COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in the People's Resource Center, Room 1100A, 100 Community Place, Crownsville, Maryland on January 6, 2006.

Members present:

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

Albert D. Brault, Esq.
Hon. James W. Dryden
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Robert D. Klein, Esq.
Timothy F. Maloney, Esq.
Hon. John F. McAuliffe
Robert R. Michael, Esq.
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Larry W. Shipley, Clerk
Hon. William B. Spellbring, Jr.
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
Robert A. Zarnoch, Esq.

In attendance:

Sherie B. Libber, Esq., Assistant Reporter
Hon. Maurice W. Baldwin, Jr.
Eric Lieberman, The Washington Post
Carol Melamed, Esq., The Washington Post
Vanita Taylor, Esq., Public Defender's Office
Sally Rankin, Court Information Office
David R. Durfee, Jr., Esq., A.O.C.
Paul H. Ethridge, Esq., Maryland State Bar Association, Inc.
John Greene, Esq.
Hon. Sally D. Adkins, Chair, Commission on Judicial Disabilities

The Chair convened the meeting. He asked if there were any additions or corrections to the minutes of the September 9, 2005 and the October 14, 2005 Rules Committee meetings. There being none, Judge Kaplan moved to approve the adoption of the minutes, the motion was seconded, and passed unanimously.

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

Agenda Item 4. Consideration of proposed revisions to the **forms** contained in proposed revised Title 9, Chapter 100 (Adoptions and Guardianships that Terminate Parental Rights) - Proposed amendments to the **forms** in: Rule 9-102 (Authority; Consents; Requests for Attorney or Counseling) and Rule 9-106 (Appointment of Attorney – Attorney Affidavit - Investigation)

The Chair told the Committee that the consultants who assisted with drafting the revised Guardianship and Adoption Rules have asked for 30 more days to make further modifications to the forms in the Rules. Mr. Greene said that the Guardianship and Adoption Rules had been presented to the Committee in November based on the new statute enacted by the General Assembly. The revised Rules were substantially accepted by the Committee, but the form consents for birth parents and prospective adoptees to sign were carried over from the current Rules and needed changes. Last month, several of the consultants worked on the form consents and drafted seven new documents. These are easier for the parents and children as well as for practitioners to understand. Ms. Ogletree and the Assistant Reporter also worked on the forms.

Since the time the forms were revised, the consultants noticed another issue that had not been previously considered. For many years, the existing consent forms have contained both a consent to adoption and a request for an attorney. If the form is handed to a birth parent who refuses to sign, then that parent will often request an attorney but will not file the form with

the court. In practice, if the parent does not sign, then he or she is served with a show cause order. The parent files an objection, then receives notice, then asks for an attorney. The forms need to be further amended to reflect actual practice. Ms. Taylor expressed the concern that people do not realize that a verbal objection to a guardianship or an adoption is not valid. This issue needs to be clarified. Also, information related to the Indian Child Welfare Act, 25 U.S.C. §§1901 et seq., should be added to the list of items in the consent to be checked off. Because the holidays interfered with the time required to update the form consents, the consultants are asking for more time to finish them. The Chair thanked the consultants for working on the Rules and granted them a brief extension that he termed "well-deserved."

Agenda Item 3. Consideration of certain proposed Rules changes pertaining to Access to Court Records - Amendments to: Rule 16-1002 (General Policy) and Rule 9-203 (Financial Statements)

Judge Norton presented Rule 16-1002, General Policy, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGE, AND ATTORNEYS

CHAPTER 1000 - ACCESS TO COURT RECORDS

AMEND Rule 16-1002 to clarify that section (c) applies only in judicial actions that are open to the public, as follows:

Rule 16-1002. GENERAL POLICY

(a) Presumption of Openness

Court records maintained by a court or by another judicial agency are presumed to be open to the public for inspection. Except as otherwise provided by or pursuant to the Rules in this Chapter, the custodian of a court record shall permit a person, upon personal appearance in the office of the custodian during normal business hours, to inspect the record.

(b) Protection of Records

To protect court records and prevent unnecessary interference with the official business and duties of the custodian and other court personnel,

(1) a clerk is not required to permit inspection of a case record filed with the clerk for docketing in a judicial action or a notice record filed for recording and indexing until the document has been docketed or recorded and indexed; and

(2) the Chief Judge of the Court of Appeals, by administrative order, a copy of which shall be filed with and maintained by the clerk of each court, may adopt procedures and conditions, not inconsistent with the Rules in this Chapter, governing the timely production, inspection, and copying of court records.

Committee note: It is anticipated that, by Administrative Order, entered pursuant to section (b) of this Rule, the Chief Judge of the Court of Appeals will direct that, if the clerk does not permit inspection of a notice record prior to recording and indexing of the record, (1) persons filing a notice record for recording and indexing include a separate legible copy of those pages of the document necessary to identify the parties to the transaction and the property that is the subject of the transaction and (2) the clerk date stamp that copy and maintain it in a separate book that is subject to inspection

by the public.

(c) Records Admitted or Considered as Evidence

Unless a judicial action is not open to the public or the court expressly orders otherwise, a court record that has been admitted into evidence in a judicial action or that a court has considered as evidence or relied upon for purposes of deciding a motion is subject to inspection, notwithstanding that the record otherwise would not have been subject to inspection under the Rules in this Chapter.

(d) Fees

(1) In this Rule, "reasonable fee" means a fee that bears a reasonable relationship to the actual or estimated costs incurred or likely to be incurred in providing the requested access.

(2) Unless otherwise expressly permitted by the Rules in this Chapter, a custodian may not charge a fee for providing access to a court record that can be made available for inspection, in paper form or by electronic access, with the expenditure of less than two hours of effort by the custodian or other judicial employee.

(3) A custodian may charge a reasonable fee if two hours or more of effort is required to provide the requested access.

(4) The custodian may charge a reasonable fee for making or supervising the making of a copy or printout of a court record.

(5) The custodian may waive a fee if, after consideration of the ability of the person requesting access to pay the fee and other relevant factors, the custodian determines that the waiver is in the public interest.

(e) New Court Records

(1) Except as expressly required by other

law and subject to Rule 16-1008, neither a custodian nor a court or other judicial agency is required by the Rules in this Chapter to index, compile, re-format, program, or reorganize existing court records or other documents or information to create a new court record not necessary to be maintained in the ordinary course of business. The removal, deletion, or redaction from a court record of information not subject to inspection under the Rules in this Chapter in order to make the court record subject to inspection does not create a new record within the meaning of this Rule.

(2) If a custodian, court, or other judicial agency (A) indexes, compiles, re-formats, programs, or reorganizes existing court records or other documents or information to create a new court record, or (B) comes into possession of a new court record created by another from the indexing, compilation, re-formatting, programming, or reorganization of other court records, documents, or information, and there is no basis under the Rules in this Chapter to deny inspection of that new court record or some part of that court record, the new court record or a part for which there is no basis to deny inspection shall be subject to inspection.

(f) Access by Judicial Employees

The Rules in this Chapter address access to court records by the public at large and do not limit access to court records by judicial officials or employees in the performance of their official duties.

Source: This Rule is new.

Rule 16-1002 was accompanied by the following Reporter's Note.

The Access Rules Implementation Committee appointed by Chief Judge Bell issued its final report on August 29, 2005. One of the issues listed in the report that

> may require final action was the need for clarification in section (c) of Rule 16-1002 that records admitted into evidence become subject to public inspection unless a proceeding is closed to the public. The General Court Administration Subcommittee recommends the addition of an introductory phrase to section (c) that provides for an exception to the principle of accessibility of records admitted into evidence when a court proceeding is closed to the public. Without this clarification, the privacy of these proceedings could be undermined.

Judge Norton explained that the Access Rules Implementation Committee appointed by the Honorable Robert M. Bell, Chief Judge of the Court of Appeals, had recommended in its final report that section (c) of Rule 16-1002 may need clarification that records admitted into evidence become subject to public inspection unless a proceeding is closed to the public. Ms. Melamed told the Committee that she is the Vice President of Government Affairs for The Washington Post and counsel to the Maryland-Delaware-District of Columbia Press Association. She expressed the opinion that no change to Rule 16-1002 is necessary. Rule 16-1006, Required Denial of Inspection – Certain Categories of Case Records, provides for closure of case records. The proposed amendment to Rule 16-1002 provides for the closure of all evidence in hearings that are closed. It does not necessarily follow that all evidence in closed proceedings should be sealed. The proposed amendment is well intended, but not necessary. The Vice Chair commented that what had led her to believe that the amendment was necessary was the last phrase in section (c) that

reads "notwithstanding that the record otherwise would not have been subject to inspection under the Rules in this Chapter." The new language refers to a "judicial action" which means that the entire proceeding is not open to the public. Ms. Melamed remarked that this is confusing. The Reporter's note refers to a court "proceeding." The Vice Chair responded that an "action" is defined in Rule 1-202 as "collectively all the steps by which a party seeks to enforce any right in a court or all of the steps of a criminal prosecution." Ms. Melamed suggested that the Reporter's note be changed to make clear that section (c) refers to a "judicial action" being closed, not a "proceeding."

The Chair noted that in a criminal case where there is a rape shield, a portion of the proceedings may be closed, but the entire case is not closed. If a discrete portion of the action is closed, it does not mean that the entire record is sealed. The Vice Chair commented that if a portion of the proceedings is closed, the evidence admitted in that portion is not open to public inspection. Ms. Melamed said that she agreed with the Vice Chair's interpretation, but others may be confused. The Vice Chair pointed out that the Reporter's note is not an official interpretation of the Rule. Ms. Melamed suggested that the language of the Rule should be made clearer.

The Chair observed that a document may be presented to the court but not actually considered by the court. A document that is offered into evidence is part of the record, but if the court does not consider the document, is it open to inspection? The

Vice Chair noted that evidence relied upon by the court to decide a motion is open to inspection. The Chair explained that a judge may consider a medical record of a witness in a case where the witness's memory is being questioned, but the judge may sustain an objection to admitting the evidence. The Vice Chair pointed out that section (c) has the language "or that a court has considered as evidence in a judicial action...". The Chair remarked that the language of section (c) is consistent with the language of Rule 2-516, Exhibits, which has the following language: "[a]ll exhibits ... whether or not offered in evidence, and if offered, whether or not admitted...". The Vice Chair suggested that the language could be "... admitted or otherwise part of the record...". Mr. Brault proposed the following language: "... a court record that has been offered, admitted into evidence, or relied upon for purposes of deciding a motion is subject to inspection..." with the rest of the sentence being deleted.

Ms. Melamed expressed the view that the Rules need to make clear what is part of the record. The Chair remarked that in the past, if the court did not want the press to have access to a document that had been marked for identification and offered into evidence, the court would not rule as to its admissibility. Until the court would admit the document into evidence, no one could look at it, except for the parties and the court. The Vice Chair noted that when documents or affidavits are attached to a motion, they are not admitted into evidence, but they are part of

the record. She suggested that the language of section (c) could be: "...offered or admitted into evidence in a judicial action or otherwise part of the record...". Senator Stone said that when the record is subject to inspection, and a motion to suppress is filed, then denied, and a trial is held 30 days later, a confession could get into the press and impact the ability of a defendant to get a fair trial. The Chair commented that the burden is on the party who wants the evidence to be protected from the press. If a judge anticipates a problem with picking a jury, the judge may not permit instant access to the records. Ms. Melamed expressed the view that the term "case record" is too broad. The language in the Rule that reads "or relied upon for purposes of deciding a motion" should be retained. The Chair pointed out that this could cause a conflict, because victims' rights advocates could argue that if the court is not relying on the evidence, the public is not entitled to access. The Vice Chair observed that if the record is the entire court file, anything filed is part of the record. The language submitted by Ms. Melamed could create the impression that the exemptions listed in Rule 16-1006, Required Denial of Inspection – Certain Categories of Case Records, will be superseded by Rule 16-1002 (c).

Ms. Melamed questioned the meaning of the language in section (c) that reads "...a court...has relied upon...". The Vice Chair noted that it may be difficult to figure out if the judge relied on a particular part of the court record. Ms.

Melamed asked if the word "considered" clarifies this issue. The Vice Chair suggested that there should be no change to the language of the Rule. Judge Norton said that this Rule is not meant to supersede prior confidentiality, and this must be clarified. Judge McAuliffe suggested that a cross reference to Rule 1-202 (a) be added after section (c) of Rule 16-1002, and the Committee agreed by consensus to this change.

Mr. Sykes inquired as to why section (c) is limited to a court record and not any document in a judicial action. The Chair responded that there is a definition of the term "court record." Mr. Sykes remarked that this is confusing, because the court record has to be admitted into evidence. The Style Subcommittee can look at this issue. The Chair commented that the term "court record" is defined in section (e) of Rule 16-1001, Definitions, to include a case record. Subsection (c)(2) of Rule 16-1001 provides that a "'case record' does not include a document or information described in subsection (a)(3) of this Rule." The Vice Chair said that this provision should be rewritten. Ms. Potter reiterated Mr. Sykes' point that admitted records are not necessarily the same as court records. The Chair said that the Rule should go back to the Subcommittee to determine a better way to communicate that evidence offered as an exhibit is subject to inspection. The language in section (c) should be "case record" instead of "court record." The Chair remanded the Rule to the Subcommittee.

Judge Norton presented Rule 9-203, Financial Statements, for

the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 200 - DIVORCE, ANNULMENT, ALIMONY,

CHILD SUPPORT, AND CHILD CUSTODY

AMEND Rule 9-203 to limit the applicability of current section (d) to financial statements that have not been admitted into evidence, to provide that a party may make a motion to seal a financial statement that has been admitted into evidence, and to add a certain cross reference, as follows:

Rule 9-203. FINANCIAL STATEMENTS

. . .

(d) Inspection of Financial Statements

~~Inspection of~~ Until a financial statement filed pursuant to the Rules in this Chapter is admitted into evidence, inspection of it is governed by Code, State Government Article, §10-617 (a) and (f). Thereafter, a party who does not want the financial statement open to public inspection may make a motion to have it sealed.

Cross reference: See Rule 16-1002 (c).

. . .

Rule 9-203 was accompanied by the following Reporter's Note.

After the Rules on Access to Court Records went into effect, Chief Judge Robert M. Bell appointed members to the Access Rules Implementation Committee. Following many meetings of the Committee and various subcommittees within it, a final report was

> issued August 29, 2005. The Committee listed the issues that may require further action along with appropriate recommendations for action. One of the issues suggested for further action is how to handle access to financial statements required in family law actions pursuant to Rule 9-203. The General Court Administration Subcommittee discussed this issue and recommends adding language to section (d) of Rule 9-203 to clarify that until a financial statement is admitted into evidence, inspection of it is governed by Code, State Government Article, §10-617 (a) and (f), which does not permit inspection of a public records containing information about the finances of an individual. The Subcommittee also recommends adding language to section (d) of Rule 9-203 that provides that a party who does not want financial statements accessible to the public may make a motion to seal the record.

Judge Norton explained that Code, State Government Article, §10-617 (a) and (f) requires that inspection of financial statements in public records be denied. However, once the financial statement is admitted into evidence, a party who does not want the statement open to public inspection must file a motion to seal it, and the Subcommittee recommends adding the second sentence to section (d) which provides this. Ms. Melamed has suggested further changes to section (d) that have been distributed at the meeting today. See Appendix 1. She proposes that the following language be added after the word "evidence" in the first sentence: "or is considered as evidence or relied upon for purposes of deciding a motion." She also suggests adding after the word "sealed" at the end of the second sentence of section (d), the following language: "pursuant to Rule 16-1009,"

and adding a new subsection (k) in Rule 16-1006 that would read: "As provided in Rule 9-203 (d), a case record that consists of a financial statement filed pursuant to Rule 9-202." The Chair commented that the burden is on the party who seeks exclusion of the record. Ms. Melamed responded that this may be too broad, because the record includes everything. The language "or relied upon for purposes of deciding a motion" should be retained.

The Chair commented that the problem is with the files in the clerks' offices. The party goes to the courthouse to seal the record, but his or her business competitors already had seen the financial statement before the motion to seal could be filed. The party who would like for the record to be sealed deserves protection. At a hearing in open court, the party can ask the judge for protection. However, in a motion for summary judgment, the judge may have decided the motion three days prior, but the clerk did not mail the decision for two days, and the business competitors were already able to gain access to the financial statement. The Vice Chair reiterated that the burden is on the party who files the sensitive information. The Chair remarked that in a domestic case, the husband and wife may be fighting. The wife's attorney files a motion and attached to it are the husband's W-2 form and tax returns. It is the wife who may alert the press about the financial information. Sometimes, it is the opponent who wants the matter sealed, not the person who filed the information.

Ms. Melamed said that the motion to seal could be filed

prospectively, but the Chair noted that a party may not know to do this. Mr. Brault noted that if someone is turning over financial statements to an opponent, he or she could move for a protective order. The Chair reiterated that an opponent may want the financial statements to be public. After the opponent has released the information, it is too late to move for a protective order. Mr. Sykes remarked that in federal practice, there are confidential agreements. The Chair said that in Maryland, the procedure is that until a financial statement is offered into evidence, it is not accessible. In a court hearing, a party has an opportunity to ask for protection. The Rule can be designed to provide that a person who wants the record to be sealed can protest. The language "considered or relied on" may cause conflicts. The Vice Chair noted that the general rule is that once evidence is admitted, it is open to inspection. She asked why section (d) is being changed. Ms. Melamed answered that the change is an attempt to give practitioners notice that they have to take action to keep the financial statements from being public. No change to the meaning of the Rule is intended.

The Chair commented that if something is marked for identification, it is considered to be part of the record. The language of section (d) should be similar to the language of Rule 2-516. Until an exhibit becomes part of the record, whether admitted or relied upon, the protection remains. Ms. Melamed suggested that section (c) of Rule 16-1002 use parallel language, so there is no question of either Rule 16-1002 or 9-203

superseding the other.

The Chair said that the General Court Administration Subcommittee will reconsider the Rules. Family law practitioners and Ms. Melamed will be invited to the meeting. Mr. Sykes pointed out that the Subcommittee should take into account that in the practice of law, when an exhibit is added as part of the record in a motion for summary judgment matter, the exhibit is not necessarily admitted. The Vice Chair inquired as to the purpose of the second sentence. Judge Norton replied that it gives people an opportunity to protect their records. Mr. Brault reiterated that a party can ask the court to put the financial statement under seal. The Chair responded that this works if the party who files the statement wants it under seal, but not if the party who files the statement wants to embarrass the other party by making it public. Judge Spellbring suggested that the language in section (d) that reads "pursuant to the Rules in this Chapter" should be deleted. The Chair said that the Rules in Maryland pertaining to access to court records are better than similar rules in many other jurisdictions. The Subcommittee will look at these issues again. Mr. Shipley commented that many of the clerks around the State are unsure how to handle these matters. The Chair thanked the consultants for their assistance with this issue.

Agenda Item 2. Consideration of proposed new Rule 18-207 (Drug Treatment Courts)

Judge Norton presented Rule 18-207, Drug Treatment Courts, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 18 - COURT ADMINISTRATION

CHAPTER 200 - GENERAL PROVISIONS -- CIRCUIT AND DISTRICT COURT

ADD new Rule 18-207, as follows:

Rule 18-207. DRUG TREATMENT COURTS

(a) Definition

"Drug treatment court" means a specialized docket designed to divert non-violent individuals who commit crimes to support their habits into an integrated system which provides intensive treatment, case supervision, and drug testing under the close supervision of the court in which offenders are held strictly and immediately accountable for their behavior through a variety of incentives and sanctions.

(b) Establishment of a Drug Treatment Court Commission

(1) Composition

The Drug Treatment Court Commission shall be staffed by the Administrative Office of the Courts, and shall support the establishment of drug treatment court programs in circuit courts and the District Court. The Commission shall include representatives from the:

(A) Judiciary;

(B) Department of Health and Mental Hygiene;

(C) Department of Public Safety and Correctional Services;

(D) Office of the Public Defender;

(E) Office of the State's Attorney;

(F) Addiction Treatment Community;

(G) Governor's Office of Crime Control and Prevention;

(H) Legislature;

(I) Maryland Association of County Health Officers;

(J) Private Criminal Defense Bar;

(K) Department of Juvenile Services;

(L) Drug Court Coordinators; and

(M) Department of Human Resources.

(2) Chair and Vice Chair

The Commission shall have a chair and a vice chair appointed by the Chief Judge of the Court of Appeals, who shall provide periodic reports to the Chief Judge as requested. Subcommittees shall be constituted at the direction of the chair as necessary.

(3) Executive Committee of the Drug Treatment Court Commission

There shall be an Executive Committee of the Commission composed of the Chair and Vice Chair, the Chief Judge of the Court of Appeals, the Chief Judge of the District Court, and the State Court Administrator.

(4) Goals of the Drug Treatment Court Commission

The goals of the Drug Treatment Court Commission include:

(A) encourage a comprehensive systems approach to the development and implementation of Drug Treatment Courts

within this State;

(B) assist interested local jurisdictions in the development of Drug Treatment Courts by drawing upon accepted national policies and practices relevant to Drug Treatment Court programs and by providing technical assistance, training, and other support;

(C) provide coordination training, and support for local Drug Treatment Court activities within the State; and

(D) provide guidance and systems support for the implementation, management, and evaluation of Drug Treatment Court programs.

(5) Scope of Services

The scope of services for the Drug Treatment Court Commission shall:

(A) provide technical assistance, grant writing assistance, and other support for the purposes of planning and implementing Drug Treatment Court programs;

(B) encourage and facilitate multi-disciplinary training regarding Drug Treatment Court policies, services, and practices;

(C) assist local jurisdictions in identifying and acquiring funding for all components necessary to implement a successful Drug Treatment Court;

(D) establish standards and guidelines for licensed treatment providers which service Drug Treatment Court programs;

(E) support implementing and continuing meritorious proposals which shall include case management and treatment services that comply with guidelines developed by the Commission;

(F) establish guidelines for Drug Treatment Court components including,

screening, assessment, treatment services, and sanctions;

(G) assist in identifying, developing and implementing a range of support services to augment recovery;

(H) establish management information system standards related to interoperability, connectivity, communications, networking, data collection, and reporting;

(I) assist in conducting evaluations to assess the effectiveness of Drug Treatment Court programs;

(J) develop and implement training for drug court professionals within the State; and

(K) develop best practices and standards.

Source: This Rule is new.

Rule 18-207 was accompanied by the following Reporter's Note.

This Rule is derived almost exclusively from an Administrative Order dated October 23, 2001 entitled "Order Governing the Establishment of Drug Treatment Courts." The only changes, except for style changes, are substitution of the word "include" for the words "be composed of" in subsection (b)(1) to allow more flexibility in the composition of the Drug Treatment Court Commission; the addition of the Department of Juvenile Services, Drug Court Coordinator, and the Department of Human Resources to the list of representatives of agencies composing the Commission; and the addition in subsection (b)(4) of "develop and implement training for drug court professionals within the State" as another service for the Commission, conforming to current practice.

Judge Norton told the Committee that Chief Judge Bell had

issued an Administrative Order on October 23, 2001 establishing drug treatment courts. See Appendix 2. These courts now exist throughout the State in most counties. The addition of a rule pertaining to the administration of these courts may be helpful. Most of the language of the proposed Rule is taken directly from the Administrative Order, except for the addition of some members of the Drug Treatment Court Commission who were added by the Subcommittee. The Subcommittee also added the word "include" after the word "shall" in the second sentence of subsection (b)(1), so that other people can be added to the composition of the Commission.

The threshold question is whether there needs to be a rule pertaining to the drug treatment courts. The Chair commented that a formal rule could be of benefit to those jurisdictions that are seeking federal funding. Judge Norton added that his perception is that the drug treatment courts are a permanent fixture. Gray Barton and Jennifer Moore from the Administrative Office of the Courts conduct drug treatment court training sessions around the State and assist jurisdictions in qualifying for federal funds. The Chair suggested that the Rule be presented to the Court of Appeals to decide if a Rule is in order. Mr. Sykes remarked that the Administrative Order could also be changed to reflect modifications in the procedures for the drug courts. The Vice Chair asked where the Rule should be placed. The Chair answered that it could go into the Criminal Rules. The Vice Chair pointed out that the Rule does not pertain

to the drug treatment courts, but rather to the Drug Treatment Court Commission. Mr. Brault questioned as to whether each county has its own drug treatment court. Judge Norton replied that each county decides whether to set up a drug treatment court. Mr. Brault asked whether there are such courts in both circuit court and the District Court. Judge Norton answered that it varies from county to county. For example, in Worcester County, there is a family drug treatment court in the Circuit Court and an adult drug treatment court in the District Court. Some counties have two or three types of these courts.

Mr. Johnson commented that the Administrative Order uses the language "non-violent individuals who commit crimes." He inquired as to whether there is a definition of "non-violent," or whether the courts have flexibility to make this determination. The Chair said that the Honorable Thomas E. Noel instituted the drug treatment courts in the Circuit Court for Baltimore City and the Honorable Jamey H. Weitzman for the District Court in Baltimore City. They were pioneers and were interested in drug treatment courts for non-violent crimes. This issue has not yet been resolved. Judge Dryden told the Committee that to qualify for a federal grant to establish a drug treatment court, one of the conditions for access to the court is that it apply to non-violent individuals. Judge Norton observed that to opt out of the federal definition of "non-violent" would be too restrictive. The Chair asked whether spousal assault qualifies as a non-violent crime. Judge Norton replied that domestic cases are

exempted out of the drug treatment courts. Mr. Johnson asked whether each jurisdiction sets its own definition, and Judge Norton responded affirmatively. Judge Dryden remarked that this is more of a political document as opposed to a rule. The framework of the drug treatment courts is being formalized by rule. The Vice Chair expressed the opinion that there should be no definition of the term "non-violent" in the Rule. Judge Norton noted that many different definitions of the term exist. Generally, the term "non-violent crime" excludes crimes such as robbery, rape, and murder.

The Chair said that the Court of Appeals can decide as to whether to define the term. The language that concerns the Committee, "non-violent individuals who commit crimes," can be bracketed so the Court can review it. Judge Norton stated that this language must remain in the Rule. Deleting it would misrepresent the jurisdiction of the drug treatment courts. Mr. Johnson remarked that the Committee should decide whether this should be a Rule or an administrative order only. If the definition of "non-violent" is different for the various jurisdictions in the State, then this should not be a Rule. It is easier if it remains an administrative order, because it allows each jurisdiction to set up its own drug treatment court. The way the Rule is written gives no guidance as to which individuals are "non-violent." Judge McAuliffe expressed the opinion that the language in question should remain in the Rule, because the Administrative Order uses the language. It is

politically acceptable and not limiting. The Chair reiterated that he can report to the Court of Appeals the discussion about the "non-violent individuals" language. Judge Dryden said that he thought that the Court of Appeals would want this to be in the form of a Rule. The Vice Chair asked whether the Rule will be reviewed by the Style Subcommittee, and the Chair replied in the affirmative. By consensus, the Committee approved the Rule as presented.

Additional Agenda Item

The Chair explained that an additional topic of an emergency nature would be presented.

Ms. Ogletree, Chair of the Property Subcommittee, presented Rules 14-204, Commencement of Action and Process; 14-205, Lien Instruments or Statutory Liens - Containing Neither Power of Sale nor Assent to Decree; and 14-206, Procedure Prior to Sale, for the Committee's consideration.

ALTERNATIVE 1 - Revision #1

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-206 to delete a certain provision concerning notice to the record owner, as follows:

Rule 14-206. PROCEDURE PRIOR TO SALE

(a) Bond

Before making a sale of property to foreclose a lien, the person authorized to make the sale shall file a bond to the State of Maryland conditioned upon compliance with any court order that may be entered in relation to the sale of the property or distribution of the proceeds of the sale. Unless the court orders otherwise, the amount of the bond shall be the amount of the debt plus the estimated expenses of the proceeding. On application by a person having an interest in the property or by the person authorized to make the sale, the court may increase or decrease the amount of the bond pursuant to Rule 1-402 (d).

(b) Notice

(1) By Publication

After commencement of an action to foreclose a lien and before making a sale of the property subject to the lien, the person authorized to make the sale shall publish notice of the time, place, and terms of sale in a newspaper of general circulation in the county in which the action is pending. "Newspaper of general circulation" means a newspaper satisfying the criteria set forth in Code, Article 1, Section 28. A newspaper circulating to a substantial number of subscribers in a county and customarily containing legal notices with respect to property in the county shall be regarded as a newspaper of general circulation in the county, notwithstanding that (1) its readership is not uniform throughout the county, or (2) its content is not directed at all segments of the population. For the sale of an interest in real property, the notice shall be given at least once a week for three successive weeks, the first publication to be not less than 15 days prior to sale and the last publication to be not more than one week prior to sale. For the sale of personal property, the notice shall be given not less than five days nor more than 12 days before the sale.

(2) By Certified and First Class Mail

(A) Before making a sale of the property, the person authorized to make the sale shall send notice of the time, place, and terms of sale by certified mail and by first class mail to the last known address of (i) the debtor, (ii) the record owner of the property, and (iii) the holder of any subordinate interest in the property subject to the lien.

(B) The notice of the sale shall be sent ~~to the record owner of the property no later than two days after the action to foreclose is docketed and shall include the notice required by Code, Real Property Article, §7-105 (a).~~

~~(C) The notice of the sale shall be sent~~ not more than 30 days and not less than ten days before the date of the sale to all ~~other~~ such persons whose identity and address are actually known to the person authorized to make the sale or are reasonably ascertainable from a document recorded, indexed, and available for public inspection 30 days before the date of the sale.

(3) To Counties or Municipal Corporations

In addition to any other required notice, not less than 15 days prior to the sale of the property, the person authorized to make the sale shall send written notice to the county or municipal corporation where the property subject to the lien is located as to:

(A) the name, address, and telephone number of the person authorized to make the sale; and

(B) the time, place, and terms of sale.

(4) Other Notice

If the person authorized to make the sale receives actual notice at any time before the sale is held that there is a person holding a subordinate interest in the property and if the interest holder's

identity and address are reasonably ascertainable, the person authorized to make the sale shall give notice of the time, place, and terms of sale to the interest holder as promptly as reasonably practicable in any manner, including by telephone or electronic transmission, that is reasonably calculated to apprise the interest holder of the sale. This notice need not be given to anyone to whom notice was sent pursuant to subsection (b)(2) of this Rule.

(5) Return Receipt or Affidavit

The person giving notice pursuant to subsections (b)(2), (b)(3), and (b)(4) of this Rule shall file in the proceedings an affidavit (A) that the person has complied with the provisions of those subsections or (B) that the identity or address of the debtor, record owner, or holder of a subordinate interest is not reasonably ascertainable. If the affidavit states that an identity or address is not reasonably ascertainable, the affidavit shall state in detail the reasonable, good faith efforts that were made to ascertain the identity or address. If notice was given pursuant to subsection (b)(4), the affidavit shall state the date, manner, and content of the notice given.

(c) Postponement

If the sale is postponed, notice of the new date of sale shall be published in accordance with subsection (b)(1) of this Rule. No new or additional notice under subsection (b)(2) or (b)(3) of this Rule need be given to any person to whom notice of the earlier date of sale was sent, but notice shall be sent to persons entitled to notice under subsections (b)(2)(B) and (4) of this Rule to whom notice of the earlier date of sale was not sent.

Cross reference: Regarding foreclosure consulting contracts, see Code, Real Property Article, §§7-301 through 7-321.

Source: This Rule is derived in part from

former Rule W74 and is in part new.

Rule 14-206 was accompanied by the following Reporter's Note.

> The proposed amendments to Rule 14-206, 14-204, and 14-205 correct a provision in Rule 14-206 pertaining to a notice that is required by Code, Real Property Article, §7-105 (a-1) to be sent to the record owner of residential real property no later than two days after the action to foreclose is docketed. This notice is in addition to the notice of sale that is required to be sent "not more than 30 days and not less than ten days before the date of the sale."
>
> The correction is made by (1) a deletion from Rule 14-206 and (2) the addition of a new section (b), Notice to Record Owner, to Rules 14-204 and 14-205 that provides for the separate "two days after the foreclosure action is docketed" notice to the record owner of residential real property required by Code, Real Property Article, §7-105 (a-1).

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-204 by adding a new section (b) pertaining to a certain notice to the record owner, as follows:

Rule 14-204. COMMENCEMENT OF ACTION AND PROCESS

(a) Methods of Commencing Action

An action to foreclose a lien pursuant to a power of sale shall be commenced by filing an order to docket. An action to foreclose a lien pursuant to an assent to a decree or where the lien instrument contains neither a power of sale nor an assent to a decree shall be commenced by filing a complaint to foreclose. When a lien instrument contains both a power of sale and an assent to a decree, the lien may be foreclosed pursuant to either the power of sale or the assent to a decree. The complaint or order to docket shall be accompanied by:

(1) the original or a certified copy of the lien instrument or, in an action to foreclose a statutory lien, an original or a certified copy of a notice of the existence of the lien,

(2) a statement of the debt remaining due and payable supported by an affidavit of the plaintiff or the secured party or the agent or attorney of the plaintiff or the secured party,

(3) in the case of a deed of trust, a copy of the debt instrument certified by the attorney or the trustee conducting the sale, and

(4) if any defendant is a natural person, an affidavit that either the person is not in the military service of the United States as defined in Section 511 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 50 U.S.C. Appendix, 520, or that the action is authorized by the Act.

(b) Notice to Record Owner

The person authorized to make a sale shall give written notice pursuant to Code, Real Property Article, §7-105 (a-1) to the record owner of residential real property no later than two days after the action to foreclose is docketed. The person giving notice pursuant to this section shall file in the proceedings an affidavit (A) that the person has complied with the provisions of

this section or (B) that the identity or address of the record owner is not reasonably ascertainable. If the affidavit states that an identity or address is not reasonably ascertainable, the affidavit shall state in detail the reasonable, good faith efforts that were made to ascertain the identity or address.

~~(b)~~ (c) Process and Hearing Not Required

In an action to foreclose a lien pursuant to a power of sale or pursuant to an order for sale under an assent to a decree, it is not necessary that process issue or that a hearing be held prior to sale.

Cross reference: Sections 511 and 532 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. Appendix.

Source: This Rule is derived from former Rule W72 c, d, and e.

Rule 14-204 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 14-206.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-205 to add a new section (b) pertaining to a certain notice to the record owner, as follows:

Rule 14-205. LIEN INSTRUMENTS OR STATUTORY LIENS - CONTAINING NEITHER POWER OF SALE NOT

ASSENT TO DECREE

(a) Commencement of Action and Process

When a complaint to foreclose a lien instrument or statutory lien containing neither a power of sale nor an assent to a decree is filed, process shall issue and be served, and the action shall proceed as in any other civil action.

(b) Notice to Record Owner

The plaintiff shall give written notice pursuant to Code, Real Property Article, §7-105 (a-1) to the record owner of residential real property no later than two days after the action to foreclose is docketed. The plaintiff shall file in the proceedings an affidavit (A) that the person has complied with the provisions of this section or (B) that the identity or address of the record owner is not reasonably ascertainable. If the affidavit states that an identity or address is not reasonably ascertainable, the affidavit shall state in detail the reasonable, good faith efforts that were made to ascertain the identity or address.

~~(b)~~ (c) Order of Court Directing Sale - Conditions

(1) Generally

In an action to foreclose a lien instrument or statutory lien containing neither a power of sale nor an assent to a decree, the court shall first determine whether a default has occurred. If the court finds that a default has occurred it shall (A) fix the amount of the debt, interest, and costs then due and (B) provide a reasonable time within which payment may be made. The court may order that if payment is not made within the time fixed in the order, so much of the property as may be necessary to satisfy the amount due shall be sold.

(2) Order Directing Sale Before Judgment

in Exceptional Case

If after a hearing the court is satisfied that the interests of justice require an immediate sale of the property that is subject to the lien, and that a sale would be ordered as a result of the final hearing of the action, the court may order a sale of the property before judgment and shall appoint a person to make the sale pursuant to Rule 14-207. The court shall order the proceeds of any sale before judgment to be deposited or invested pending distribution pursuant to judgment.

Source: This Rule is derived from former Rule W73.

Rule 14-205 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 14-206.

Ms. Ogletree told the Committee that Jeffrey Fisher, Esq., a mortgage foreclosure practitioner, had called the Rules Committee Office to point out a problem with recent changes to Rule 14-206 which had collapsed two notices to the record owner of the property. A recent change in the law requires notice to be sent two days after the case has been docketed to warn the record owner of the cottage industry of mortgage foreclosure consultants. The recent change to the Rules collapsed this notice with the notice of sale which is given 10 to 30 days before the date of the sale. Mr. Fisher had pointed out that these two types of notice have to be separated out, so that notice to the record owner is not held to be invalid later on. Rule 14-206 should be changed back to the way it appeared before

the latest change to it. In the draft of the Rules distributed today, the language shown as deleted in subsection (b)(2)(B) is the new language that was added recently. The notice about mortgage foreclosure consultants is to be given first, followed later by existing procedural notice to the record owner and others as to the time, place, and manner of sale.

The Vice Chair noted that the second sentence of section (b) of Rule 14-205 provides for an affidavit by the plaintiff that he or she has sent the required notice. The statute, Code, Real Property Article, §7-105 a-1, provides for notice by certified mail and first class mail. What happens if the record owner cannot be found? Ms. Ogletree answered that notice is sent to the last known address for the property owner of record. The Chair added that the notice will be sent in advance of the docketing action. Mr. Sykes remarked that the Rule should be clear that if it is not known where the record owner of the property is, the notice should be mailed to the owner's last known address. The Vice Chair observed that the notice required by law should be given and an affidavit filed stating that notice was properly given. Senator Stone said that the original bill required stronger notice, but the final bill provided for notice by first class and certified mail. Mr. Brault inquired as to the consequence of not giving proper notice, and Senator Stone answered that the law does not provide a consequence.

Ms. Ogletree reiterated that the two notices were inadvertently collapsed which interferes with the timing of the

second notice. To correct the mistake, Rule 14-206 should be changed back to the way it was previously, and Rules 14-204 and 14-205 each should have a new section (b) added that provides for the separate notice two days after the foreclosure action is docketed warning about mortgage foreclosure consultants. By consensus, the Committee agreed to these changes.

Agenda Item 1. Consideration of certain proposed amendments to the Rules concerning the Commission on Judicial Disabilities: Rule 16-803 (Commission on Judicial Disabilities - Definitions), Rule 16-805 (Complaints; Preliminary Investigations), and Rule 16-806 (Further Investigations)

The Chair introduced the Honorable Maurice Baldwin of the Circuit Court for Harford County.

Judge Norton presented Rules 16-803, Commission on Judicial Disabilities - Definitions; 16-805, Complaints; Preliminary Investigations; and Rule 16-806, Further Investigations, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-803 to add a definition of the word "panel" and to reletter the Rule, as follows:

Rule 16-803. COMMISSION ON JUDICIAL DISABILITIES - DEFINITIONS

The following definitions apply in Rules

16-804 through 16-810 except as expressly otherwise provided or as necessary implication requires:

(a) Address of Record

"Address of record" means a judge's current home address or another address designated by the judge.

Cross reference: See Rule 16-810 (a)(1) concerning confidentiality of a judge's home address.

(b) Charges

"Charges" means the charges filed with the Commission by Investigative Counsel pursuant to Rule 16-808.

(c) Commission

"Commission" means the Commission on Judicial Disabilities.

(d) Commission Record

"Commission record" means all documents pertaining to the judge who is the subject of charges that are filed with the Commission or made available to any member of the Commission.

(e) Complainant

"Complainant" means a person who has filed a complaint.

(f) Complaint

"Complaint" means a communication alleging that a judge has a disability or has committed sanctionable conduct.

(g) Disability

"Disability" means a mental or physical disability that seriously interferes with the performance of a judge's duties and is, or is likely to become, permanent.

(h) Formal Complaint

"Formal Complaint" means a written communication under affidavit signed by the complainant, alleging facts indicating that a judge has a disability or has committed sanctionable conduct.

Committee note: The complainant may comply with the affidavit requirement of this section by signing a statement in the following form: "I solemnly affirm under the penalties of perjury that the contents of the foregoing paper are true to the best of my knowledge, information, and belief." It is not required that the complainant appear before a notary public.

(i) Judge

"Judge" means a judge of the Court of Appeals, the Court of Special Appeals, a circuit court, the District Court, or an orphans' court, and a retired judge during any period that the retired judge has been approved to sit.

Cross reference: See Md. Const., Art. 4, §3A and Code, Courts Article, §1-302.

(j) Panel

"Panel" means three members of the Commission, including a judge, an attorney, and a member of the public, appointed by the Chair to review the recommendations of Investigative Counsel.

~~(j)~~ (k) Sanctionable Conduct

(1) "Sanctionable conduct" means misconduct while in office, the persistent failure by a judge to perform the duties of the judge's office, or conduct prejudicial to the proper administration of justice. A judge's violation of any of the provisions of the Maryland Code of Judicial Conduct promulgated by Rule 16-813 may constitute sanctionable conduct.

(2) Unless the conduct is occasioned by

fraud or corrupt motive or raises a substantial question as to the judge's fitness for office, "sanctionable conduct" does not include:

(A) making an erroneous finding of fact, reaching an incorrect legal conclusion, or misapplying the law; or

(B) failure to decide matters in a timely fashion unless such failure is habitual.

Committee note: Sanctionable conduct does not include a judge's making wrong decisions - even very wrong decisions - in particular cases.

Cross reference: Md. Const., Art. IV, §4B (b)(1).

For powers of the Commission in regard to any investigation or proceeding under §4B of Article IV of the Constitution, see Code, Courts Article, §§13-401 to 13-403.

Source: This Rule is in part derived from former Rule 1227 (adopted 1995) and is in part new.

Rule 16-803 was accompanied by the following Reporter's Note.

The Honorable Sally D. Adkins, Chair of the Commission on Judicial Disabilities, requested that the Rules Committee consider modifying the review process by the Commission to include a review of Investigative Counsel's recommendations by a panel of members of the Commission. Frequently, several members are not present at meetings, and review by a panel would alleviate the problem of decisions being made by only a portion of the Commission. The "panelization" model was recommended by the ABA, and several other states use some version of it. To add a panel review procedure to the Rules pertaining to the Commission on Judicial Disabilities, the

General Court Administration Subcommittee recommends amending Rules 16-803, 16-805, and 16-806. A definition of the word "panel" would be added to Rule 16-803, and two sections would be added to the other two Rules providing for a review of Investigative Counsel's recommendations by a panel. If a timely objection to the panel's recommendation is filed, the full Commission reviews the matter. The Subcommittee recommends that when the full Commission reviews the case, the attorney and public member of the panel do not participate.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-805 to add sections (g) and (h) providing for review of Investigative Counsel's recommendations by a panel of the Commission, as follows:

Rule 16-805. COMPLAINTS; PRELIMINARY INVESTIGATIONS

(a) Complaints

All complaints against a judge shall be sent to Investigative Counsel. Upon receiving a complaint that does not qualify as a formal complaint but indicates that a judge may have a disability or have committed sanctionable conduct, Investigative Counsel shall, if possible: (1) inform the complainant of the right to file a formal complaint; (2) inform the complainant that a formal complaint must be supported by affidavit and provide the complainant with the appropriate form of affidavit; and (3) inform the complainant that unless a formal

complaint is filed within 30 days after the date of the notice, Investigative Counsel is not required to take action, and the complaint may be dismissed.

(b) Formal Complaints

Investigative Counsel shall number and open a file on each formal complaint received and promptly in writing (1) acknowledge receipt of the complaint and (2) explain to the complainant the procedure for investigating and processing the complaint.

(c) Dismissal by Investigative Counsel

If Investigative Counsel concludes that the complaint does not allege facts that, if true, would constitute a disability or sanctionable conduct and that there are no reasonable grounds for a preliminary investigation, Investigative Counsel shall dismiss the complaint. If a complainant does not file a formal complaint within the time stated in section (a) of this Rule, Investigative Counsel may dismiss the complaint. Upon dismissing a complaint, Investigative Counsel shall notify the complainant and the Commission that the complaint has been dismissed. If the judge has learned of the complaint and has requested notification, Investigative Counsel shall also notify the judge that the complaint has been dismissed.

(d) Inquiry

Upon receiving information from any source indicating that a judge may have a disability or may have committed sanctionable conduct, Investigative Counsel may open a file and make an inquiry. Following the inquiry, Investigative Counsel shall (1) close the file and dismiss any complaint in conformity with section (b) of this Rule or (2) proceed as if a formal complaint had been filed and undertake a preliminary investigation in accordance with section (d) of this Rule.

Committee note: An inquiry may include

obtaining additional information from the complainant, reviewing public records, obtaining transcripts of court proceedings, and communicating informally with the judge.

(e) Preliminary Investigation

(1) If a complaint is not dismissed in accordance with section (c) or (d) of this Rule, Investigative Counsel shall conduct a preliminary investigation to determine whether there are reasonable grounds to believe that the judge may have a disability or may have committed sanctionable conduct. Investigative Counsel shall promptly inform the Commission that the preliminary investigation is being undertaken.

(2) Upon application by Investigative Counsel and for good cause, the Commission may authorize Investigative Counsel to issue a subpoena to obtain evidence during a preliminary investigation.

(3) Unless directed otherwise by the Commission for good cause, Investigative Counsel shall notify the judge before the conclusion of the preliminary investigation (A) that Investigative Counsel has undertaken a preliminary investigation into whether the judge has a disability or has committed sanctionable conduct; (B) whether the preliminary investigation was undertaken on Investigative Counsel's initiative or on a complaint; (C) if the investigation was undertaken on a complaint, of the name of the person who filed the complaint and the contents of the complaint; (D) of the nature of the disability or sanctionable conduct under investigation; and (E) of the judge's rights under subsection (e)(4) of this Rule. The notice shall be given by first class mail or by certified mail requesting "Restricted Delivery - show to whom, date, address of delivery" addressed to the judge at the judge's address of record.

(4) Before the conclusion of the preliminary investigation, Investigative Counsel shall afford the judge a reasonable opportunity to present, in person or in

writing, such information as the judge chooses.

(5) Investigative Counsel shall complete a preliminary investigation within 90 days after the investigation is commenced. Upon application by Investigative Counsel within the 90-day period and for good cause, the Commission shall extend the time for completing the preliminary investigation for an additional 30-day period. For failure to comply with the time requirements of this section, the Commission may dismiss any complaint and terminate the investigation.

(f) Recommendation by Investigative Counsel

Within the time for completing a preliminary investigation, Investigative Counsel shall report the results of the investigation in the form that the Commission requires. The report shall include one of the following recommendations: (1) dismissal of any complaint and termination of the investigation, (2) the offer of a private reprimand or a deferred discipline agreement, (3) authorization of a further investigation, or (4) the filing of charges.

(g) Referral to Panel

The Chair of the Commission shall appoint a panel of three Commission members, including one judge, one attorney, and one public member, to review the recommendations of Investigative Counsel. The panel shall submit a report to the full Commission which shall notify Investigative Counsel and the judge of the panel's decision. The report shall include one of the following recommendations: (1) dismissal of any complaint and termination of the investigation; (2) the offer of a private reprimand or deferred discipline agreement; (3) authorization of a further investigation; or (4) the filing of charges. Investigative Counsel and the judge must file any objections within 30 days of the date on the notice.

(h) Review of Panel's Recommendations

If an objection to the panel's recommendation is timely filed, the Commission, excluding the attorney and public member who served on the panel, shall review the recommendations of the panel. The Commission shall dispose of the matter pursuant to Rule 16-807, if the Commission decides to dismiss the case, to issue a private reprimand, or to enter into a deferred discipline agreement. If the Commission finds probable cause to believe that the judge has a disability or has committed sanctionable conduct, the Commission shall proceed pursuant to Rule 16-808.

Source: This Rule is in part derived from former Rule 1227B and is in part new.

Rule 16-805 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 16-803.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-806 to change the word "Commission" to "panel" in sections (a), (c), and (d) and to add sections (e) and (f) providing for review of Investigative Counsel's recommendations by a panel of the Commission, as follows:

Rule 16-806. FURTHER INVESTIGATION

(a) Notice to Judge

Upon approval of a further investigation by the ~~Commission~~ panel previously appointed in the case pursuant to Rule 16-805 (g), Investigative Counsel promptly shall notify the judge (1) that the ~~Commission~~ panel has authorized the further investigation, (2) of the specific nature of the disability or sanctionable conduct under investigation, and (3) that the judge may file a written response within 30 days of the date on the notice. The notice shall be given (1) by first class mail to the judge's address of record, or (2) if previously authorized by the judge, by first class mail to an attorney designated by the judge. The Commission, for good cause, may defer the giving of notice, but notice must be given not less than 30 days before Investigative Counsel makes a recommendation as to disposition.

(b) Subpoenas

(1) Upon application by Investigative Counsel and for good cause, the Commission may authorize Investigative Counsel to issue a subpoena to compel the attendance of witnesses and the production of documents or other tangible things at a time and place specified in the subpoena. Promptly after service of the subpoena and in addition to any other notice required by law, Investigative Counsel shall provide to the judge under investigation notice of the service of the subpoena. The notice to the judge shall be sent by first class mail to the judge's address of record or, if previously authorized by the judge, by first class mail to an attorney designated by the judge.

(2) The judge or the person served with the subpoena may file a motion for a protective order pursuant to Rule 2-510 (e). The motion shall be filed in the circuit court for the county in which the subpoena was served or, if the judge under

investigation is a judge serving on that circuit court, another circuit court designated by the Commission. The court may enter any order permitted by Rule 2-510 (e). Upon a failure to comply with a subpoena issued pursuant to this Rule, the court, on motion of Investigative Counsel, may compel compliance with the subpoena.

(3) To the extent practicable, a subpoena shall not divulge the name of the judge under investigation. Files and records of the court pertaining to any motion filed with respect to a subpoena shall be sealed and shall be open to inspection only upon order of the Court of Appeals. Hearings before the circuit court on any motion shall be on the record and shall be conducted out of the presence of all persons except those whose presence is necessary.

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

(c) Completion

Investigative Counsel shall complete a further investigation within 60 days after it is authorized by the ~~Commission~~ panel. Upon application by Investigative Counsel made within the 60-day period and served by first class mail upon the judge or counsel of record, the Commission, for good cause, may extend the time for completing the further investigation for a specified reasonable time. The Commission may dismiss the complaint and terminate the investigation for failure to comply with the time requirements of this section.

(d) Recommendation by Investigative Counsel

Within the time for completing a further investigation, Investigative Counsel shall report the results of the investigation to the ~~Commission~~ panel in the form that the Commission requires. The report shall include one of the following recommendations: (1) dismissal of any complaint and termination of the investigation, (2) the

offer of a private reprimand or a deferred discipline agreement, or (3) the filing of charges.

(e) Referral to Panel

The panel shall review the recommendations of Investigative Counsel and shall submit a report to the full Commission which shall notify Investigative Counsel and the judge of the panel's decision. The report shall include one of the following recommendations: (1) dismissal of any complaint and termination of the investigation; (2) the offer of a private reprimand or deferred discipline agreement; or (3) the filing of charges. Investigative Counsel and the judge must file any objections within 30 days of the date on the notice.

(f) Review of Panel's Recommendations

If an objection to the panel's recommendation is timely filed, the Commission, excluding the attorney and public member who served on the panel, shall review the recommendations of the panel. The Commission shall dispose of the matter pursuant to Rule 16-807, if the Commission decides to dismiss the case, to issue a private reprimand, or to enter into a deferred discipline agreement. If the Commission finds probable cause to believe that the judge has a disability or has committed sanctionable conduct, the Commission shall proceed pursuant to Rule 16-808.

Source: This Rule is in part derived from former Rule 1227C and is in part new.

Rule 16-806 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 16-803.

Judge Norton told the Committee that the Honorable Sally D.

Adkins, Chair of the Commission on Judicial Disabilities, had asked the General Court Administration Subcommittee for a change to the Rules Governing the Commission on Judicial Disabilities. A number of other states have a separation of the investigatory and adjudicatory arms of the judicial discipline structure. There are different models among the various states with different bodies doing the investigating. Judge Adkins had suggested a judicial investigatory board consisting of seven members appointed by the Commission. The Subcommittee was concerned that the Maryland Constitution requires that members of the Commission are appointed by the Governor, but the proposed judicial investigatory board, while performing functions of the Commission, would not have been appointed by the Governor. The Subcommittee had proposed that the investigatory body be composed of Commission members, but have a lesser amount of people on it, possibly five or six. Judge Adkins' view was that this amount was too many, because of the difficulty in attaining a quorum at the Commission meetings. The end result was a proposal for a three-person panel containing one judge who would then sit later on the Commission after having been part of the initial panel determination.

The Vice Chair asked why the panel was designed this way. The Chair cited the example of *Board of Pharmacy v. Spencer*, 150 Md. App. 138 (2003), *rev'd in part on other grounds*, 380 Md. 515 (2004). The Court of Special Appeals held that under the facts of that case, it was improper for Board of Pharmacy members who

had participated in settlement discussions with a pharmacist in disciplinary proceedings to sit on the panel that hears the disciplinary proceeding. Judge Adkins remarked that the language of that case was not intended to prevent trial judges from participating in settlement discussions, then hearing the case later.

Judge Adkins observed that Judge Norton had presented a good introduction of the topic. She explained that the Commission's proposal is a two-tiered model. Under the current Rules, the Commission has an investigatory function to decide whether or not to press public charges and an adjudicatory function, and all members of the Commission participate in both functions. The Evidence Rules in Title 5 are the applicable rules for hearing the cases in the Commission, rather than the rules for administrative agencies. During the investigatory phase, the Commission has to hear hearsay information, but during the hearing, no hearsay information can be considered. Judge Adkins told the Committee that she has tried to conduct proceedings so that no hearsay information is considered by the Commission during the investigatory phase, but it is difficult to do. She said that as the intermediary between Investigative Counsel and the Commission, she is allowed to hear hearsay.

Judge Adkins stated that the *Spencer* case is a problem. In that case, the Court of Special Appeals negated the decision of the Board of Pharmacy, because two of the members of the Board had participated in settlement discussions with the pharmacist,

then sat in adjudication of the pharmacist. Inadmissible information that the two members heard during the settlement discussions was considered by the Board and included in the Board's Final Decision and Order. The court held that this was improper. This decision has implications for the Commission on Judicial Disabilities. The Commission Rules direct that in the investigatory phase, when the determination is being made as to whether charges should be filed against a judge, Investigative Counsel can delve more deeply into the investigation and subpoena witnesses. Investigative Counsel is directed to recommend whether in lieu of formal charges, there should be a deferred discipline agreement or a public reprimand. In the past, Investigative Counsel has been a liaison between the Commission and the judge who is the subject of the complaint. Although the Commission does not directly negotiate with the judge, the members hear the results of what Investigative Counsel says to the judge and the judge's responses. There have been other decisions since *Spencer,* but they do not resolve the problems.

The Commission's proposal is to create an advisory board entitled the "Judicial Inquiry Board" that would be composed of seven members. The issue of whether to pursue a further investigation of the judge would be presented to the Board instead of to the Commission. The Board would consider whether there is probable cause to determine if the judge committed misconduct under the judicial canons. If probable cause is not found, the Board would recommend to the Commission that the

complaint be dismissed. If probable cause is found, the Board would recommend the filing of charges, or the Board would negotiate with the judge for an alternate disposition, such as a private reprimand. The Commission has the ultimate say. The Commission would appoint the seven members of the Board, which would be comprised of two judges, two attorneys, and three public members. The fact that the Commission appoints is consistent with the Maryland Constitutional provision. The composition of the Board carries forward the diverse membership of the Commission.

Judge Adkins said that the problems with the Subcommittee's model are threefold.

One is that sufficient members may not be present at the final adjudication. Under the Rules, a quorum consists of six. If some Commission members are excluded from the adjudication, it may not be possible to get a quorum. In her letter to the Rules Committee, Judge Adkins said that she explained why it is so difficult to get all 11 Commission members to attend the meetings.

The second concern is the differing viewpoints as to issues that arise. Sometimes after a complaint is filed, a judgment call is needed as to whether a judge committed misconduct or simply had a bad day. What is actually a single bad day may look different to a lay person, but the judges and attorneys more fully understand that a judge is only human and makes mistakes. When various views and responses are heard, a better decision is

reached. The concern is with having only three people making the decision as to public charges (even if this is only advisory).

The third problem is that a three-person panel will dilute the number of public members who are able to have a voice in the initial process. If the one public member of the panel disagrees with the attorney and judge members, the public member has no voice. The Maryland Constitution establishes a greater voice for members of the public than the three-person panel would achieve. If the panel is expanded to include more than three members, then the process cannot operate at the adjudicatory level.

The Chair commented that when the Honorable Glenn T. Harrell, Jr., now on the Court of Appeals, was the Chair of the Commission and a member of the Court of Special Appeals, H. Thomas Howell, Esq., who was then a member of the Rules Committee, was a proponent of a system being put in place to protect a judge from having to face a Commission that prejudged his or her guilt, because the Commission had received unfiltered, unfairly prejudicial information concerning the judge. It is wrong to have the judge argue before the Commission after it has heard information not admissible in evidence and uses that information to possibly charge the judge. As Commission Chair, Judge Harrell had formulated an internal rule that Investigative Counsel should not submit anything to the Commission that could not be admitted into evidence. On the strength of this internal rule, a majority of the Subcommittee at that time felt that Mr. Howell's suggestions were not necessary. The Chair asked how a

panelization model would protect against unfiltered information being presented to the panel. No member of a panel who would want to charge the judge should participate in the Commission proceedings. Mr. Howell's point was that a system should be in place where the Commission holds a hearing, and the finders of fact have not been presented with inadmissible, unfairly prejudicial information in advance. Judge McAuliffe pointed out that the internal rule may not protect a judge. When a Montgomery County District Court judge was tried some years ago, the judge took a lie detector test, and the Commission heard the inadmissible and prejudicial material concerning the test. Judge Adkins remarked that this occurred before the internal rule was adopted.

Judge McAuliffe inquired as to whether the Judicial Conference had looked at this issue. Judge Baldwin replied that the Conference had endorsed the changes to the Rules the last time they were considered. He said that he favors a panel of three as opposed to a panel of seven. Judge McAuliffe noted a potential problem. After the Commission has been sitting for some time and has concluded that many complaints have no merit, the members have become seasoned. If seven new people are added, at first they may take a very hard-line approach. Judge Adkins responded that one solution to that problem is to have advisory groups chaired by former Commission members and have other former members available for guidance. Mr. Maloney added that this problem is not unique to the judicial discipline system. It is

applicable to the attorney discipline system and other professional discipline boards. The Attorney Grievance Rules in Maryland have diversity of functions, including a peer review panel. Judge Adkins remarked that this panel is similar to the proposed Judicial Inquiry Board. Mr. Maloney expressed the view that the members of the Commission should be somewhat insulated. They should not sit on the panel. However, the Maryland Constitution has provided that the Commission is to hear all cases, which cannot be put off to investigatory panels. How much of a role should the investigatory panel play to insulate the Commission from *ex parte* actions?

The Chair said that hypothetically the panel could consist of seven members appointed by the Court of Appeals. Investigative Counsel or the panel would decide to ask the Commission to file charges. The decision is submitted in writing. There may be a debate as to what should or should not go into the document. The issue would be presented to the Chair of the Commission, who would decide whether charges should be brought against the judge. The decision must be approved by the Commission. Judge McAuliffe inquired as to why the Court of Appeals would appoint the board members. The Commission could appoint the board. Judge Adkins remarked that the way the board members are appointed should carry the prestige of the Court of Appeals.

Mr. Brault pointed out an inherent flaw in the current system. The Commission investigates and decides whether to

charge. This is not fair. Judge Adkins' proposal is better. The model should be similar to the Attorney Grievance model. The number of people on the panel is immaterial. The Chair commented that conceptually, the goal is to devise a set of rules that implements and enforces the Commission's powers pursuant to the Maryland Constitution. The investigatory panel can be assigned the issue of whether to charge the judge or pursue other appropriate disciplinary measures. The discipline can either be agreed to by the judge and Investigative Counsel or approved by the Chair of the Commission. It would be helpful to look at those jurisdictions with similar procedures. Judge Adkins has provided a list of other jurisdictions with a similar system. See Appendix 3.

Mr. Johnson pointed out that the current system has a mechanism to allow objections to who will be sitting on the case. Judge Baldwin responded that recusal may be necessary. Mr. Johnson observed that to avoid the case going to federal court, there should be a mechanism for allowing a motion to recuse or reconstitute the panel. Judge Baldwin remarked that the cases used to be conducted rather informally. The judge was invited to the Commission. How can the Commission hear a case fairly if it is aware of damaging information? Judge Adkins noted that for that reason, judges are no longer invited to the Commission hearings. The Chair commented that this is unfortunate, because in some cases, the judge should be allowed to explain the situation and discuss it with the Commission. Mr. Brault added

that in attorney discipline cases, the attorney is allowed to appear before the Attorney Grievance Commission. The Chair said that a provision could be added to the Rules allowing the parties to agree that the judge would be allowed to appear before the Commission, in addition to the judge's right to appear at a hearing on charges. The Vice Chair asked whether the judge should be allowed to appear before the investigatory panel. The Chair replied that the judge should not be foreclosed from speaking to the panel. Judge Adkins suggested that the Rule provide that the parties can agree that the judge may appear before the Commission.

The Chair inquired about other states that have a good judicial discipline system that could serve as a model. Judge Adkins answered that there are states with systems similar to the one proposed. The problem is that the advisory group in some states is independent and allowed to decide whether to charge. This is not allowed in Maryland. Mr. Brault questioned if these states use a grand jury type of system, and Judge Adkins replied affirmatively. Mr. Sykes asked if the inquiry panel is bound by the rules of evidence, and Mr. Brault answered that it is not bound. The Committee approved the concept of the Judicial Disabilities Commission's proposal, subject to further refinement based on research on systems in other states.

The Chair adjourned the meeting.