourth Circuit, a co-author of the book, and formerly a member of the Rules Committee, wrote the section in the book on mandamus. He had commented that the Mandamus Rule is left over from a previous time. It does not permit a demand for general relief, and it requires a complaint and answer under oath, which is unnecessary.

Mr. Titus observed that he had never used a writ against an administrative agency when the agency's actions were being reviewed. The modern way to challenge the action of an agency when there is no statutory authority is through a declaratory judgment. He expressed the view that there need not be a

specific rule. The Chair noted that if the writ of mandamus is abolished, cases may be in limbo. A police officer who seeks a special disability pension from Baltimore City but is only given ordinary disability has no statutory remedy to appeal the decision and would file a petition for a writ of mandamus. Mr. Titus noted that the police officer could seek a declaratory judgment. Mr. Gohn responded that case law does not support this –- it provides for writs of mandamus or certiorari as a remedy.

Judge Kaplan remarked that mandamus is used for cases involving elections where someone on the ballot did not have the necessary qualifications. The way to obtain immediate action is to file for a writ of mandamus. The Chair added that this would also apply to someone who wants to be added to a ballot. Mr. Gohn pointed out that the cases involving a review of agency actions where statutory review is not provided show that declaratory judgment is not available as a remedy. The case of Bucktail v. Talbot County, 352 Md. 530 (1999) held that the appropriate remedies are mandamus and certiorari. The case involved a review of the action of the county council sitting as the zoning board. Mr. Zarnoch added that the statutes authorize mandamus.

Mr. Sykes commented that the first attempt to provide in the Rules that any relief that was heretofore available by mandamus or certiorari could be obtained by injunction did not get very far. The Vice Chair said that she was not sure why this would be unacceptable so many years later. The Chair asked if this relief

would be available through the issuance of an injunction. Mr. Gohn replied that this review might be able to be substituted for certiorari when the circuit court reviews final agency action and tests the jurisdiction of orphans' courts and the District Court. With administrative agencies, injunctive relief might be able to be substituted for cases involving executive actions, but if the action is quasi-judicial, the rules pertaining to relief would have to go into the Title 7, Chapter 200 Rules.

Mr. Titus commented that the term "quasi-judicial" is not definitive enough. An action by a zoning board is a legislative act, but in the case of Montgomery County v. Woodward & Lothrop, 280 Md. 686 (1977), the court held that in some cases, the agencies are resolving disputed adjudicative facts; in others, the agencies are resolving disputed legislative facts. How can this be organized in the Rules? The function of the agency is irrelevant -– the question is whether the agency is resolving disputed adjudicative facts. Mr. Gohn pointed out that Mr. Zarnoch had indicated that language could be borrowed from §1094.5 of the California Code of Civil Procedure to separate out administrative mandamus from traditional mandamus. Mr. Titus remarked that comprehensive zoning cases do not involve disputed adjudicative facts. Mr. Gohn agreed that those cases are quasi-legislative. The dividing line is whether the agency resolved legislative or adjudicative facts.

The Chair asked the Committee how this matter should proceed. The Vice Chair suggested that the matter should go back

to the Subcommittee for further study and that Mr. Titus should come to the Subcommittee meetings. Mr. Sykes inquired as to what direction the Subcommittee should follow regarding policy. Mr. Titus suggested that mandamus should be largely abolished. Judge Heller remarked that these cases do come up in Baltimore City, and she asked whether there would be supporting case law if the cases are handled by a declaratory judgment or injunctive relief. Mr. Titus responded that the standard of review is the same. Judge Heller noted that a wealth of case law defines the standard of review when administrative agency review, mandamus, or certiorari is sought. The Chair said that the Subcommittee will have to consider these issues. Subsection (a) of Code, Criminal Procedure Article, §7-102 (formerly Code, Article 27, §654A) lists all of the writs people can request in a post conviction proceeding for relief. Judge Heller commented that writs are still filed, and Judge Missouri added that he sees writs of *corum nobis*. Judge Heller noted that incarcerated defendants file writs of *habeas corpus.*

Mr. Zarnoch pointed out that several years ago, the Rules Committee considered the suggestion to replace mandamus with injunctive relief and rejected the idea. It would be useful to look at the minutes of the meetings where this was discussed. Mr. Titus remarked that the case of State Insurance Commissioner v. National Bureau of Casualty Underwriters, 248 Md. 292 (1967) held that the circuit court's review of a decision of an administrative agency to see whether the finding of facts by the

agency was supported by a preponderance of the evidence does not impose non-judicial duties on the court and does not conflict with the concept of separation of powers.

Judge Heller commented that she did not want to vote on this matter until she fully understood the implications. Mr. Sykes inquired about mandamus in the federal courts, and Mr. Zarnoch replied that the federal rules abolished the writ, but some language in federal cases brought it back. Judge Kaplan asked whether Mr. Titus had filed a writ of mandamus to allow Montgomery County into a case adjudicated by Judge Kaplan in which Mr. Titus had been counsel, and Mr. Titus answered that he had filed a motion for leave to intervene. He said that the case of Heaps v. Cobb, 185 Md. 372 (1945) held that there is an inherent right to judicial review, but it cannot interfere with any exercise of legislative prerogative within constitutional limits.

Mr. Gohn drew the Committee's attention to Table A in a handout he had distributed at the meeting. (See Appendix 1). He explained that mandamus and certiorari can be used in the same case, but they are inconsistent, and the procedures are hard to follow. They need simplification. Judge Missouri commented that Mr. Gohn's handouts are very helpful, but more information is needed. The Chair said that the Subcommittee can reconsider the matter, taking into consideration Judge Niemeyer's commentary and the minutes of the meetings at which this has already been discussed. Mr. Sykes pointed out that other aspects of mandamus

and certiorari need to be considered, such as the extent to which the Rules Committee would like discovery. The Subcommittee and Mr. Gohn are divergent as to this. Section (c) of proposed new Rule 7-402, Procedures, has two alternatives. The first is the Subcommittee's recommendation; the second is Mr. Gohn's recommended language. Mr. Titus said that he definitely preferred the first alternative. The Chair suggested that if the first alternative is used, a period should be placed after the word "appropriate," and the remainder of the language be deleted.

Mr. Gohn explained that he drafted Alternative B because of a case in which he had been involved. He had represented someone who had applied for a professional license and was turned down, because the applicant had neglected to mention that he had been previously convicted of a crime. The person reapplied, and the agency did not act on the second application. In filing an action for mandamus to discover why an agency would not tell an applicant of its decision, the following language in section (c) would be helpful: "...the nature and content of actions of the agency of which the plaintiff is not otherwise informed, the good faith of agency personnel, and the reasoning of agency decision-makers."

Mr. Titus commented that if Alternative B were used, it would overrule a large amount of case law. Mr. Gohn disagreed, explaining that there is Administrative Procedure Act ("APA") case law which is applicable. The Chair said that the discovery decisions can be left up to the court's discretion. Mr. Gohn

commented that the cases of Public Service Commission of Maryland v. Patuxent Valley Conservation League, 300 Md. 200 (1984) and Montgomery County v. Stevens, 337 Md. 471 (1995) leave open the possibility that the decision-maker's thought process could be considered. Mr. Titus reiterated that Alternative A is consistent with case law.

Judge Heller noted that mandamus provides an inherent right of review which is not available under the APA. Discovery would open up a new way of reviewing decisions of administrative agencies. Mr. Gohn responded that there is a good reason for this. The posture in the case is different than one brought under the APA, which involves a ruling on the record and the trappings of due process. These may be missing in mandamus. When there is a decision by a county official, there is no reviewable record or statement of reasons for the decision. Judge Heller remarked that the matter could be remanded back to the agency to set forth the reasons for its decision. The Chair stated that if discovery is built in with a *prima facie* showing, this would tie the judge's hands. Mr. Titus commented that if an agency will not make a decision, a writ of mandamus can be issued to force the agency to make a decision. If there is no file, the court can issue a preliminary injunction for the agency to give the court the necessary materials. Mr. Gohn noted that this is discovery.

The Chair stated that the Rule should provide only that the judge will decide what is appropriate, or else legal battles will

ensue as to what is a *prima facie* showing. The decision should be left in the judge's hands. The Chair said that he has confidence that circuit court judges will handle cases appropriately. Mr. Titus expressed the view that other than pursuant to an averment of fraud, there should be no inquiry into the agency's decision; otherwise the floodgates of litigation will be opened. The Vice Chair commented that discovery is appropriate under limited circumstances -– the Subcommittee needs to discuss what those circumstances are. The Chair observed that this is consistent with the actions of the Discovery Subcommittee, which is working on a Rule that allows the court discretion to limit or expand discovery. Mr. Sykes said that the Specific Remedies Subcommittee will do its best to address the Committee's concerns. Judge Missouri asked the Subcommittee to consider not building in more hearings than the courts already have. The proposed amendments to Rules 15-701 and 7-301 and proposed new Rules 7-401, 7-402, and 7-403 were remanded to the Specific Remedies Subcommittee.

The Chair thanked Mr. Gohn for all of his assistance.

Agenda Item 3. Consideration of a proposed amendment to Rule 8-305 (Certification of Questions of Law to the Court of Appeals)

Mr. Titus presented Rule 8-305 (a), Certification of Questions of Law to the Court of Appeals, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 300 - OBTAINING APPELLATE REVIEW IN COURT OF APPEALS

AMEND Rule 8-305 (a) to add the United States Bankruptcy Court to the list of certifying courts, as follows:

Rule 8-305. CERTIFICATION ~~FROM FEDERAL COURTS AND OTHER STATE COURTS~~ OF QUESTIONS OF LAW TO THE COURT OF APPEALS

Alternative A

(a) Certifying Court

"Certifying court" as used in this Rule means the Supreme Court of the United States, a United States Court of Appeals, a United States District Court, a United States Bankruptcy Court, or the highest appellate court or an intermediate appellate court of another State, District, Territory, or Commonwealth of the United States.

Alternative B

(a) Certifying Court

"Certifying court" as used in this Rule means ~~the Supreme Court of the United States, a United States Court of Appeals, a United States District Court, or the highest appellate court or an intermediate appellate court of another State, District, Territory, or Commonwealth of the United States~~ a court authorized by Code, Courts Article, §12-603 to certify a question of law to the Court of Appeals of Maryland.

Committee note: Necessary implication requires that the definition of "court" set forth in Rule 1-202 does not apply in this

Rule.

(b) Certification Order

In disposing of an action pending before it, a certifying court, on motion of any party or on its own initiative, may submit to the Court of Appeals a question of law of this State, in accordance with the Maryland Uniform Certification of Questions of Law Act, by filing a certification order signed by a judge of the certifying court. The certification order shall state the question of law submitted, the relevant facts from which the question arises, and the party who shall be treated as the appellant in the certification procedure. The original order and seven copies shall be forwarded to the Court of Appeals by the clerk of ~~of~~ the certifying court under its official seal, together with the filing fee for docketing regular appeals, payable to the Clerk of the Court of Appeals.

(c) Proceeding in the Court of Appeals

The filing of the certification order in the Court of Appeals shall be the equivalent of the transmission of a record on appeal. The Court of Appeals may request, in addition, all or any part of the record before the certifying court. Upon request, the certifying court shall file the original or a copy of the parts of the record requested together with a certificate, under the official seal of the certifying court and signed by a judge or clerk of that court, stating that the materials submitted are all the parts of the record requested by the Court of Appeals.

(d) Decision by the Court of Appeals

The written opinion of the Court of Appeals stating the law governing the question certified shall be sent by the Clerk of the Court of Appeals to the certifying court. The Clerk of the Court of Appeals shall certify, under seal of the Court, that the opinion is in response to the question of law of this State submitted by the certifying

court.

Cross reference: Code, Courts Article, §§12-601 through 12-609.

Source: This Rule is derived from former Rule 896.

Rule 8-305 was accompanied by the following Reporter's Note.

> The Honorable Paul Mannes, a judge of the United States Bankruptcy Court for the District of Maryland, pointed out to Al Brault that in 1996, the Uniform Act on Certification was amended to include the United States Bankruptcy Court. Since Code, Courts Article, §12-603 authorizes the Court of Appeals to answer a question of law certified in a court of the United States, Rule 8-305 (a) should be amended to refer to "a United States Bankruptcy Court." This would enable these courts to certify questions to the Court of Appeals and would conform to the Uniform Act.

Mr. Titus explained that the Honorable Paul Mannes, a judge of the United States Bankruptcy Court for the District of Maryland, had pointed out to Mr. Brault, a member of the Committee not present at today's meeting, that the Uniform Act on Certification had been amended in 1996 to include the United States Bankruptcy Court. The list of certifying courts in section (a) of Rule 8-305 should be amended to include the United States Bankruptcy Court. This is Alternative A in the proposed Rule. Alternative B simply refers to Code, Courts Article, §12-603, the statute which lists the appropriate courts. Mr. Titus expressed his preference for Alternative B, which will avoid another change to the Rule if the statute is amended later. He

moved that the Rules Committee adopt Alternative B, the motion was seconded, and the motion was passed unanimously.

Mr. Titus said that he was grateful to Judge Mannes for bringing this matter to the Committee's attention.

Agenda Item 4. Consideration of proposed amendments to certain rules pertaining to discovery: Rule 2-421 (Interrogatories to Parties), Rule 2-422 (Discovery of Documents and Property), Rule 2-424 (Admission of Facts and Genuineness of Documents) - section (a), Rule 2-424 (Admission of Facts and Genuineness of Documents) - section (b), Rule 2-633 (Discovery in Aid of Enforcement), Rule 3-633 (Discovery in Aid of Enforcement), Rule 2-501 (Motion for Summary Judgment), Rule 2-415 (Deposition - Procedure), and Rule 2-401 (General Provisions Governing Discovery)

The Vice Chair presented Rules 2-421, Interrogatories to Parties, 2-422, Discovery of Documents and Property, and section (a) of Rule 2-424, Admission of Facts and Genuineness of Documents, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-421 to delete the phrase "at any time" from section (a), as follows:

Rule 2-421. INTERROGATORIES TO PARTIES

(a) Availability; Number

Any party may serve ~~at any time~~ written interrogatories directed to any other party. Unless the court orders otherwise, a party may serve one or more sets having a cumulative total of not more than 30 interrogatories to be answered by the same

party. Interrogatories, however grouped, combined, or arranged and even though subsidiary or incidental to or dependent upon other interrogatories, shall be counted separately. Each form interrogatory contained in the Appendix to these Rules shall count as a single interrogatory.

. . .

Rule 2-421 was accompanied by the following Reporter's Note.

The proposed deletion of the phrase "at any time" from Rules 2-421 (a), 2-422 (a), and 2-424 (a) makes clear that interrogatories and discovery requests may not be served "at any time" if the timing is not in accordance with a scheduling order entered under Rule 2-504. A similar amendment to section (a) of Rule 2-501, Motion for Summary Judgment, previously was approved by the Committee in response to *Pittman v. Atlantic Realty Co.*, 359 Md. 513 (2000).

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-422 to delete the phrase "at any time" from section (a), as follows:

Rule 2-422. DISCOVERY OF DOCUMENTS AND PROPERTY

(a) Scope

Any party may serve ~~at any time~~ one or more requests to any other party (1) as to items that are in the possession, custody, or control of the party upon whom the request is served, to produce and permit the party

making the request, or someone acting on the party's behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, recordings, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form) or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 2-402 (a); or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection, measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property, within the scope of Rule 2-402 (a).

. . .

Rule 2-422 was accompanied by the following Reporter's Note.

See the Reporter's Note to the proposed amendment to Rule 2-421.

The Vice Chair presented Rule 2-424, Admission of Facts and Genuineness of Documents for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-424 to delete the phrase "at any time" from section (a), as follows:

Rule 2-424. ADMISSION OF FACTS AND GENUINENESS OF DOCUMENTS

(a) Request for Admission

A party may serve ~~at any time~~ one or more written requests to any other party for the admission of (1) the genuineness of any relevant documents described in or exhibited with the request, or (2) the truth of any relevant matters of fact set forth in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Each matter of which an admission is requested shall be separately set forth.

. . .

Rule 2-424 was accompanied by the following Reporter's Note.

See the Reporter's Note to the proposed amendment to Rule 2-421.

The Vice Chair explained that the phrase "at any time" is proposed to be deleted from several rules, including these three and Rule 2-501, Motion for Summary Judgment, already approved by the Committee, because the timing of certain procedures must be in accordance with scheduling orders and other rules. The Committee agreed by consensus to the proposed changes to the Rules and approved the Rules as presented.

The Vice Chair presented section (b) of Rule 2-424, Admission of Facts and Genuineness of Documents, for the Committee's consideration.

AMEND Rule 2-424 (b) to add language requiring parties responding to requests for admissions to set forth the request with the response, as follows:

Rule 2-424. ADMISSION OF FACTS AND GENUINENESS OF DOCUMENTS

. . .

(b) Response

Each matter of which an admission is requested shall be deemed admitted unless, within 30 days after service of the request or within 15 days after the date on which that party's initial pleading or motion is required, whichever is later, the party to whom the request is directed serves a response signed by the party or the party's attorney. As to each matter of which an admission is requested, the response shall <u>set forth each request for admission and shall</u> specify an objection, or shall admit or deny the matter, or shall set forth in detail the reason why the respondent cannot truthfully admit or deny it. The reasons for any objection shall be stated. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and deny or qualify the remainder. A respondent may not give lack of information or knowledge as a reason for failure to admit or deny unless the respondent states that after reasonable inquiry the information known or readily obtainable by the respondent is insufficient to enable the respondent to admit or deny. A party who considers that a matter of which an admission is requested presents a genuine issue for trial may not, on that ground alone, object to the request but the party may, subject to the provisions of section (e) of this Rule, deny the matter or set forth reasons for not being able to admit or deny it.

. . .

Rule 2-424 (b) was accompanied by the following Reporter's Note.

> Michael C. Worsham, Esq. requested that language be added to Rule 2-424 (b) which would require a party responding to a request for admissions to include the original request along with the response. This will make the responses more meaningful for all parties and the court. Mr. Worsham also points out that this procedure will allow parties to attach the response including the original request for admission to motions or responses to motions. The Discovery Subcommittee recommends that the change be made to Rule 2-424 (b).

The Vice Chair explained that the change to section (b) requiring a party responding to a request for admissions to include the original request along with the response was suggested by Michael C. Worsham, Esq., who expressed his dislike for only receiving the response and not the original request. Mr. Titus agreed, noting that in his law practice he had received responses which simply stated "yes" or "no," a response that was not very meaningful. The Committee, by consensus, approved the Rule as presented.

The Vice Chair presented Rule 2-633, Discovery in Aid of Enforcement, and Rule 3-633, Discovery in Aid of Enforcement, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 600 - JUDGMENT

AMEND Rule 2-633 (a) to clarify that post-judgment discovery is in addition to pre-judgment discovery, as follows:

Rule 2-633. DISCOVERY IN AID OF ENFORCEMENT

. . .

(a) Methods

In addition to the discovery permitted before the entry of judgment, ~~A~~ a judgment creditor may obtain discovery to aid enforcement of a money judgment ~~(1)~~ by use of depositions, interrogatories, and requests for documents~~, and (2)~~. A judgment creditor may also obtain discovery to aid enforcement of a money judgment by examination before a judge or an examiner as provided in section (b) of this Rule.

Committee note: Because the discovery permitted by this Rule is in addition to the discovery permitted before the entry of judgment, the limitations set forth in Rules 2-411 (d) and 2-421 (a) apply separately to each. Thus, a second deposition of an individual previously deposed before the entry of judgment may be taken after the entry of judgment without leave of court. A second post-judgment deposition of that individual, however, would require leave of court. *Melnick v. New Plan Realty*, 89 Md. App. 435 (1991). Furthermore, leave of court is not required under Rule 2-421 to serve interrogatories on a judgment debtor solely because 30 interrogatories were served upon that party before the entry of judgment.

. . .

Rule 2-633 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 2-633 makes clear that discovery in aid of enforcement is allowed in addition to any pre-judgment discovery that may have been obtained. As stated in the Committee note, a second deposition of an individual previously

deposed before the entry of judgment may be taken after the entry of judgment without the leave of court otherwise required by Rule 2-411. A second post-judgment deposition of that individual, however, would require leave of court. *Melnick v. New Plan Realty*, 89 Md. App. 435 (1991). Furthermore, leave of court is not required under Rule 2-421 to serve interrogatories on a judgment debtor solely because 30 interrogatories were served upon that party before the entry of judgment.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE -- DISTRICT COURT

CHAPTER 600 - JUDGMENT

AMEND Rule 3-633 (a) to clarify that post judgment discovery is in addition to prejudgment discovery, as follows:

Rule 3-633. DISCOVERY IN AID OF ENFORCEMENT

(a) Methods

In addition to the discovery permitted before the entry of judgment, ~~A~~ a judgment creditor may obtain discovery to aid enforcement of a money judgment ~~(1)~~ by use of interrogatories pursuant to Rule 3-421~~, and (2)~~. A judgment creditor may also obtain discovery to aid enforcement of a money judgment by examination before a judge or an examiner as provided in section (b) of this Rule.

Committee note: Because the discovery permitted by this Rule is in addition to the discovery permitted before the entry of judgment, the limitations set forth in Rule 3-421 (b) apply separately to each. Thus, leave of court is not required under Rule 3-421 to serve one set of not more than 15

> <u>interrogatories on a judgment debtor solely because interrogatories were served upon that party before the entry of judgment.</u>
>
> . . .

Rule 3-633 was accompanied by the following Reporter's Note.

> The proposed amendment to Rule 3-633 makes clear that discovery in aid of enforcement is allowed in addition to any pre-judgment discovery that may have been obtained. As stated in the Committee note, leave of court is not required under Rule 3-421 to serve one set of not more than 15 interrogatories on a judgment debtor solely because interrogatories were served upon that party before the entry of judgment.

The Vice Chair explained that a letter from Michael J. Fradkin, Esq., pointed out that there is a potential interpretation of Rule 3-633 that leave of court is necessary for discovery in aid of enforcement. (See Appendix 2). Prejudgment discovery is separate from post-judgment discovery which does not require leave of court. The proposed changes to Rules 2-633 and 3-633 are intended to clarify that post-judgment interrogatories and, in a circuit court, the first post-judgment deposition of an individual previously deposed before entry of judgment do not require leave of court. The Committee approved the Rules as presented.

The Vice Chair said that Mr. Klein would present Rule 2-501, Motion for Summary Judgment, and Rule 2-415, Deposition – Procedure, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-501 to delete the phrase "at any time" from section (a), to revise the requirements of a response to a motion for summary judgment, to delete certain language from section (d), and to make a certain stylistic change, as follows:

Rule 2-501. MOTION FOR SUMMARY JUDGMENT

(a) Motion

Any party may file ~~at any time~~ a motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law. The motion shall be supported by affidavit if it is (1) filed before the day on which the adverse party's initial pleading or motion is filed or (2) based on facts not contained in the record.

(b) Response

~~The~~ A response to a motion for summary judgment shall ~~identify with particularity the material facts that are disputed. When a motion for summary judgment is supported by an affidavit or other statement under oath,~~ be in writing and shall (1) identify with particularity each material fact as to which it is contended that there is a genuine dispute and (2) as to each such fact, identify and attach the relevant portion of the specific document, discovery response, transcript of testimony (by page and line), or other statement under oath that demonstrates the dispute. A response asserting the existence of a material fact or controverting any fact contained in the record shall be supported by ~~an opposing~~

~~party who desires to controvert any fact contained in it may not rest solely upon allegations contained in the pleadings, but shall support the response by~~ an affidavit or other written statement under oath. **[Unless the Court, after opportunity for the parties to be heard, makes an express finding of a compelling reason not to do so, the Court shall strike any such affidavit or statement that contradicts the deposition testimony of the person making the affidavit or statement after the expiration of the time allowed for making changes to deposition testimony under Rule 2-415(d).]**

[*ALTERNATIVE (no discretion)*:[, provided that the affidavit or statement does not contradict the deposition testimony of the person making the affidavit or statement after the expiration of the time allowed for making changes to deposition testimony under Rule 2-415(d).]

(c) Form of Affidavit

An affidavit supporting or opposing a motion for summary judgment shall be made upon personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.

(d) Affidavit of Defense Not Available

If the court is satisfied from the affidavit of a party opposing a motion for summary judgment that the facts essential to justify the opposition cannot be set forth for reasons stated in the affidavit, the court may deny the motion or may order a continuance to permit affidavits to be obtained or discovery to be conducted or may enter any other order that justice requires.

(e) Entry of Judgment

The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no

genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law. By order pursuant to Rule 2-602 (b), the court may direct entry of judgment (1) for or against one or more but less than all of the parties to the action, (2) upon one or more but less than all of the claims presented by a party to the action, or (3) for some but less than all of the amount requested when the claim for relief is for money only and the court reserves disposition of the balance of the amount requested. If the judgment is entered against a party in default for failure to appear in the action, the clerk promptly shall send a copy of the judgment to that party at the party's last known address appearing in the court file. Cross reference: Section 200 of the Soldiers' and Sailors' Relief Act of 1940, 50 U.S.C. Appendix, §520, imposes specific requirements that must be fulfilled before a default judgment may be entered.

(f) Order Specifying Issues or Facts Not in Dispute

When a ruling ~~upon~~ on a motion for summary judgment does not dispose of the entire action and a trial is necessary, the court~~, on the basis of the pleadings, depositions, answers to interrogatories, admissions, and affidavits and, if necessary, after interrogating counsel on the record,~~ may enter an order specifying the issues or facts that are not in genuine dispute. The order controls the subsequent course of the action but may be modified by the court to prevent manifest injustice.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 610 a 1 and 3.
Section (b) is new.
Section (c) is derived from former Rule 610 b.
Section (d) is derived from former Rule 610 d 2.
Section (e) is derived in part from former Rules 610 d 1 and 611 and is, in part, new.

Section (f) is derived from former Rule 610 d 4.

Rule 2-501 was accompanied by the following Reporter's Note.

As a method of encouraging judges to grant more motions for summary judgment, the Rules Committee recommends the addition of language to section (b) which states affirmatively that the response to a motion for summary judgment must contain specific references to transcripts or other documents that demonstrate a genuine dispute of material fact. The new language is derived from District Court Local Rule 56.1 (b) for the District of Nebraska. The Committee also recommends deleting the introductory language of the second sentence of section (b), because the Committee feels that the requirement to cite to specific facts in the record that demonstrate a genuine dispute should apply even when the motion for summary judgment is not supported by a statement under oath. The last sentence of section (b) addresses when the response must be supported by affidavit or other statement under oath, which, as the rule is proposed to be amended, would include the responding party's assertion of a material fact that the moving party contends does not exist. **The proposed amendments to Rule 2-501(b), in conjunction with proposed amendments to Rule 2-415(d), are intended to respond to the Court of Appeal's invitation in *Pittman v. Atlantic Realty Co., 359 Md. 513 (2000)* for the Rules Committee to study the issue of "sham affidavits" and "recommend appropriate adjustments in other Rules of Procedure if the trial courts were given the discretion under Rule 2-501 to strike a sham affidavit." *Id.* at *542.***

Additionally, certain deletions to sections (a) and (f) are proposed.

The deletion of the phrase "at any time" from section (a) is in response to *Pittman v. Atlantic Realty Co.*, 359 Md. 513 (2000), and makes clear that the motion may not be filed

"at any time" if the filing is not in accordance with a scheduling order entered under Rule 2-504.

The deletion of language from section (f) conforms that section to section (e), from which similar language previously was deleted. The change of the word "upon" to "on" is stylistic, only.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-415 to allow for changes in form and substance of testimony contained in deposition transcripts and to add a new section (i) providing a procedure for further deposition following substantive change to a transcript, as follows:

Rule 2-415. DEPOSITION -– PROCEDURE

. . .

(d) ~~Correction and~~ Signature and Changes

The officer shall submit the transcript to the deponent for ~~correction~~ any changes and signing, unless changes and signing are waived by the deponent and the parties. ~~Any corrections desired by the deponent to conform the transcript to the testimony shall be made on a separate sheet and attached by the officer to the transcript. Corrections made by the deponent become part of the transcript unless the court orders otherwise on a motion to suppress under section (i) of this Rule. If the transcript is not signed by the deponent~~

~~within 30 days after its submission, the officer shall sign it and state why the deponent has not signed.~~ Within 30 days after the date the officer mails or otherwise submits the transcript to the deponent, the deponent shall sign the transcript and may make changes to the form or substance of the testimony contained in the transcript. The deponent shall make any changes on a separate correction sheet and shall state the reason why each change is being made. **After the expiration of that time, no further changes to the form or substance of the testimony may be made, unless allowed by the Court after making the finding required under Rule 2-501(b).** The officer promptly shall serve a copy of the correction sheet on the parties and attach the correction sheet to the transcript. The changes contained on the correction sheet become part of the transcript. If the deponent does not timely sign the transcript, the officer shall sign it and state that the deponent has not signed. The transcript may then be used as if signed by the deponent, unless the court finds, on a motion to suppress under section ~~(i)~~ (j) of this Rule, that the reason for refusal to sign requires rejection of all or part of the transcript.

. . .

(i) Further Deposition Upon Substantive Changes to Transcript

If a correction sheet contains substantive changes, any party may serve notice of a further deposition of the deponent limited to the subject matter of the substantive changes made by the deponent unless the court, on motion of a party pursuant to Rule 2-403, enters a protective order precluding the further deposition.

~~(i)~~ (j) Motions to Suppress

An objection to the manner in which testimony is transcribed, videotaped, or audiotaped, or to the manner in which a transcript is prepared, signed, certified,

sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer is waived unless a motion to suppress all or part of the deposition is made promptly after the defect is or with due diligence might have been ascertained. ~~An objection to corrections made to the transcript by the deponent is waived unless a motion to suppress all or part of the corrections is filed within sufficient time before trial to allow for a ruling by the court and, if appropriate, further deposition.~~ In ruling on a motion to suppress, the court may grant leave to any party to depose the deponent further on terms and conditions the court deems appropriate.

Source: This Rule is derived as follows:

Section (a) is derived from former Rule 409 c.
Section (b) is derived from former Rule 409 a.
Section (c) is derived from former Rule 411 b 3.
Section (d) is derived <u>in part</u> from former Rule<u>s</u> 411 a and 412 e <u>and in part from the 1993 version of Fed. R. Civ. P. 30 (e)</u>.
Section (e) is derived from former Rule 411 b 1, 2 and 5.
Section (f) is derived from former Rule 411 b 4.
Section (g) is derived from former Rules 409 c 2, and 412 c 1 and 2.
Section (h) is derived from former Rule 422 a 2.
<u>Section (i) is new.</u>
Section ~~(i)~~ <u>(j)</u> is derived from former Rule 412 d and e.

Rule 2-415 was accompanied by the following Reporter's Note.

The Rules Committee recommends that section (d) of Rule 2-415 be amended to allow for changes to form and substance of testimony contained in deposition transcripts. The amendments are derived from Fed. R. Civ. P. 30 (e). **<u>The proposed amendments to Rule 2-415(d), in conjunction with proposed amendments to Rule 2-501, are</u>**

intended to respond to the Court of Appeal's invitation in *Pittman v. Atlantic Realty Co., 359 Md. 513 (2000)* for the Rules Committee to study the issue of "sham affidavits" and "recommend appropriate adjustments in other Rules of Procedure if the trial courts were given the discretion under Rule 2-501 to strike a sham affidavit." *Id.* at 542.

If changes and signing are not waived by the deponent and the parties, the deponent, within 30 days after the transcript is mailed or submitted to him or her, may make changes to the transcript and shall sign it. The changes may be to the form or substance of the testimony and must be set forth on a separate correction sheet, together with the reason for each change. If the deponent does not timely sign the transcript, the officer before whom the deposition was taken shall sign it and state that the deponent has not signed. The requirement in current section (d) that the officer state why the deponent has not signed is proposed to be deleted because the officer usually does not know why.

Proposed new section (i), pertaining to substantive changes, allows a further deposition on the subject matter of the change and a mechanism for objecting to the further deposition by filing a motion for a protective order pursuant to Rule 2-403.

Section (j), pertaining to objections as to the manner of recording and the manner of preparing transcripts, retains the motion to suppress as the mechanism for filing objections concerning these matters. The sentence pertaining to motions to suppress corrections is proposed to be deleted in light of the proposed changes set forth above.

Mr. Klein explained that the proposed changes to Rule 2-501 are in response to the comments of the Court of Appeals in the case of Pittman v. Atlantic Realty Co., 359 Md. 513 (2000).

The enhancements suggested for Rule 2-415, Deposition -- Procedure, one of which provides for a 30-day window for submitting a correction sheet, do not directly deal with the issue of "sham affidavits." Rule 2-501 provides that a motion for summary judgment can be opposed by filing an affidavit which points to the existence of a genuine dispute of material fact. What happens if an affidavit opposing a motion for summary judgment is filed six months after the affiant had stated a different fact during a deposition? The Court of Appeals in the Pittman case extended an invitation to the Rules Committee to examine the issue of "sham affidavits" and to recommend an appropriate adjustment if trial courts are given discretion under Rule 2-501 to strike a sham affidavit. One of the versions of section (b) in the Rule reflects what this discretion might look like. The other alternative is if the trial court has no discretion. Mr. Klein's proposal uses a standard of a "compelling reason" not to strike the contradicting affidavit instead of the standard of "good cause shown." If a compelling reason is demonstrated, the court will allow the contradicting affidavit to remain. If it is not demonstrated, the court will strike the contradicting affidavit. A companion provision is proposed to be added to Rule 2-415 (d).

Mr. Klein said that he has tried to clarify what happens after the 30-day period runs. In Rule 2-501, after the period runs, absent a compelling reason, an affidavit that contradicts the affiant's deposition testimony may be stricken. In Rule 4-

215, after the period runs, no changes are allowed unless a showing is made. The reason for allowing any change after 30 days is that circumstances independent of the opposition to the motion for summary judgment may have arisen supporting a change in the testimony. The Chair commented that the same idea should apply to answers to interrogatories. Someone could supplement answers to interrogatories with an assertion that contradicts a fact in the original answer.

Ms. Potter asked if the court reporting company is responsible as to the timing of distributing the correction sheet. The Rule does not control the court reporter. Mr. Klein noted that the 30 days runs after the transcript has been submitted to the deponent by the court reporter. Ms. Ogletree questioned as to how one proves that the transcript has been sent out by the court reporter. The Vice Chair inquired as to how the corrections are made. Ms. Ogletree said that the correction sheet is separately served on the parties. What happens if the correction sheet is not served, or how does one show that it has not been served? The Vice Chair remarked that if someone does not get a copy of the correction sheet, the person would not know about any discrepancies. Ms. Potter pointed out that the court reporting companies would need to be educated about the Rule. The Vice Chair commented that in her experience, the court reporting companies send out the correction sheets. Ms. Ogletree responded that this does not always happen.

The Chair noted that under current Rule 2-415 (e), the

officer attaches to the transcript a certificate that the deponent was duly sworn and that the transcript is a true record of the testimony given. The Vice Chair questioned whether parties must call the court reporter to ask if there are any corrections to the testimony. She said that a party could file a motion that an affidavit be stricken because it contradicts the deposition testimony, but the other side may say that the testimony was changed within the 30-day period.

Ms. Potter asked if the language "serve the correction sheet" in section (d) of Rule 2-415 means the same as mailing the correction sheet. The Vice Chair suggested that the word "serve" be changed to the word "mail." The Chair suggested that the officer could "furnish" the correction sheet. The language of current section (f) of Rule 2-415 reads as follows: "... the officer shall furnish a copy of the transcript to any party or to the deponent." The Rule could provide that the officer does the same thing with the correction sheet. The Vice Chair expressed the opinion that this sentence is not necessary, because the correction sheet is part of the transcript. The Chair responded that it will not hurt to retain this language.

The Chair stated that the question is what is the standard for allowing corrections after 30 days? Someone with a legitimate cause of action may be dismissed from a case because his or her attorney did not do the right thing. On the other hand, the court may be required to approve a sham affidavit if the standard is not clear. The Vice Chair commented that the

"compelling reason" standard is sufficient. The Chair pointed out that judges have more familiarity with the term "for good cause shown." Judge Dryden suggested a "clear and convincing evidence" standard, and the Vice Chair suggested the standard "unless manifest injustice results." Mr. Klein said that he did not like the "good cause" standard. The Chair noted that "manifest injustice" language already appears in section (f) of Rule 2-501, and it would be appropriate to use it again.

The Vice Chair asked whether the scope of the proposed changes to Rule 2-501 refers to any statement under oath that contradicts deposition testimony. The Chair suggested that it could include supplemental answers to interrogatories. The Vice Chair agreed. The new language could be: "The affidavit shall be stricken if it contradicts any sworn testimony unless manifest injustice would result." Judge Heller suggested that in place of "sworn testimony," the words "sworn statement" should be substituted. Mr. Klein pointed out that there are two places where the "manifest injustice" standard could be applied. One is in Rule 2-501 (b), and the other is in Rule 2-415 (d). The burden is on the person seeking to make the change after 30 days. The Chair stated that no change will be permitted unless the court finds that it would be manifest injustice not to allow the change.

Mr. Sykes pointed out that in the case of interrogatories, the 30-day period to make changes could be built in. The Vice Chair disagreed, and the Reporter noted that there is a

continuing duty to supplement. Mr. Sykes remarked that a motion for summary judgment could be filed more than 30 days after the interrogatories are answered, and then a supplemental answer is filed to defeat the motion for summary judgment. The Chair suggested that the Rule should contain a provision that most motions for summary judgment cannot be defeated by filing a supplement to the answers to interrogatories unless the court is satisfied that the information in the supplement is sufficient to defeat the motion. Mr. Klein asked if changing the testimony is considered to be supplemental. Ms. Ogletree replied that this would have to be considered in connection with Rule 2-501 rather than Rule 2-421. The Vice Chair commented that it is difficult to envision the proposed change in situations other than depositions. Judge Heller noted that the Pittman case involved a deposition with rambling answers. Suddenly, a motion for summary judgment was filed with an affidavit contradicting the prior testimony.

The Chair said that the issue for the court to determine is whether the change is material. Mr. Johnson questioned whether it would be a sham affidavit if after a party answered interrogatories, the party received documents through discovery and then filed supplemental answers to the interrogatories based on those documents. The Vice Chair remarked that this would be newly discovered evidence. Mr. Johnson commented that the Rule allows one to change his or her answers to interrogatories. The Chair observed that answers can be drafted that expressly refer

to the opportunity to supplement. He expressed the view that the proposed changes are beneficial. The Committee agreed by consensus to the changes to Rule 2-501 as discussed, using the "manifest injustice" standard. Ms. Ogletree asked if the "manifest injustice" language should be added also to Rule 2-415, and the Committee indicated by consensus that it should be.

Mr. Klein presented Rule 2-401, General Provisions Governing Discovery, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-401 to add language to the Committee note after subsection (d)(2) that requires parties to provide editable copies in electronic or other form to any other party, as follows:

Rule 2-401. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods

Parties may obtain discovery by one or more of the following methods: (1) depositions upon oral examination or written questions, (2) written interrogatories, (3) production or inspection of documents or other tangible things or permission to enter upon land or other property, (4) mental or physical examinations, and (5) requests for admission of facts and genuineness of documents.

(b) Sequence and Timing of Discovery

Unless the court orders otherwise, methods of discovery may be used in any

sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery. The court may at any time order that discovery be completed by a specified date or time, which shall be a reasonable time after the action is at issue.

(c) Discovery Plan

The parties are encouraged to reach agreement on a plan for the scheduling and completion of discovery.

(d) Discovery Material

(1) Defined

For purposes of this section, the term "discovery material" means a notice of deposition, an objection to the form of a notice of deposition, the questions for a deposition upon written questions, an objection to the form of the questions for a deposition upon written questions, a deposition transcript, interrogatories, a response to interrogatories, a request for discovery of documents and property, a response to a request for discovery of documents and property, a request for admission of facts and genuineness of documents, and a response to a request for admission of facts and genuineness of documents.

(2) Not to be Filed with Court

Except as otherwise provided in these rules or by order of court, discovery material shall not be filed with the court. Instead, the party generating the discovery material shall serve the discovery material on all other parties and shall file with the court a notice stating (A) the type of discovery material served, (B) the date and manner of service, and (C) the party or person served. The party generating the discovery material shall retain the original and shall make it available for inspection by any other party. This section does not preclude the use of discovery material at trial or as exhibits to support or oppose

motions.

Cross reference: Rule 2-311 (c).

Committee note: Rule 1-321 requires that the notice be served on all parties. Rule 1-323 requires that it contain a certificate of service. Whenever possible, **upon request** a party generating discovery material ~~shall~~ **should** provide ~~editable copies~~ **the material** in **a word processing file or other** electronic **format in which the text of the material may be copied and edited on the requesting party's computer** ~~or other form to any other party upon request~~.

(e) Supplementation of Responses

Except in the case of a deposition, a party who has responded to a request or order for discovery and who obtains further material information before trial shall supplement the response promptly.

(f) Substitution of a Party

Substitution of a party pursuant to Rule 2-241 does not affect the conduct of discovery previously commenced or the use of the product of discovery previously conducted.

(g) Stipulations Regarding Discovery Procedure

Unless the court orders otherwise, the parties by written stipulation may (1) provide that a deposition may be taken before any person, at any time or place, upon any notice, and in any manner and, when so taken, may be used like other depositions and (2) modify the procedures provided by these rules for other methods of discovery, except that the parties may not modify any discovery procedure if the effect of the modification would be to impair or delay a scheduled court proceeding or conference or delay the time specified in a court order for filing a motion or other paper.

Source: This Rule is derived as follows:
Section (a) is derived from FRCP 26 (a).
Section (b) is derived from FRCP 26 (d).
Section (c) is new.
Section (d) is new.
Section (e) is derived from former Rule 417 a 3.
Section (f) is derived from former Rule 413 a 5.
Section (g) is derived in part from FRCP 29 and former Rule 404 and is in part new.

Rule 2-401 was accompanied by the following Reporter's Note.

Based on a request by Michael C. Worsham, Esq., the Discovery Subcommittee recommends the addition of language to the Committee note after subsection (d)(2) which requires a party generating discovery material to provide whenever possible, editable copies in electronic or other form to any other party upon request. Mr. Worsham pointed out that sending an electronic copy of a document or a floppy disk would save typing and document scanning, which is especially helpful in smaller law offices or offices of a solo practitioner.

Mr. Klein explained that Mr. Worsham had suggested that it would be useful for parties to send to other parties electronic copies of documents or floppy disks to save on extra typing and document scanning. Mr. Klein said that he had spoken with information technology consultants, and he had drafted the language of the Committee note after subsection (d)(2) of the Rule. Sending electronic copies cannot be mandatory, but is a statement of what good practice is. Ms. Potter inquired as to whether this statement would be more appropriately placed in the Discovery Guidelines. The Vice Chair commented that it could go

in both the Rule and the Guidelines.

Mr. Worsham questioned the use of the word "should" as opposed to the word "shall." The Vice Chair expressed her concern that if this were mandatory, it would be a burden on those who are not familiar with the technology. The Chair said that he thought that the new language is a good change and should go into both Rule 2-401 and the Discovery Guidelines. Mr. Johnson agreed that the language should not be mandatory, since not all attorneys use computers. He expressed the concern that the language "wherever possible" might create an area of controversy. The Chair suggested that the Committee note could read: "Upon request, unless it is impracticable to do so...". Mr. Johnson noted that *pro se* parties might have problems with this. Mr. Sykes suggested that the new language could begin with: "The Committee encourages...".

Judge Heller pointed out that the trend is toward electronic filing, such as in asbestos cases and in U.S. District Court. The Chair suggested that the beginning language of the Committee note read as follows: "The Committee recommends that a party generating discovery material provides...". The Vice Chair suggested that the new language read: "Parties generating discovery material are encouraged on request to provide...". Mr. Sykes suggested that the language should be "provide on request." The Committee agreed by consensus to the following language: "Parties generating discovery material are encouraged to provide the material in a word processing file or other electronic format

in which the text of the material may be copied and edited on the requesting party's computer if requested to do so." The Committee, by consensus, approved the Rule as amended.

The Chair said that Rule 16-723, Confidentiality, had been distributed as a handout at the meeting. The Reporter presented Rule 16-723 for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

AMEND Rule 16-723 (b)(1) to add language clarifying that a complaint is confidential and to add a new subsection (d)(1) concerning notice to the Court of Appeals of a reprimand issued by the Attorney Grievance Commission, as follows:

Rule 16-723. CONFIDENTIALITY

. . .

(b) Other Confidential ~~Proceedings and Records~~ Matters

Except as otherwise provided in these Rules, the following records and proceedings are confidential and not open to public inspection or disclosure:

(1) the records of an investigation by Bar Counsel, including the existence and content of any complaint;

(2) the records and proceedings of a Peer Review Panel;

(3) information that is the subject of a protective order;

(4) the contents of a warning issued by Bar Counsel pursuant to Rule 16-735 (b), but the fact that a warning was issued shall be disclosed to the complainant;

(5) the contents of a prior private reprimand or Bar Counsel reprimand pursuant to the Attorney Disciplinary Rules in effect prior to July 1, 2001, but the fact that a private or Bar Counsel reprimand was issued and the facts underlying the reprimand may be disclosed to a peer review panel in a proceeding against the attorney alleging similar misconduct;

Committee note: The peer review panel is not required to find that information disclosed under subsection (b)(5) is relevant under Rule 16-743 (c)(1).

(6) the contents of a Conditional Diversion Agreement entered into pursuant to Rule 16-736, but the fact that an attorney has signed such an agreement shall be public;

(7) the records and proceedings of the Commission on matters that are confidential under this Rule;

(8) a Petition for Disciplinary or Remedial Action based solely on the alleged incapacity of an attorney and records and proceedings other than proceedings in the Court of Appeals on that petition; and

(9) a petition for an audit of an attorney's accounts filed pursuant to Rule 16-722 and records and proceedings other than proceedings in the Court of Appeals on that petition.

. . .

Query to the Rules Committee from the Style Subcommittee: At the February 2003 meeting, the Committee approved an amendment to Rule 16-771 (b), changing the word “shall” to

"may" in two places. This creates the possibility that an attorney may have been convicted of a "serious crime," but no Petition for Disciplinary or Remedial Action is filed in the Court of Appeals. Therefore, the Clerk of the Court of Appeals would not know about the conviction and could not comply with subsection (d)(2). In light of the proposed change to Rule 16-771 (b), should conforming language be added to Rule 16-723 (d)(1) after the word "commission" that reads something like "or if Bar Counsel has received and verified information that an attorney has been convicted or a serious crime"?

(d) Required Disclosure ~~to Disciplinary Authorities~~

(1) By Bar Counsel to Clerk of the Court of Appeals

Bar Counsel shall notify the Clerk of the Court of Appeals if an attorney is reprimanded by the Commission **or if Bar Counsel has received and verified information that an attorney has been convicted of a serious crime.**

(2) By the Clerk of the Court of Appeals to Disciplinary Authorities

If an attorney resigns or is reprimanded, convicted of a serious crime, or, by order of the Court of Appeals, disbarred, suspended, reinstated, or transferred to inactive status, the Clerk of the Court of Appeals of Maryland shall notify the National Lawyer Regulatory Data Bank of the American Bar Association and the disciplinary authority of every other jurisdiction in which the attorney is admitted to practice.

. . .

Rule 16-723 was accompanied by the following Reporter's Note.

> At the open meeting on the 151st Report of the Rules Committee, the Court of Appeals asked the Chair of the Attorney Grievance Commission to consider whether the mere fact that a complaint was filed against an attorney can be disclosed. The Commission and the Rules Committee are in agreement that the fact that a complaint has been filed and the contents of any complaint should be confidential. They recommend that language referring to the complaint be added to subsection (b)(1) to make this clear.
>
> The Court of Appeals amended Rule 16-723 (d) sua sponte to change "Bar Counsel" to "the Clerk of the Court of Appeals." The amendment requires the latter to notify the National Lawyer Regulatory Data Bank of the American Bar Association and the disciplinary authority of other jurisdictions concerning the resignation or discipline of an attorney in Maryland. In light of this change in procedure, the Committee recommends parallel changes to Rules 16-775 and 16-781, as well as a further change to Rule 16-723 (d) to provide a mechanism by which the Clerk of the Court of Appeals is notified that an attorney has been reprimanded by the Commission. **Additionally, in light of the proposed amendment to Rule 16-771 that changes the word "shall" to the word "may" in the first and second sentences of section (b), the proposed amendment to Rule 16-723 (d) also requires Bar Counsel to notify the Clerk of the Court of Appeals if Bar Counsel has received and verified information that an attorney has been convicted of a serious crime.**

The Reporter explained that the Style Subcommittee had questioned the language of subsection (d)(1). Previously, the Court of Appeals, *sua sponte*, had changed the Rule so that

instead of Bar Counsel notifying the National Lawyer Regulatory Data Bank that an attorney has resigned or has been reprimanded, convicted of a serious crime, or disbarred, the Clerk of the Court of Appeals is responsible for the notification. However, the Clerk may not know about some of these occurrences because they do not involve actions of the Court of Appeals. Therefore, the Committee had approved an amendment to the Rule to require Bar Counsel to notify the Clerk if an attorney had been reprimanded by the Commission. This change does not go far enough to provide notification to the Clerk in light of the proposed amendment to section (b) of Rule 16-771, Disciplinary or Remedial Action upon Conviction of Crime, which provides that Bar Counsel may, but is not required to, file a Petition for Disciplinary or Remedial Action in the Court of Appeals. An attorney may have been convicted of a serious crime, but the Clerk would not know about it, because no Petition for Disciplinary or Remedial Action had been filed. Therefore, the Style Subcommittee is suggesting the addition of the language in bold that reads: "or if Bar Counsel has received and verified information that an attorney has been convicted of a serious crime." This change will correctly connect the various Rules.

Mr. Titus asked about subsection (a)(2) of Rule 16-751, Petition for Disciplinary or Remedial Action. The Reporter replied that the Committee had also recommended that the word "shall" be changed to the word "may" in that provision. Bar Counsel could learn that an attorney was convicted of a crime,

yet not file a Petition for Disciplinary or Remedial Action in the Court of Appeals. Judge Missouri asked why this change was made. The Reporter explained that the Attorney Grievance Commission and Bar Counsel wanted to be able to expedite the process by instituting disciplinary proceedings without having to wait for the Commission to meet and approve the filing of the Petition. The Rules Committee approved the use of the word "may" rather than "shall," because the Committee believed that there may be some situations in which, after an investigation by Bar Counsel, it appears that a Petition for Disciplinary or Remedial Action may be inappropriate.

Mr. Titus remarked that Bar Counsel may refuse to file the Petition, and the Commission should be able to direct Bar Counsel to file the Petition. Subsection (a)(1) should begin: "Upon approval or at the direction of the Commission...". The Vice Chair suggested that subsection (d)(1) of Rule 16-723 read as follows: "Bar Counsel shall notify the Clerk of the Court of Appeals and shall also notify the Commission if an attorney is reprimanded by the Commission or if Bar Counsel has received and verified information that an attorney has been convicted of a serious crime." By consensus the Committee agreed with the Vice Chair's suggested change to Rule 16-723 (d)(1) and with Mr. Titus's suggested change to Rule 16-751 (a). The Committee approved Rule 16-723 as amended and the change to Rule 16-751 that Mr. Titus proposed.

The Chair announced that Judge Heller had won an award from

the University of Maryland Law School, and Ms. Potter had won an award from the Anne Arundel County Bar Association. The Chair congratulated both of them.

The Chair adjourned the meeting.