COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 of the Judicial Education and Conference Center, 2011 Commerce Park Drive, Annapolis, Maryland on January 8, 2010.

Members present:

Hon. Alan M. Wilner, Chair

F. Vernon Boozer, Esq.
Lowell R. Bowen, Esq.
Hon. Ellen L. Hollander
Hon. Michele D. Hotten
John B. Howard, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Hon. Thomas J. Love
Zakia Mahasa, Esq.
Timothy F. Maloney, Esq.
Robert R. Michael, Esq.
Hon. John L. Norton, III
Scott G. Patterson, Esq.
Hon. W. Michael Pierson
Kathy P. Smith, Clerk

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Donald Sealing, II, Clerk, Circuit Court for Carroll County
David W. Weissert, Coordinator of Commissioner Activity, District Court of Maryland
Paul DeWolfe, Esq., Office of the Public Defender
Peter Rose, Esq., Office of the Public Defender
Paul H. Ethridge, Esq., Chair, Rules of Practice Committee, MSBA
Pamela Harris, Court Administrator for Montgomery County
Hon. Neil Edward Axel, District Court for Howard County
Hon. Kathleen G. Cox, Circuit Court for Baltimore County
Hon. Jamey Hueston, District Court for Baltimore City
Gray Barton, Executive Director, Office of Problem-Solving Courts
Scott D. Shellenberger, Esq., Office of the State's Attorney
Mary-Ann R. Burkhart, Esq., Office of the State's Attorney
Sharon R. Holback, Esq., Office of the State's Attorney

The Chair convened the meeting. He announced that he had sent out a memorandum to the Rules Committee dated December 21,

2009 in which he had explained that the discussion of the new Code of Conduct for Judicial Appointees and Rule 16-206, Problem-Solving Courts, would have to be completed at today's meeting. He also advised that the Professionalism Commission created by the Court of Appeals, had drafted a set of Ideals of Professionalism. The Court adopted them without referring them to the Rules Committee, but asked the Style Subcommittee of the Rules Committee to style them. In conformance with the Court's request, the Style Subcommittee considered them and made a number of style recommendations. They will be sent back to the Court as requested. The Chair added that he thought that the Committee should be aware of them, so a copy was handed out this morning. (See Appendix 1).

The Reporter introduced Chris Norman, the Rules Committee's current intern. He is a third-year student at the University of Baltimore School of Law.

Agenda Item 1. Consideration of a proposed revision of Rule 16-814 (Code of Conduct for Judicial Appointees) (See Appendix 2.)

The Chair presented Rule 16-814, Code of Conduct for Judicial Appointees, for the Committee's consideration. (See Appendix 2).

The Chair said that Rule 16-814, Code of Conduct for Judicial Appointees, was explained in a December 21, 2009 memorandum that read as follows:

MEMORANDUM

TO: Members of the Rules Committee
FROM: Alan M. Wilner
RE: Code of Conduct for Judicial Appointees
DATE: December 21, 2009

Item 1 on the Committee's agenda for the January 8, 2010 meeting will be consideration of a new Code of Conduct for Judicial Appointees. There is some urgency with respect to this Item. It will need to be approved, with such amendments as the Committee may adopt, at the January 8 meeting, for reasons explained below. The purpose of this Memorandum is to give you the background of this Item and to alert you to one major issue, so that the discussion will be informed and focused.

Background

In February 2007, the American Bar Association adopted a new Model Code of Judicial Conduct, to replace the 1990 Model Code. Although most of the substance of the 1990 Code was not significantly changed, there were some substantive changes, and much of the language of both the text of the Code and the Comments was rewritten. The most prominent change was in the format. The 1990 Model Code (like the 1972 Model Code) was in the form of six multi-part Canons, each dealing with a broad range of activity. The 2007 Code essentially breaks up those few Canons into 39 more specific Rules which, in turn, are allocated among four Sections.

The Conference of Chief Justices – a council consisting of the Chief Judges of the State supreme courts – endorsed the new Model Code, at least in principle, and agreed to form committees in their States to review the new Code and make recommendations to their respective supreme courts with respect to it.

In June 2007, Chief Judge Bell appointed such a committee in Maryland. It consisted of one judge from the Court of Special Appeals (Fred Sharer), three Circuit Court judges (Louise Scrivener, Karen Jensen, and Paul Hackner), three District Court judges (Jean Baron, Jeannie Hong, and Neil Axel), one Orphans' Court judge (Joyce Baylor Thompson), one master (C. Theresa Beck), a reporter (Barbara Howe), and me. In June 2009, the committee filed a report with the Court recommending adoption of the new Model Code, with a number of amendments. The report consisted, principally, of an actual draft of a new Code, as proposed by the committee. The committee's report was published in the *Maryland Register* and posted on the Judiciary's website, and several comments were received. At the time, 10 other States had adopted the new Code. In six States, recommendations were pending before the State supreme court, and in 21, the committees were still reviewing the proposal.

On October 5, 2009, after an open hearing, the Court of Appeals gave tentative approval to the committee's proposed code, with certain amendments made by the Court. The Court did not give final approval for two principal reasons. First, it wanted to reserve judgment on the Rules governing *ex parte* communications, particularly with respect to problem-solving programs ("drug courts," etc.), and the Rules impacting a judge's conduct when dealing with self-represented litigants. Second, the Court was aware that, if it adopted the new Code for judges, which was a complete "rewrite" of the existing Code, it would need to adopt, contemporaneously, a new Code of Conduct for Judicial Appointees, so that the two remained in sync. The committee appointed to review the Code of Judicial Conduct was not tasked with rewriting a Code for judicial appointees, and that had not been done. The Court directed the Rules Committee to draft such a Code, consistent with the proposed Code of Judicial Conduct.

I referred that task to the General

Court Administration ("GCA") Subcommittee. With the approval of the Subcommittee, I put together a small group of consultants to help draft a preliminary Code for consideration by the Subcommittee. That group consisted of two county administrative judges designated by the Conference of Circuit Judges (Judges Turnbull and Davis-Loomis); Chief Judge Clyburn; Dave Weissert, the District Court's Coordinator of Commissioner Activity; Peter Tabatsko, a master in Carroll County who is a member of the Judicial Ethics Committee; Master Mahasa; Sandy Haines; and me. That group approved a preliminary draft Code, which was then presented to the GCA Subcommittee. That Subcommittee made a number of amendments to the preliminary draft and, with those amendments, approved the draft. Item 1 is the Subcommittee's draft, which is included with the meeting materials.

The Court plans to have an open hearing on the Code for judicial appointees in March, adopt both Codes at that time, subject to such amendments as *it* may make, and have both Codes take effect April 30, 2010. This timetable is what creates the urgency. In order for the Court to meet that schedule, the Code of Conduct for Judicial Appointees will have to be published for comment in January, shortly after the January 8 meeting. Because the basic language of the Code, subject to whatever deviations are approved, must be parallel to the Code of Judicial Conduct, which the Court already has considered and tentatively approved, there will be little or no need for the Style Subcommittee to weave its usual magic.

Item 2 on the agenda is a recommendation from the Special Subcommittee on Problem-solving Programs, chaired by Tim Maloney. That item also must be considered at the January 8 meeting, as it impacts on the *ex parte* communication issue, upon which the Court reserved judgment. You will see the connection in Rule 2.9, §(a)(6).

Policy Issue

Although the Committee members may have questions and comments on a number of provisions, there is one very basic issue that needs to be considered: to whom should the Code apply? The current Code for judicial appointees defines a judicial appointee as "(1) an auditor, examiner, master, or referee appointed by the Court of Appeals, the Court of Special Appeals, a circuit court, or an orphans' court; or (2) a commissioner appointed by a District Administrative Judge with the approval of the Chief Judge of the District Court of Maryland." To the best of our knowledge, no issue has arisen so far with respect to that definition.

Most of the departures from the Code of Judicial Conduct in the Code for judicial appointees concern part-time judicial appointees. For obvious reasons, they are given more leeway in terms of outside interests than full-time judicial appointees. With some limitations, they are permitted to practice law and to have business and financial interests forbidden to judges and full-time judicial appointees. As we went through the review process, two questions arose with respect to the current definition that, so far as I can tell, have not been previously considered:

FIRST: There are a number of persons other than auditors, examiners, masters, and District Court commissioners who are appointed by judges or courts to do judicially related work, *e.g.*, trust clerks, trustees, commissioners appointed in partition cases to value and divide the property, receivers, ADR practitioners, parenting coordinators, and persons appointed to serve on property review boards under Code, Transportation Article, §8-327. Should any of them be included?

SECOND: The Maryland Rules provide for two classes of auditors, examiners, and masters – *standing* and *special*. *See* Rules 2-541, 2-542, and 2-543. A special auditor, examiner, or master is appointed for "a

particular action," but, subject to any limitations in the order of appointment, they seem to have, as to that one action, the same powers as their standing counterparts. The question is whether those *special* auditors, examiners, or masters should be subject to the Code.

The initial review group felt that the current definition should remain as it is, which would *include* the special appointees but *exclude* persons who were not auditors, examiners, masters, or District Court commissioners. The GCA Subcommittee voted to exclude special auditors, examiners, and masters, but otherwise to leave the current definition intact, largely on the theory that those other types of appointees are likely to be regarded as fiduciaries and, as such, constrained by duties and limitations attendant to that status. There is a third approach, namely, to go through each Rule and make a judgment of whether *it* should apply to these groups, at least while they are serving – such Rules as impartiality and fairness, bias, prejudice, and harassment, competence, diligence, external influences, etc.

It is my sense that the Court will prefer that third approach. I suggest for your consideration, in particular, that Rules 1.3, 2.1., 2.2, 2.3, 2.4, 2.5, 2.6, 2.7, 2.8, 2.9, 2.11, 2.12, 2.16, 3.5, and 3.9 be made applicable to special auditors, examiners, and masters during the period of their serving in that capacity. I am not sure that any of the Code should apply to persons appointed as counsel or guardians for individuals, to conduct ADR proceedings, or as parenting coordinators, as they are not exercising judicial or quasi-judicial functions. There may well be reason, however, to apply some or all of the above-noted Rules to trust clerks and partition case commissioners. I haven't a clue with respect to property review boards -- even whether they are Executive or Judicial Branch agencies. You may want to look at Transportation Article, §8-327 -- a most peculiar statute -- and make your own

judgment. Please think of any other kinds of appointments made by judges or courts that should be considered.

I would be grateful (and, more important, I think the Court would be grateful) if each of you would read carefully the proposed Code and think about the issues noted above and any others that occur to you prior to the meeting. Thank you, and may each of you have a happy and safe holiday season.

The significant issue is the application of the Code of Conduct of Judicial Appointees to different groups of people. New information has come to light, and more research has been done.

A document entitled “Application” was distributed for the Committee’s consideration.

APPLICATION

(a) District Court Commissioners and Full-time Standing Masters, Examiners, and Auditors

This Code applies in its entirety to District Court Commissioners and full-time standing masters, examiners, and auditors.

(b) Part-time Standing Masters, Examiners, and Auditors

Except as otherwise provided in a specific Rule, this Code applies in its entirety to part-time standing masters, examiners, and auditors.

(c) Special Masters, Examiners, and Auditors

During the period of their serving in that capacity, special masters, examiners,

and auditors are subject only to the Rules in Sections 1 and 2, to Rules 3.5 and 3.9, and to such of the Comments to those Rules as are relevant, given the limited duration of the service. Special masters, examiners, and auditors shall, however, on request of a party or the appointing authority, disclose any extra-official activity or interests covered by the other Rules in this Code that may be grounds for a motion to recuse under Rule 2.11.

Source: This provision is new.

Committee note: District Court Commissioners, despite the number of hours they may actually be on duty, are regarded as full-time judicial appointees. Auditors, examiners, and masters may fall into several categories.

Under Code, Courts Article, §2-102, all courts may appoint a master, examiner, or auditor in "a specific proceeding." Under Code, Courts Article, §2-501, the judges of the circuit courts have more general authority to employ masters, examiners, and auditors. That authority is extended and made more specific in Rules 2-541 (masters), 2-542 (examiners), and 2-543 (auditors).

Rules 2-541, 2-542, and 2-543 create two categories of masters, examiners, and auditors – standing and special. Standing masters, examiners, and auditors are employed to deal with whatever cases are referred to them on an on-going basis, but their employment by the court may be full-time or part-time. Special masters, examiners, and auditors are appointed "for a particular action," and thus, like appointments made under Courts Article, § 2-102, their service is limited to the particular action or proceeding. During that period of service, however, it is possible that they may work full-time or part-time, as necessary or as directed by the court. A master, examiner, or auditor may therefore be standing full-time, standing part-time, special full-time, or special part-time.

> This Code, in its entirety, applies to District Court Commissioners and full-time standing masters, examiners, and auditors. Because their employment by the court is full-time and more-or-less permanent, it is appropriate to limit some of their extra-official activities in the same manner as judges. Standing masters, examiners, and auditors who work only part-time but whose employment is also more-or-less permanent and who handle whatever cases are referred to them also need to be subject to most of the requirements and limitations in the Code, but it is impractical to preclude them from engaging in other lawful remunerative activities, such as practicing law or accounting or providing ADR services. They are subject to the entire Code, except as provided in specific Rules. Special masters, examiners, and auditors, appointed for only one proceeding, are subject to those Rules governing such things as fairness, impartiality, integrity, and diligence during the period of their service, but it is impractical and unnecessary to subject them across-the-board to the Rules in Section 4 or most of the Rules in Section 3 (political and extra-official activities), provided that, upon request of a party or the appointing authority, they disclose any activity or interest that may be cause for recusal.

The Chair said that the problem is that the current Code defines the term “judicial appointees” as District Court commissioners, masters, examiners, and auditors. It includes no others. If someone is in one of those categories, the Code applies. The Chair commented that the Honorable Ben Clyburn, Chief Judge of the District Court, and David Weissert, Coordinator of Commissioner Activity, had informed him that although some District Court commissioners do not work a full 40-hour week, they are all regarded as full-time. Mr. Weissert, who

was present at the meeting, agreed and explained that the commissioners are all assigned to be available to the court from 168 to 178 hours each week.

The Chair observed that the Commissioners are regarded as full-time officials and judicial officers in the District Court, no matter how many hours they work. Masters, examiners, and auditors can fall into at least four different categories. Rules 2-541, Masters; 2-542, Examiners; and 2-543, Auditors, create two categories of judicial appointees: (1) standing masters, examiners, and auditors and (2) special masters, examiners, and auditors. The Rules do not define who the standing ones are, but they do define who the special ones are. They are people who are appointed for one case or one particular action, although they can be appointed to several different cases sequentially.

The standing masters, examiners, and auditors are somewhat permanent employees of the court. They take whatever matter is referred to them on an ongoing basis. The standing ones can either be full-time or part-time. This varies around the State. Some are only full-time, some are only part-time. One could be a standing full-time or a standing part-time master, examiner, or auditor. The special ones could be full-time during the time that they are in a particular case, or they could be part-time.

The Chair commented that the question is the extent to which the Code should apply to each of these groups. The opinion of the review group that initially worked on this was that the definition should be left the way it is in the current Code.

Standing and special masters, examiners, and auditors should not be distinguished. The current Code does make some distinction in specific rules between full-time and part-time employees.

The Chair said that the General Court Administration Subcommittee view as presented in the meeting materials is that the Code should not apply to the special employees, because they are only in for the one case. After the Subcommittee decided this, the Chair and Judge Pierson had some discussions, and they concluded that this is not a good idea, because during the period of time that the special employees are serving as masters, auditors, and examiners, they should be subject to those rules that address the integrity of the process itself.

The Rules are divided into four sections. Section 1 applies to impartiality and fairness. Section 2 addresses what one's conduct should be while one is serving in the position. Judge Pierson and the Chair would recommend that the special employees not be excluded entirely from this Code. While they are serving, they are exactly in the same position as standing employees. They are performing exactly the same function with exactly the same authority. To the extent that rules govern partiality, how one conducts oneself, ex parte communication, the use of non-public information, etc., they should apply to special masters, examiners, and auditors as well.

The Chair commented that a second issue arose which is that the current Code applies to referees. The only other place in the Rules that the word "referee" is mentioned is in Rule 16-816,

Financial Disclosure Statement - Judicial Appointees. Who are the referees? Since the Subcommittee met, there have been two pieces of investigation. One was a questionnaire sent to all of the county administrative judges in the State asking if they had ever appointed a referee or if they knew of any referees that had ever been appointed. In all counties, except Baltimore County, which did not respond, no one had ever heard of them, appointed one, nor seen one. The financial disclosure forms that have to be filed by referees were also checked. On the front page, one has to state why he or she is filing the form. No one in the last two years has filed a financial disclosure form as a referee. It appears that no referees exist any more. The research done as to what referees do, other than referees in bankruptcy which no longer exist, indicates that their duties are the same ones as performed by masters.

The Chair noted that the Honorable Marcella Holland, Administrative Judge for the Circuit Court of Baltimore City, had reported that she had never heard of referees. She indicated in her response that Judge Kaplan may have appointed one once. Judge Kaplan said that he had appointed one to evaluate the stock of a railroad where the minority stockholders were forced out, so that there had to be a valuation of the property of the railroad. The Chair inquired as to whether this could be handled by a special master. Judge Kaplan replied that it could be handled by a master, but in this case, it was done by a referee, which was the usual practice in those kind of cases. The Chair said that

the issue before the Committee is whether the reference to "referee" should be kept or not.

The Chair noted that the third issue in terms of application is related to the people that judges appoint besides masters, auditors, and examiners. This arose when Anne Ogletree, a member of the Committee who was unable to attend the meeting today, had reported that she had just been appointed by the court to the Board of Property Review. The Board is referred to in Title 8 of the Transportation Article of the Maryland Code. An absolute requirement exists that every circuit court appoint three people to this board. One has to be a farmer, one an engineer, and one an attorney. They serve two-year terms, and the Code states that the members of the board are officers of the court. Their duties are to review State Highway Administration condemnation cases and evaluate what the State should pay. Ms. Ogletree wanted to know whether she was a judicial appointee under the Code.

The Chair pointed out that other related positions were trust clerks, trustees, commissioners appointed in partition cases, receivers, and Alternative Dispute Resolution (ADR) practitioners. After a consideration of what these various persons do, apart from the Board of Property Review, they do not perform judicial or quasi-judicial duties. The Chair suggested that they do not need to be in the Code. The Board of Property Review is problematic in part because it looks like an executive agency. Many old Court of Appeals cases, mostly from the 1800's, hold that it is a violation of Article 8 of the Declaration of

Rights, (separation of powers) for a judge to appoint people to executive agencies. It is not entirely clear that the statute that requires this is even constitutional. The question to raise at the Court of Appeals is whether the Committee wants to include these people in the Code of Conduct for Judicial Appointees.

The Chair commented that the application question is whether the special masters, auditors, and examiners should be included under the Code. The view of Judge Pierson and the Chair was that the Rules in Section 1 and 2, and two Rules in Section 3 should apply to the special employees but only during the time that they are serving. The Chair said that the special employees can be included entirely, excluded entirely, or included only for purposes of those rules that address their conduct while they are serving. The latter is the recommendation. Judge Pierson moved that the rules that address conduct be applied to special masters, auditors, and examiners. The motion was seconded, and it carried unanimously.

The Chair asked the Committee whether the concept of referees should be retained. Master Mahasa responded that this title should be eliminated, because it is superfluous. The Chair pointed out that the handout entitled “Application” has a Committee note that explains what special employees are. Language could be added to the note that would make it clear that referees are obsolete, and their duties can be performed by masters, examiners, and auditors. By consensus, the Committee agreed to this suggestion.

The Chair told the Committee that the third issue is the question of people, other than masters, auditors, and examiners, who are appointed in certain cases. He questioned as to whether anyone felt that these people should be included in the Code of Conduct for Judicial Appointees. This includes the Board of Property Review, trust clerks, trustees, etc. He had once thought that trust clerks did more than they really do. They do not have any decision-making authority. The judge has to resolve issues, and the trust clerks simply make a recommendation to the judge. He asked the Committee if anyone wanted to include any of these people.

By consensus, the Committee indicated that people other than masters, auditors, and examiners should not be included under the aegis of the Code of Conduct for Judicial Appointees. The Chair said that the best way to handle this is to adopt the Application Rule subject to any changes that need to be made. Judge Pierson moved that the Application Rule be adopted, the motion was seconded, and it passed unanimously.

The Chair suggested that the Committee go through the Code. He asked if there were any comments pertaining to the "Preamble," and there were none. The next section to discuss was "Definitions." Based on the motion that just passed, what is in subsection (a)(1) will change, so that it includes whatever is in the Application. The definition will include all masters, examiners, and auditors. The Application will include the "special" employees. The Chair asked if anyone had any comment

or proposed change to the definition of “judicial appointee.” None was forthcoming.

The Chair inquired whether there were any proposed changes to the definition of “Member of Judicial Appointee’s Family” and “Member of Judicial Appointee’s Household” which are taken from the Code of Judicial Conduct. There were none. The Chair asked about suggestions to change section (d), “Other Definitions.” Master Mahasa questioned as to how the special masters, examiners, and auditors are going to be integrated. The Chair answered that they are judicial appointees, but the entire Code does not apply to them. The part of the Rule that is entitled “Application” will follow the definitions.

Mr. Michael remarked that in Montgomery County, judges use special masters frequently to resolve discovery disputes, and they are appointed only in a specific case for this purpose. This will encompass what is being discussed today relating to “special masters.” He noted that Paul Ethridge, Esq., who often is a special master in Montgomery County, was present at the meeting. The Chair asked Mr. Ethridge if it would be a problem to include special masters within part of the Code. Mr. Ethridge replied that this is not a problem, especially where, upon request, the applicability can be extended to other issues in case there is a suggestion that there was favoritism on the part of a special master. There is no problem including them, but it is another layer of paperwork for the court administrators.

The Chair commented that the proposal that was approved is

that the Rules in Sections 3 and 4 do not apply, but that, upon request, the special masters would have to disclose any interest that could be cause for a motion for recusal. Mr. Ethridge suggested that in Sections 1 and 2, this request be sent out with the order from the court, so that the parties, attorneys, and special masters get it, and everyone knows what is in effect, particularly at the beginning of the case. People need to be aware of the new requirements. The Chair added that the way the Code reads now, all of it applies to special masters, which makes no sense. Mr. Ethridge observed that once a judge appoints a special discovery master in a case, he or she usually is told to stay in the case for any further disputes, so the involvement can go on for a long time. The Chair pointed out that no one had raised this issue, and currently the special masters are included in the Code for everything.

The Chair drew the Committee's attention to Rule 1.1. (See Appendix 2). He noted that the Rule provides that a judicial appointee shall comply with the law. He had a stylistic suggestion for Rule 1.1, as follows: "A **judicial appointee** shall comply with the law, including the Rules in this Code of Conduct for Judicial Appointees that are applicable." Some of the rules are not going to be applicable, because of the decision made today. By consensus, the Committee approved this change. By consensus, the Committee approved the Rule as amended.

The Chair asked if there were any comments about Rule 1.2.

(See Appendix 2). Mr. Howard responded that in paragraph [5], it appears that the word “independence” is left out, but it is in other places in the Rule where the words “integrity” and “impartiality” appear. The Chair inquired as to whether Mr. Howard thought that the word should be added in. Mr. Howard replied that if it is not added in, it appears that it is an intentional omission. The Chair pointed out that the word “independence” is not in the Code of Judicial Conduct in the parallel rule. Mr. Howard observed that the word seems to be added in various places, and the Chair said that it is the same for the Code of Judicial Conduct. Mr. Howard added that it may just be an oversight. The Chair noted that the Code of Judicial Conduct was patterned after the American Bar Association (ABA) Model Code, and this is the form that the Court of Appeals tentatively adopted. If there is a motion to add the word, it should be added in both the Code for judges and for judicial appointees.

Mr. Michael inquired as to the meaning of paragraph [6] of Rule 1.2, which requires a judicial appointee to initiate and participate in community outreach activities. The Chair responded that this Code is almost identical to the Code of Judicial Conduct as the Court of Appeals has tentatively approved it, except where a deviation is necessary. Mr. Michael suggested that the words “where appropriate” should be added after the word “should” in paragraph [6]. The way this is worded, it would require a discovery master to participate in community outreach

activities. He moved to add the words “where appropriate,” the motion was seconded, and it carried unanimously. By consensus, the Committee approved the Rule as amended.

The Chair drew the Committee’s attention to Rule 1.3. (See Appendix 2). There were no comments. By consensus, the Committee approved the Rule as presented.

The Chair drew the Committee’s attention to Rule 2.1. (See Appendix 2). There were no comments. By consensus, the Committee approved the Rule as presented.

The Chair asked the Committee to look at Rule 2.2. (See Appendix 2). Judge Hotten referred to paragraph [4], and she inquired as to what constitutes “reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard.” The Chair responded that this is the same language that is in the Code of Judicial Conduct and has the same meaning as the Judicial Conference had determined. By consensus, the Committee approved the Rule as presented.

The Chair drew the Committee’s attention to Rules 2.3, 2.4, and 2.5. (See Appendix 2). There were no comments. By consensus, the Committee approved the Rules as presented.

The Chair drew the Committee’s attention to Rule 2.6. (See Appendix 2). The Chair told Judge Hotten that there were references to self-represented litigants in paragraphs [2] and [3] of the Comment. Mr. Bowen expressed the opinion that the phrase “self-represented litigants” should be changed to “*pro se*

litigants" or "litigants representing themselves." The Chair responded that the Court of Appeals had expressly taken the phrase "*pro se* litigants" out of the Code of Judicial Conduct and substituted the phrase "self-represented litigants." The Reporter remarked that the better wording is "unrepresented litigants." The ABA may have used that term, but one of the members of the Court of Appeals preferred the term "self-represented." The Chair said that there had been a motion that passed in the Court of Appeals to use this term. Judge Norton noted that most of the literature in the country uses the term "self-represented." Mr. Patterson added that the Committee on Access to Justice also uses the same term. By consensus, the Committee approved the Rule as presented.

The Chair drew the Committee's attention to Rule 2.7. (See Appendix 2). Mr. Bowen pointed out that the words "recusal" and "disqualification" are both used in Rule 2.7. Why are two terms with the same meaning in this Rule? The Chair answered that the language of the ABA Model Rule is "disqualification." Mr. Bowen noted that the word "disqualification" appears more than the word "recusal." Judge Pierson remarked that this Code was copied from the Code of Judicial Conduct. If anything is changed in the Code of Conduct for Judicial Appointees, the same change should be made in the Code of Judicial Conduct. The Chair expressed doubt as to whether the Committee could make any changes to the Code for judges.

Mr. Bowen said that in subsection (b)(3) of Rule 3.9, the word “non-recusal” appears in reference to Rule 2.11. The Chair pointed out that the last sentence of Comment [1] of Rule 2.11 states: “In this Rule, “disqualification” has the same meaning as “recusal.” He had no problem using the word “disqualification.” Mr. Bowen suggested that the word “disqualification” should be used in place of the word “recusal.” It makes no sense to use two different words for the same concept.

Judge Pierson remarked that there are situations where disqualification and recusal have different shades of meaning. Mr. Bowen noted that the last sentence of Comment [1] of Rule 2.11 states that the two words have the same meaning. Judge Pierson countered that this is true in this particular Rule. He commented that a judge recuses himself or herself, but the judge disqualifies himself or herself, or someone else disqualifies the judge. Instances arise in which one can happen, and not the other. Mr. Bowen responded that the last sentence of Comment [1] would have to be corrected. The Chair noted that this sentence was added by the committee that had looked at the ABA Rules. The ABA did not use the word “recusal” at all. The Rules of Procedure have always used the word “recusal.”

Master Mahasa questioned whether Mr. Bowen’s suggestion to change the last sentence of Comment [1] would require the rest of the Rule to be changed. The Chair said that the ABA Rule has a comment that reads: “In many jurisdictions, the term ‘recusal’ is

used interchangeably with the term 'disqualification.'" Mr. Bowen remarked that the comment should agree with the Rule to which it refers. He moved that the word "disqualification" should be used in lieu of the word "recusal" in Rule 2.7. The motion was seconded, and it passed unanimously. By consensus, the Committee approved the Rule as amended.

Judge Love asked if Rule 2.6 could be reconsidered. The second sentence of Comment [2] reads: "A **judicial appointee's** obligation under Rule 2.2 to remain fair and **impartial** does not preclude the **judicial appointee** from making reasonable accommodations to protect a self-represented litigant's right to be heard, so long as those accommodations do not give the self-represented litigant an unfair advantage." He inquired as to under what circumstances this would happen without implicating a judge's obligation to be fair and impartial. The Chair responded that this issue had been discussed by the Judicial Conference. The Court had looked at this when it considered the Code of Judicial Conduct and adopted this language. An alternative was proposed to the Court which was a "laundry list" of what judges could and could not do. The Court chose not to adopt that alternative but to use the language in Comment [2] instead. If this language were to be changed, it would have to be changed in both Codes. The theory was to let each judge decide the accommodations in each case.

Judge Norton remarked that he would have been an advocate

for bright lines to be drawn. This is what Judge Love was pointing out. Judges like bright lines to be drawn. This is a colorable shield which the judge can try to use and have some level of effectiveness. Judge Love explained that when both sentences of Comment [2] are read, the first sentence addresses the lack of knowledge on the part of the litigant. The second sentence infers that because the litigant does not have this knowledge, it is permissible to level the playing field to give them that knowledge. If this is what the Court of Appeals would like for judges to do, then Judge Love said that he is willing to comply. Judge Norton added that this was designed to give some shelter to someone who may be doing this already without any authorization or colorable basis for it. It provides some ethical basis for the attempt.

The Chair noted that there had been concern about the laundry list, because some of the actions that would be listed went too far and could prejudice the represented party. The view of the committee that initially looked at the ABA Code and the view of the Judicial Conference as well as the Court of Appeals was to keep this provision general. Judge Norton observed that this provision mirrors the same provision that applies to judges, and the Chair confirmed this. He asked if anyone had a motion to change Comment [2] of Rule 2.6, and none was forthcoming.

The Chair drew the Committee's attention to Rule 2.8. (See Appendix 2). Mr. Bowen pointed out that the word "court" is not necessarily applicable to all judicial appointees, and he

suggested that the word "court" be changed to the words "judicial appointee." By consensus, the Committee agreed to this change. By consensus, the Committee approved the Rule as amended.

The Chair drew the Committee's attention to Rule 2.9. (See Appendix 2). Mr. Michael referred to section (c) of Rule 2.9. He inquired as to whether Rule 2.9 will apply to the special masters. The Chair replied affirmatively. Mr. Michael commented that section (c) will cause a problem. This provision ties the hands of someone who is appointed as a discovery master. The language "not investigate the facts independently and shall consider only the evidence presented and any facts that may properly be judicially noticed" appears to apply more to a commissioner. This language ties the hands of a special master who is handling a discovery dispute. He asked Mr. Ethridge, who works as a special master, for his view.

Mr. Ethridge responded that normally a special master would do his or her own legal research. The Chair pointed out that this language would not preclude a master from doing legal research. Mr. Michael inquired if the Chair felt that this was not covered by the language in section (c). The Chair noted that the language states that the judicial appointee shall not investigate facts. The ABA Code did not have the bolded language in it. Without this language, it is absolutely prohibited. The language "[u]nless expressly authorized by law" was added, because Code, Courts Article, §2-607 requires District Court Commissioners to make investigations.

Mr. Michael remarked that he had no problem with the language applying to a District Court commissioner who should not be his or her own fact-finder. The Chair explained that the statute permits them to find facts. This was debated at the Court of Appeals in the context of the Judicial Code. Mr. Michael responded that he saw the applicability in that context but not as it applies to a special master. However, it does not seem that the language restricts the special masters enough to make a change to the language.

The Chair commented that the Court may want to look at Rule 2.9 again. It was discussed at the open hearing on the Judicial Code concerning the extent to which judges look up facts on the internet. One of the Court of Appeals judges raised the issue of whether the word "adjudicative" should be added before the word "facts." The Court will have to resolve this when it discusses both Codes. By consensus, the Committee approved the Rule as presented.

The Chair drew the Committee's attention to Rules 2.10, 2.11, 2.12, and 2.13. (See Appendix 2). Mr. Leahy remarked that the Chair's memorandum indicated that a number of the Rules should apply to the special masters, auditors, and examiners. In the new Application Rule that was handed out today, was it intended that all of the Rules in Sections 1 and 2 apply? The Chair replied affirmatively, explaining that initially some of the Rules in Section 2 were not applicable. Mr. Leahy expressed the view that some of the Rules in Section 2 should not apply to

special masters. The Chair agreed that Rule 2.13 may not apply, because it provides that judicial appointees make administrative appointments. However, with the court's permission, even special masters can make administrative appointments in a case.

Mr. Leahy noted that Rule 2.10 provides that if the judicial appointee is a special master in one case, he or she is not supposed to discuss any other case that comes before any other court. The Rule applies more to judges than to a special master appointed in one case. The Chair pointed out that this provision applies only during the time that the person is serving as a special master. Mr. Leahy remarked that the Chair's memorandum seemed to be correct in that it stated that not all of the Rules apply to all judicial appointees. The Chair said that it would be appropriate for anyone to move to exclude any of the Rules from applying to any of the judicial appointees.

Judge Pierson remarked that this issue also came up in the Subcommittee as pertaining to part-time standing judicial appointees, such as auditors and examiners who only perform duties for the court on a part-time basis. An effort was made to structure the Rules so that they differentiate between what the person is doing in his or her private capacity and what the person is doing in his or her official capacity. For example, Comment [3] of Rule 2.13 states: "Rule 2.13 does not apply to the appointment or compensation of an employee in the private office of a part-time judicial appointee." The Chair commented that this issue came up regarding examiners who work out of their

offices and may not even come to the courthouse. Their spouse may be their secretary in their private office. He asked if anyone had any suggested changes. By consensus, the Committee approved the Rules as presented.

The Chair drew the Committee's attention to Rules 2.14, Disability and Impairment of Others; 2.15, Responding to Judicial and Lawyer Misconduct; and 2.16, Cooperation with Disciplinary Authorities. (See Appendix 2). No comments were made. By consensus, the Committee approved the Rules as presented.

The Chair explained that, with two exceptions the Rules beginning with Section 3 will not apply to special masters, examiners, and auditors. He drew the Committee's attention to Rules 3.1, Extra-Official Activities in General; 3.2, Appearances before Governmental Bodies and Consultation with Government Officials; 3.3, Testifying as a Character Witness; and 3.4, Appointment to Governmental Positions. (See Appendix 2). No comments were forthcoming. By consensus, the Committee approved the Rules as presented.

The Chair drew the Committee's attention to Rule 3.5, Use of Nonpublic Information. (See Appendix 2). He noted that this Rule would apply to special masters, auditors, and examiners. Mr. Bowen pointed out that in the first line of Comment [1], the word "official" should replace the word "judicial." By consensus, the Committee agreed to this suggestion. By consensus, the Committee approved the Rule as amended.

The Chair drew the Committee's attention to Rules 3.6,

Affiliation with Discriminatory Organizations; 3.7, Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations; and 3.8, Appointments to Fiduciary Positions. (See Appendix 2). No one had any comments. By consensus, the Committee approved the Rules as presented.

The Chair drew the Committee's attention to Rule 3.9, Service as Arbitrator or Mediator. (See Appendix 2). Mr. Michael inquired as to whether Rule 3.9 applied to special masters, examiners, and auditors. The Chair answered that Rule 3.9 would apply to special masters, examiners, and auditors while they were acting in that capacity in a case unless anyone thought that they should be excluded. Mr. Leahy noted that the Application Rule that was handed out at the meeting indicates that special masters, examiners, and auditors are subject to Rule 3.9, but the basic Rule only applies to full-time or part-time judicial appointees. Should section (b) contain a reference to a "special master" if this is the intent? Otherwise the Rule does not seem to apply to special masters.

The Chair noted that the Application states that Rule 3.9 applies to special masters, examiners, and auditors. He asked Mr. Leahy if he were suggesting that it should not apply to these people. Mr. Leahy answered that Rule 3.9 states that a full-time judicial appointee cannot conduct ADR , and a part-time judicial appointee can conduct ADR under certain circumstances. The way the Rule is written, there is nothing to indicate that it applies to special masters, examiners, and auditors. If it is intended

to apply to them, a reference to them should be added to the Rule in section (b), because on its face, the Rule does not apply to these individuals. The Chair said that it would apply to those people; the Rule simply distinguishes between full-time and part-time judicial appointees.

Mr. Michael observed that a special master would be part-time. The Chair stated that a special master could be full-time during his or her service in the one case. It is a fair point that this Rule should not apply to special masters, examiners, and auditors. The Application Rule could be changed to make it clear that Rule 3.9 does not apply to special masters, etc. Mr. Michael commented that he had not read the word "full-time" to have the meaning that the Chair had stated. It is sufficiently vague to exempt the special masters from the scope of Rule 3.9. If a special discovery master in one case wants to do a mediation in another case, the Rule would seem to prohibit this. Under the Chair's definition, the special discovery master would be a full-time appointee while he or she is working in the first case.

The Chair told the Committee that this is a policy issue. Mr. Michael moved that Rule 3.9 should not apply to special masters, examiners, and auditors. The motion was seconded, and it carried unanimously. The Chair remarked that if the judge appoints the special discovery master, the judge can ask him or her to work full-time on this one case and allow the master to conduct ADR on the side. By consensus, the Committee approved the Rule as amended.

The Chair drew the Committee's attention to Rule 3.10, Practice of Law. (See Appendix 2). He pointed out that one of the other Rules prohibits judicial appointees from appearing before executive or legislative bodies or officials, except as permitted by Rule 3.10. Judge Pierson stated that the Rule to which the Chair was referring is Rule 3.2. (d). The Chair said that this Rule states that a judicial appointee shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, and then exceptions are provided. The last exception is "as permitted by Rule 3.10." This Rule states that a judicial appointee shall not practice law, and section (b) provides exceptions to this. Subsection (b)(2) reads as follows: "To the extent not expressly prohibited by law or by the appointing authority and subject to other applicable provisions of this Code, a part-time judicial appointee who is a lawyer may practice law...". The Chair remarked that it may be helpful to add "including as part of a law practice, appearing before an executive or legislative body or official." This would clarify that these judicial appointees can handle zoning or other administrative cases as part of their practice of law. The Committee was not in favor of this change. By consensus, the Committee approved the Rule as presented.

The Chair drew the Committee's attention to Rule 3.11, Financial, Business, or Remunerative Activities. (See Appendix 2). The Chair said that a question has arisen concerning section (b), which prohibits a judicial appointee from serving as an

officer, director, manager, general partner, advisor, or employee of any business entity except as listed in the Rule. Should this apply to part-time judicial appointees? Someone could be a part-time officer of a title company, but this would preclude the person from doing so. Judge Pierson responded that section (b) should not apply to a part-time judicial appointee. Judge Kaplan agreed with Judge Pierson. Auditors and examiners who work part-time for the court also can practice law. The Chair pointed out that the Rule allows them to practice law, but the issue is whether they can be officers, etc. of a business entity.

Judge Pierson remarked that at the Subcommittee meeting, he had suggested that this prohibition should not apply to part-time judicial appointees. He moved that section (b) should not apply to part-time judicial appointees. The motion was seconded, and it passed unanimously. The Chair commented that the Rule will have to be restructured to include this exception. By consensus, the Committee approved the Rule as amended.

The Chair drew the Committee's attention to Rule 3.12, Compensation for Extra-Official Activities. (See Appendix 2). No comments were made. By consensus, the Committee approved the Rule as presented.

The Chair drew the Committee's attention to Rule 3.13, Acceptance of Gifts, Loans, Bequests, Benefits, or Other Things of Value. (See Appendix 2). Mr. Bowen suggested that in subsection (b)(1)(B), the words "judges or" should be stricken, because they do not add anything meaningful to this provision.

By consensus, the Committee approved this deletion. By consensus, the Committee approved the Rule as amended.

The Chair drew the Committee's attention to Rules 3.14, Reimbursement of Expenses and Waivers of Fees or Charges, and 3.15, Reporting Requirements. (See Appendix 2). No comments were made. The Chair said that in light of the deletion of the references to "referees" in the Code, an amendment to Rule 16-816, Financial Disclosure Statement – Judicial Appointees, deleting the reference to "referee" in section (a) will be necessary. By consensus, the Committee approved Rules 3.14 and 3.15 as presented.

The Chair told the Committee that Section 4 deals with political activity. He drew the Committee's attention to Rule 4.1, Definitions. (See Appendix 2). Mr. Maloney said that he had a question about using the term "applicant" in the definitions. As originally proposed, the Rules extensively dealt with the concept of a judicial applicant. Most of this has been stricken as shown on pages 67 through 69, which deletes the Comment pertaining to this. The Rules do not govern or in any way, regulate a judicial applicant. Should the Code regulate the conduct of a judicial applicant? The only person who files an application is an attorney applying to be a judge. The appointment process is an executive branch function at that point. To the extent that there is regulation of this, it should be in the Code of Professional Conduct pertaining to attorneys. The real issue is that as originally proposed, Rule 4.1 had

extensive treatment of what a judicial applicant could do, communications, etc. Judicial "applicants" are defined in section (a) of Rule 4.1, but in most of the rest of the Rules, there is little reference to them.

Mr. Howard asked if this applies only to applicants who are already judicial appointees. The Chair replied that this would only apply to judicial appointees. Mr. Maloney said that this refers to an incumbent who is applying for a judicial renomination. The Reporter noted that this is not a renomination. Mr. Maloney inquired if this would refer to a circuit court judge who applies to be on the Court of Special Appeals. The Chair clarified that this would be addressed in the Code of Judicial Conduct. What is addressed in Rule 4.1 is a judicial appointee who is applying for a judgeship.

Mr. Maloney said that he had no problem with this, but he again noted that most of the other Rules do not pertain to judicial applicants. The Reporter pointed out that the stricken language is the language that is in the Code of Judicial Conduct. The Chair said that Rule 4.3, Political Conduct of Applicant, applies to the judicial applicants. Mr. Maloney questioned as to what extent the Code of Judicial Conduct can regulate whether there should be ex parte communications or otherwise with the Nominating Commission and whether judicial appointees who are applicants are being treated differently than attorneys who are applicants. Based on the separation of powers and otherwise, his first question was whether the Judiciary should be regulating

communications with the Nominating Commissions. The other question was whether there should be one standard of communication for applicants who are judges that is not applicable to other applicants.

The Chair commented that this issue had been raised before the Court of Appeals in the context of the Code of Judicial Conduct. The Court had agreed to delete what the Committee had proposed, which was that one should not initiate contact with a member of a judicial nominating commission. The Court had said to eliminate this and clarify in the Rules that one could do this. This also applies to judicial appointees. What will be suggested to the Court in both Codes is the bolded language in the Comment to Rule 4.1 that states: "This Rule is not intended to permit an applicant to give anything of value to a Commission member or to any member of a Commission member's immediate family." The Court has not yet adopted this provision.

Mr. Maloney said that he questioned the Judiciary regulating the Judicial Nominating Commission. He referred to the language in Comment [1] of Rule 4.3 which states: "...neither the Commission nor its members are obliged to respond to such communications or contact." The Commissioners are creatures of executive order. They are gubernatorial nominees. It is an anomaly that the Administrative Office of the Courts (AOC) acts to staff the Judicial Nominating Commissions. Their function is entirely under the executive branch of the government. Mr. Maloney expressed the view that it is not appropriate to regulate

the Commission by rule. The Comment also states that if the applicants have a question regarding the procedure or their application, they may contact the AOC, which acts as a secretariate to the commissions. Aside from the fact that the Rules usually do not contain a statement that if one has a question, the person should call "X," it is not for the AOC to vest themselves in the Rules as the staff agency, because this is really at the discretion of the governor.

The Chair responded that Mr. Maloney's question is a fair one. It was presented to the Court in the context of the Code of Judicial Conduct. The language in Rule 4.1 was what the Court adopted. The only change to it is to make it applicable to judicial appointees. The Court might reconsider this language when it gets this Code in March. The General Court Administration Subcommittee's view was that whatever applies to the judges in this should apply to judges who are seeking to become judges in another court. Therefore it applied to nominating commissions. It also applied to judicial appointees who are seeking to become judges.

Mr. Maloney suggested that rather than not submitting the entire Rule, it could be modified slightly as follows: "An applicant may initiate communications or contact with a judicial nominating commission." The language pertaining to what the commissioners can do which is: "but neither the Commission nor its members are obliged to respond to such communications or contact" should be omitted, because they are part of the

executive branch. The Rule would then provide as follows: "**Applicants** may appear for interviews before the commission, and may respond to questions or inquiries from commission members, and they may solicit endorsements from other persons or organizations (other than a **political organization**.)" The next sentence would be deleted, and the last sentence which reads: "This Rule is not intended to permit an applicant to give anything of value to a Commission member or to any member of a Commission member's immediate family" would be retained.

The Chair said that Mr. Maloney had made a good point, but the Chair expressed the concern that the Court has already adopted this. Mr. Maloney commented that this question should be put before the Court. The Chair responded that he would do so, but it cannot be accomplished by changing Rule 4.1 and not the Code of Judicial Conduct. Mr. Maloney added that the Court may wish to revisit the parallel section of the judges' code. The Chair reiterated that he was hesitant to change Rule 4.1, because it would not be consistent with the Code of Judicial Conduct. The same rules should apply to both. Mr. Maloney remarked that something uniform should be presented to the Court. The Chair agreed with Mr. Maloney. By consensus, the Committee approved Rule 4.1 subject to further changes.

The Chair drew the Committee's attention to Rules 4.2, Political Conduct of Judicial Appointee Who is Not a Candidate, and Rule 4.3, Political Conduct of Applicant, for the Committee's

consideration. (See Appendix 2). By consensus, the Committee approved the Rules as presented.

The Chair drew the Committee's attention to Rule 4.4, Political Conduct of Candidate for Election, for the Committee's consideration. (See Appendix 2). Mr. Bowen referred to Comment [8] of Rule 4.4. He suggested that the word "judge" should be changed to the words "candidate for election." By consensus, the Committee approved Mr. Bowen's suggested change. By consensus, the Committee approved the Rule as amended.

The Chair drew the Committee's attention to Rule 4.5, Applicability and Discipline. (See Appendix 2). No comments were made. By consensus, the Committee approved the Rule as presented.

By consensus, the Committee adopted the Code of Conduct for Judicial Appointees as amended.

Agenda Item 2. Consideration of proposed new Rule 16-206 (Problem-Solving Court Programs)

Mr. Maloney presented Rule 16-206, Problem-Solving Court Programs, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 200 - THE CALENDAR - ASSIGNMENT AND DISPOSITION OF MOTIONS AND CASES

ADD new Rule 16-206, as follows:

Rule 16-206. PROBLEM-SOLVING COURT PROGRAMS

(a) Applicability

This Rule applies to problem-solving court programs, which are specialized court dockets or programs that address matters under a court's jurisdiction through a multi-disciplinary and integrated approach incorporating collaboration among courts, other governmental entities, community organizations, and parties.

Committee note: Problem-solving court programs include adult and juvenile drug treatment, DUI, mental health, truancy, and family recovery programs.

POLICY QUESTION FOR THE RULES COMMITTEE RE: SECTION (b):

Should approval of a new program be by the whole Court of Appeals or by just the Chief Judge?

(b) Approval of Program

A County Administrative Judge of the Circuit Court may submit to the Chief Judge of the Court of Appeals a request to develop a problem-solving court program in the Circuit Court for that county in accordance with procedures and protocols established by the State Court Administrator. The Chief Judge of the District Court may submit to the Chief Judge of the Court of Appeals a request to develop a problem-solving court program in accordance with the same procedures and protocols. Upon approval by the Chief Judge of the Court of Appeals, the program may be implemented.

POLICY QUESTIONS FOR THE RULES COMMITTEE RE: SECTION (c):

(1) Should section (c) require a written agreement for participation in all programs, not just programs into which "referrals are made in a criminal or delinquency action"?

(2) Should an unrepresented juvenile respondent be permitted to enter into a program?

(3) Should the following concept be added to section (c): "Prior to execution of the agreement in a criminal or delinquency action in which the defendant or respondent is unrepresented, the court, on the record, shall explain the requirements and protocols of the program, including protocols concerning ex parte communications, and advise the prospective participant of any rights that the participant waives by participating in the program."?

(c) Written Agreement Required; Contents

As a condition of acceptance into a program into which referrals are made in a criminal or delinquency action and after the advice of counsel, if any, a prospective participant shall execute a written agreement that sets forth:

(1) the requirements of the program,

(2) the protocols of the program, including protocols concerning the authority of the judge to initiate, permit, and consider ex parte communications pursuant to Rule 2.9 of the Maryland Code of Judicial Conduct; and

(3) any rights waived by the participant.
Committee note: Examples of rights waived by a participant may include the right to counsel pursuant to Rule 4-215, the right to a jury trial pursuant to Rule 4-246, and the right to confidentiality.

[Query: What is the nature of a Rule 4-215 waiver of counsel at this juncture, when, later in the Rule, the court must comply with Rule 4-215 in connection with termination of the defendant from the program (or imposition of a "loss of liberty" sanction)?]

POLICY QUESTION FOR THE RULES COMMITTEE RE: SECTION (d):

Should the notice/hearing/representation procedure required by section (d) apply not only to termination of the participant from the program but also to the imposition of a sanction involving the loss of liberty while the participant is in the program?

(d) Immediate Sanctions; Exceptions – Loss of Liberty or Termination from Program

In accordance with the protocols of the program, the court may impose an immediate sanction on a participant, except that if the participant is considered for [the imposition of a sanction involving the loss of liberty or] termination from the program, the participant shall be afforded notice, an opportunity to be heard, and the right to be represented by counsel before the court makes its decision. If a hearing is required by this section and the participant is unrepresented by counsel, the court shall comply with Rule 4-215 in a criminal action [or Rule 11-106 in a delinquency action(?)] before holding the hearing.

POLICY QUESTION FOR THE RULES COMMITTEE RE: SECTION (e):

If a participant who has been terminated from a program files a motion to disqualify the judge who ordered the termination, must the motion be granted? Or, does disqualification depend upon the circumstances of the particular case?

(e) Disqualification of Judge

A judge who terminates a participant from a program **shall** grant a motion filed by the participant for the judge's disqualification from further proceedings in the action.

Cross reference: For other circumstances requiring disqualification of a judge, see Rule 2.11 of the Maryland Code of Judicial

Conduct.

POLICY QUESTION FOR THE RULES COMMITTEE RE: SECTION (f):

Could/should section (f) be made applicable in a delinquency action?

(f) Credit for Incarceration Time Served

If a participant is terminated from a program, any period of time for which the participant was incarcerated as a sanction during participation in the program shall be credited against any sentence imposed in the action.

Source: This Rule is new.

Rule 16-206 was accompanied by the following Reporter's Note.

Problem-solving court programs have been a part of the Maryland Judiciary for several years. The Special Subcommittee on Problem-Solving Judicial Programs –- composed of representatives from the Rules Committee, the Judiciary, the Administrative Office of the Courts, and the bar -- proposes a general rule that provides some guidance to judges and participants, while allowing jurisdictions flexibility in administering these court programs based on each jurisdiction's needs.

Judge Hueston told the Committee that the consultants who were present all served on the Problem-Solving Judicial Programs Subcommittee which oversees the administration of problem-solving courts. The Subcommittee worked very hard to come up with some rules to provide oversight for the problem-solving courts. They would like to present to the Rules Committee some of the issues

and concerns that they have. Because of the guidance of the Chair of the Rules Committee, they have addressed some of the major issues. The first issue was the applicability of the Rules and the approval of the program. She directed the Committee to look at the handout distributed today, which is labeled "Additional Plan Details, Version #2."

1/8/10 Rules Committee HANDOUT - VERSION #2 - Add Plan Details to Rule 16-206?

(a) Applicability

. . .

(b) Submission of Plan

After consultation with the Office of Problem-Solving Courts and any officials whose participation in the program will be required, the Chief Judge of the District Court or the County Administrative Judge of a circuit court may prepare and submit to the State Court Administrator a detailed plan for a problem-solving program for their respective courts consistent with the protocols and requirements in an Administrative Order of the Chief Judge of the Court of Appeals.
Committee note: Examples of officials to be consulted include individuals in the Office of the State's Attorney, Office of the Public Defender, Department of Juvenile Services, and Department of Human Resources.

~~(b)~~ (c) Approval of ~~Program~~ Plan

~~A County Administrative Judge of the Circuit Court may submit to the Chief Judge of the Court of Appeals a request to develop a problem-solving court program in the Circuit Court for that county in accordance with procedures and protocols established by the State Court Administrator. The Chief Judge of the District Court may submit to the~~

~~Chief Judge of the Court of Appeals a request to develop a problem-solving court program in accordance with the same procedures and protocols. Upon approval by the Chief Judge of the Court of Appeals, the program may be implemented.~~

After review of the plan, the State Court Administrator shall submit the plan, together with any comments and a recommendation to the Court of Appeals. The program shall not be implemented until it is approved by the Court of Appeals.

~~(c)~~ (e) Written Agreement Required; Contents

. . .

~~(d)~~ (f) Immediate Sanctions; Exceptions - Loss of Liberty or Termination from program

. . .

~~(e)~~ (g) Disqualification of Judge

. . .

~~(f)~~ (h) Credit for Incarceration Time Served

. . .

Source: This Rule is new.

Section (b) is entitled "Submission of Plan." The Subcommittee is in agreement with the process that the Chair has provided. Any jurisdiction that is interested in developing a problem-solving court program should obtain approval through the process that has been specified in the Rule. The plan would ultimately be submitted to the State Court Administrator and then to the Court of Appeals. The Subcommittee thinks that section (b) works well.

Master Mahasa inquired whether the handout is part of Rule 16-206. The Reporter explained that the Version #2 of the "Additional Plan Details" handout gets plugged into Rule 16-206. Master Mahasa noted that this document refers to programs in the District Court, and she asked if ADR is a problem-solving program. Judge Hueston responded that the Problem-solving Courts are defined in the Rule. Master Mahasa said that she understood about the courts, but the Rule also refers to programs.

The Chair explained the confusion. The programs started out by being labeled "drug courts;" however there are no such "courts" in Maryland. These are programs that operate in the circuit courts and District Court, both in the adult and the juvenile divisions. It is a mistake to call them "courts." Article IV of the Maryland Constitution defines what the courts are in the State, and drug courts are not listed there. They are programs of other courts. The real issue is how much should go into the Rule. The Honorable Robert M. Bell, Chief Judge of the Court of Appeals, has agreed to put all of the protocols and requirements that have been floating around in some other capacity into an administrative order. This would give public notice of all of these protocols.

Judge Cox remarked that the handout has the modified version of the submission of the plan. Attached to this is the "Maryland Problem-solving Court Application Rules" that are currently in existence, and the application procedure that has been in use for over a year. (See Appendix 3). These procedures were

promulgated by the Judicial Conference Committee on Problem-solving Courts and went through the Judicial Conference Committee process. It is anticipated that Chief Judge Bell will do an administrative order that will encompass these procedures or some version of them and spell out in similar detail what is required before a problem-solving court program is approved for operation in any jurisdiction. The details include participation of interested agencies, parties, public defenders, counsel, etc. in the planning process. What is required before the program is approved is spelled out, so that the court dockets are not simply labeled "problem-solving courts" that pop up everywhere with no oversight. A process is in place already, and the Rule just formalizes that process and requires that it be done as soon as the order is approved by the Chief Judge.

Judge Hueston added that the theory of the Rule is that less is more. The transparency of the problem-solving court program is available through the administrative order. She drew the Committee's attention to section (c), which pertains to the written agreement that a participant must execute to be a part of the problem-solving court program. The Subcommittee is in accord with the way section (c) is drafted. They agree that a written agreement is necessary, and all problem-solving courts have written agreements. The program needs to be transparent and fully disclosed to all participants in a precise, detailed manner. The written agreements already exist and must continue to do so. This can be effected by rule.

Judge Hueston said that several policy questions have been raised. These are listed after section (b) of the Rule. The second one regarding juvenile programs will be discussed by Judge Cox. The third question is whether self-represented persons should have these protocols and requirements of the program explained in open court in addition to in the written contract. The Rule itself does not require the oral explanation.

Judge Hueston remarked that she would encourage the Committee not to require an oral explanation. Many courts go to a great extent to orally explain what the participant will be facing. To require this in lengthy, laborious detail when it has already been reviewed in writing seems to be repetitious and unwarranted. Additionally, before anyone enters a problem-solving court, the person must waive his or her rights. The person must voluntarily agree to enter, and if he or she is self-represented, a full inquiry will take place in compliance with Rule 4-215, Waiver of Counsel. The person will be told that he or she has a right to be represented and can waive that right. The person can always obtain counsel at any time during participation in the problem-solving court. The rules of the program will be fully and laboriously explained in the written contract. Judge Norton commented that the existing rules pertaining to waiver of counsel are not being replaced, and most judges comply with them. He could not see a conflict between section (c) and other rules pertaining to waiver of counsel.

The Chair cautioned about one tangent of this. The advice

that is given under Rule 4-215 is in the context of the rights that are being waived at trial. In this situation, is the waiver effective without some explanation of what someone would be facing in this program? He was referring to the knowingness of the waiver, not the voluntariness. Judge Hueston responded that the person will be advised of the maximum sentence that he or she could receive, and there will be a written contract that would be attached. The Chair inquired as to who would explain that contract to the person. Judge Hueston answered that if Rule 4-215 is complied with, the person has the ability to waive the right to counsel and accept responsibility for the decisions that he or she would make.

The Reporter questioned as to whether it is clear that one of the outcomes could be incarceration. Judge Hueston replied it is absolutely clear, and it has to be clearly spelled out. Mr. Maloney remarked that many courts use written waivers pursuant to Rule 4-215. Section (c) provides that the written agreement shall include any rights waived by the participant. The following language could be added to subsection (c)(3): "including any rights waived under Rule 4-215." There are two issues. One is if the Rule should provide for a waiver in open court. The second issue is whether any explicit language relating to Rule 4-215 has to be added. He expressed his agreement with Judge Hueston that there is no need for a waiver in open court.

The Chair pointed out that one of the questions regarding

problem-solving courts was whether unrepresented people should be allowed into the program. This gets into the issue of ex parte communication. Counsel is part of the team, so that there are no ex parte communications. If the participant is not represented, then this issue arises. The Chair said that he did not know the answer to this question, but he noted that whether the case is in juvenile or adult court, someone who is not represented may come into court where a Rule 4-215 inquiry is conducted, but no explanation of the program is given. The person is asked to sign the written agreement. Could an issue be raised later that this is not a knowing waiver? Judge Hueston explained that the advisement of rights orally is done in almost every program. It is a question of the thoroughness with which it is done.

The Chair inquired as to whether the agreement is placed in the record. If only a waiver is given and not an agreement, how is it docketed? Judge Cox responded that the waiver proceedings in problem-solving courts are more formal than traditional waiver proceedings. At the same time, the participant signs an agreement pursuant to Chief Judge Bell's direction. The program spells out in great detail what is in those agreements, but the practice has been and will continue to be that those agreements include notice of the specific range of sanctions that anyone is facing if he or she fails to comply with the conditions of the program. At the time of entry into the program, the participant is formally advised of his or her rights to counsel and other waivers. The participant signs the agreement and would

acknowledge the range of sanctions that may later be applicable.

Judge Hueston noted that the difficulty with drug courts is that the person comes into court a certain number of times a month. Every time the participant comes in, when he or she faces some range of sanctions, is it necessary to go through a formal advisement for everyone on the docket? This is distinct from the initial formal advisement and waiver that is required. Under the Rules, once there is a waiver and an advisement, the person is taken care of in the subsequent proceedings. The Rule is simpler in the juvenile context, because Code, Courts Article, §3-8A-20 mandates representation of juveniles. Rule 16-206 references Rule 4-215, and a reference to the Code provision should be added. The judges in the program always prefer that participants have counsel. The reality is that in some of the adult courts, this is not feasible.

Master Mahasa asked whether the initial advisement is oral. She noted the problem of comprehension. Judge Hueston responded that this is a good question. It is incumbent upon the court to make sure that the person understood the inquiry. Master Mahasa remarked that many times, people have come before her in court, and after responding affirmatively to questions about their comprehension, she would then ask them to explain what they had read, and they did not understand it. Is it the responsibility of the bench to delve deeply into this, or should it be the best practice? She would be comfortable if there were some assurance that the participant really understands what is going on.

Judge Norton remarked that the discussion is mixing the issues. The Rule provides what is in the agreement. It changes nothing about the rules pertaining to rights and waiver. Master Mahasa observed that the person is agreeing to something substantive. Judge Norton noted that it does not change the obligations of the court that already exist in any other way. Master Mahasa said that she would like to know what is in the actual agreement. If someone agrees and does not comply, and there is a sanction, there should be some assurance that the person understands.

Mr. Patterson remarked that in this situation as in any situation when someone is faced with the potential of giving up rights that the individual has and faced with sanctions if he or she does not comply, the courts have said over and over that it is necessary to ensure on the record that the person has been told about every right that the person is giving up and that the person must be informed of what may happen to him or her in the future if the person does not comply. Mr. Patterson did not feel that the person had to be advised again each time he or she comes into court. It is similar to a violation of probation. If someone is put on probation and then gets violated, it is not necessary to do an advisement of rights again. If the person comes in on a violation of probation, there may be some aspect of advising what this means regarding the hearing on that violation, but it is not necessary to start the case all over again with everything that the law required and the courts required at the

initial time the person entered into the guilty plea.

Mr. Patterson commented that if there were a valid point of objection to the problem-solving courts, it would be centered on the concept of due process which addresses knowledge and voluntariness of actions. It is beneficial to spell out what is going to be in the agreement. Whether or not it is spelled out in the agreement, the operative fact is that if it is not done properly, between the court and the individual, who may or may not be represented at the time the agreement is entered into, and if it has not been shown conclusively that it meets all of the requirements, then it is subject to attack and a later reversal of the case. This is a fairly well-delineated concept that has existed for some time in the criminal arena, even going too far, as Mr. Patterson had discussed at other meetings, where the Court of Special Appeals required a judge to advise a defendant about something that the judge did not even know about in *Camper v. State*, No. 2999, Sept. Term (2006). Whether the advisement is effected in writing or effected orally by going through everything that is in the writing, it amounts to the same procedure. Mr. Patterson asked what the concern is as long as either of these is effected.

The Chair commented that one of the requirements listed in Rule 4-215 is that the judge inform the defendant of the importance of the assistance of counsel. The judges normally mention counsel's assistance in selecting the jury, cross-

examining witnesses, and summoning witnesses. All of these pertain to trial. Is anyone going to tell the participant that his or her attorney is part of the treatment team and is meeting with the prosecutor and the judge in team meetings? If this is not disclosed as part of a Rule 4-215 waiver, the defendant may not be making a knowing waiver. Is a different litany needed for a Rule 4-215 waiver on the front end in the problem-solving court programs? Judge Hueston replied that due process is not being abandoned just because it is a problem-solving court. These courts have to comply with the requirements of Rule 4-215. The judge must assure that the participant fully understands the nature of the program and what the consequences are. Because these courts are very different from other courts, it is incumbent upon the judges to explain to the participant that the operations are very different.

The Chair questioned as to whether the judges have a different set of questions that are read to the participants than those read in ordinary cases. Judge Cox answered affirmatively. At the time of entry, the judge goes through what the requirements of the program are, ensures that the participant understands the agreement, explains how the program is going to work, and answers questions. Section (c) of Rule 16-206 states that the written agreement shall set forth the protocols of the program. It may be helpful to state explicitly that this refers to the range of sanctions that are potentially imposed within the program. As part of the inquiry and waiver process at the time

of entry, the Rule could provide that the judge goes over the requirements of the program. None of the problem-solving court judges are objecting to this. They would like people to come into the program knowing and fully comprehending the range of what will go on when they are in the program. The bigger question is if the litany must be repeated in the context of coming into court week after week. Mr. Maloney responded that no one thinks that this is necessary until the point where there is a loss of liberty or termination from the program.

Mr. Karceski asked what happens initially. In a criminal or juvenile case, a guilty plea or an admission takes place, and it would be just like any guilty plea or admission if it is in juvenile court. This involves not only the guilty plea, but the entry of an order of probation. It is the same as if a person were placed on probation. The conditions of probation, whether standard on the form or special, should be listed, and the participant should be told about these conditions. If a violation is to occur, it has to be for one of those reasons. Judge Cox said that this is why the requirement of a written agreement has been included, because this is the standard language that the person is approving when a probation order has been issued. This tells the person what he or she is required to do and what the range of sanctions will be if the person fails to do what is required.

The Chair stated that his question was whether any requirement of compliance with Rule 4-215 has to be tailored to

what the participant is facing if this explanation will be given to the participant, at some point, as the process begins, and if the participant is unrepresented. Mr. Karceski remarked that this is front-end loaded. Before one is held to be guilty, all of the conditions and sanctions are explained. Judge Norton noted that this is all part of the guilty plea, sentence, and voluntariness determination.

Judge Cox told the Committee that she would give an example of how the system works. At the time of entry, a participant would agree to testing a certain number of times a week and to abstain from the use of drugs and alcohol. The participant would acknowledge that failure to comply with program requirements could result in sanctions, including weekend incarceration. A failure to comply would be not showing up for drug testing for two weeks. Mr. Karceski questioned as to whether the judge first finds the participant guilty of the offense, and then the case proceeds to a problem-solving court program, or whether all of the events happen at the same time.

The Chair noted that before the participant pleads guilty, he or she comes to court and may not be represented. This is before anything happens. The judge goes through the Rule 4-215 waiver inquiry. Then the judge goes beyond this and puts the participant into the problem-solving court program. Is another 4-215 waiver inquiry needed at this point? If one is needed, should it be tailored, so that the participant knows how useful it would be to have counsel?

Mr. Maloney replied that the answer to the Chair's question is that it depends on what the participant has been told before, and it is fact-specific. He suggested that to address this issue, a sentence could be added to the Committee note that states that the written agreement shall be in addition to any advisement as required under Rule 4-215. This makes it clear that if there are obligations under Rule 4-215, they still apply. This does not change the meaning of Rule 4-215. The meaning of section (c) is that in addition to the requirements of Rule 4-215, there is a written agreement, and the judge can decide whatever obligations are applicable.

The Chair suggested that it may be helpful to add to the Committee note language providing that as part of Rule 4-215, the judge shall explain the value of counsel in this program. This is something that the participant may have never heard before. If the person does not have an attorney, no one in the meetings in the judge's chambers where decisions about the person's participation are made will represent the participant. Mr. Karceski inquired if it would be any different if a probation agent were in the meeting. If the participant confesses a murder to his or her probation agent, that will end the program participation. The Chair said that the judge would be involved. Mr. Maloney remarked that 95% of the participants do not have attorneys at this stage. The Reporter added that the probation agent is subject to testifying and to cross-examination whereas the judge is the decision-maker. Mr. Maloney expressed the

opinion that there is an obligation to tell the participant that he or she has a right to counsel at all stages of the proceeding, and counsel would be helpful to the person. This is all that is required. The Chair noted that this is what the Rule provides.

Mr. Maloney remarked that it is not necessary to embroider into the Rule the constitutional requirement, except to reference in a Committee note that in addition to whatever the written agreement provides, the advisement requirements of Rule 4-215 must be complied with. The judge can decide.

Judge Axel commented that all of this is played out in open court and on the record following the team meeting. The Chair pointed out no attorney is there, either. Judge Axel noted that this is where the written waiver and the Rule 4-215 advisement comes in. Mr. Maloney had suggested that the contract provide notice of any rights waived, including rights under Rule 4-215. The recommendations are made at the team meetings, but the decisions are made in open court in the presence of the participant who has the opportunity to speak. The participant could be asked why he or she did not go to treatment on a certain day. The participant has the opportunity to explain.

Master Mahasa questioned whether the agreement is actually discussed before it is drawn up. Judge Axel replied that the agreement is normally reviewed by counsel, or if the participant is unrepresented, it is reviewed by the program coordinator and the participant, before the participant signs the agreement. In all of these programs, the participation is voluntary. It is not

a form of probation that is thrust upon the person. In open court, it is similar to a written waiver of rights on a guilty plea. The person is asked whether he or she had reviewed the agreement before it was signed. The person is also asked if he or she had reviewed the handbook and if he or she has any questions about the program. Judge Hueston added that the practical result is that the program staff would like for the participants to succeed. If they do not know what the requirements are, they will not be able to succeed. The courts take time and effort to explain to the participants each step of the program. Master Mahasa remarked that the explanation should be prior to the participant signing the agreement. Judge Hueston reiterated that the program is voluntary. The courts must determine that the agreement to participate is knowingly and voluntarily made. The judges spend a great amount of time discussing the parameters of the program before the person signs anything.

The Reporter inquired whether entry into the program is ever done as a condition of a stet as opposed to a guilty plea. Judge Hueston replied that almost all of the programs are probation programs at this point. The vast majority of the people put into problem-solving court programs in this State are high-end drug users, people with very difficult and chronic problems. Judge Cox noted that not all of the problem-solving courts are drug courts. There are many other types of problem-solving courts, including courts dealing with family recovery, truancy, and

mental health. Most of the concerns pertain to the courts where the loss of liberty is an issue. The Rules are going to govern problem-solving courts generically, and some of them are in the civil context.

The Chair pointed out that a Rule 4-215 waiver is not needed outside of a criminal or delinquency context. The Reporter questioned as to whether any prohibition exists for the program used as a condition for a stet. Judge Norton commented that certain criteria have to be met for eligibility into most of these programs. Criteria include a finding of guilty, a criminal charge, or an active case. When there is a guilty plea, people plead guilty and are sentenced; then they come back to court asking for modification. Someone may have been in prison for a while and after having gone through drug counseling in the prison, hears about the drug court and wants to enter into the program from the prison. It is not always at the initial point in the proceedings.

The Chair asked whether the agreement that is signed by the participant is placed on the record. Judge Cox replied that this is a practice employed by the problem-solving court programs. Judge Hueston remarked that this is similar to a domestic violence case where there are criteria that are required, and there are agreements that the defendant has consented to abide by that are made part of the record. Judge Cox commented that the suggestion that the agreements be made part of the record is a good addition to the Rule. If there is a question of what

someone agreed to and what he or she was advised of, at least something exists that memorializes this.

Judge Pierson inquired if the decision was made today to add a Committee note that provides that there is a continuing responsibility to apply Rule 4-215. Mr. Maloney answered negatively. The Committee note would state that the written agreement is in addition to any requirements of Rule 4-215. The Chair clarified that it is in addition to the requirements of Rule 4-215, if that Rule is applicable. Mr. Maloney agreed, commenting that it would not be applicable in civil cases.

The Reporter noted that in juvenile cases, the juvenile can waive his or her right to counsel. A 17-year-old juvenile cannot enter into a valid contract, but can he or she sign the agreement? Judge Cox expressed the view that the only way that this could be accomplished would be to use the protocol set out in Code, Courts Article, §3-8A-20, which provides a litany of actions the court must take before a juvenile is allowed to waive counsel, including making a finding that the juvenile has waived the counsel who had gone through that advisement process with the juvenile. The Chair pointed out that this would be in a delinquency proceeding. If the case is in a truancy court coming out of a Child in Need of Assistance case, the child cannot waive counsel. Judge Hueston commented that it is very difficult when someone is unrepresented in a problem-solving court program.

Judge Cox inquired if section (c) is being amended to provide that a written agreement be filed in court and included

in it would be the requirements of the program, the protocols, and the range of sanctions. Judge Hueston responded that this is already in section (c), so the Committee note should provide that the agreement will be attached. The Chair pointed out that the agreements vary from program to program. Judge Hueston remarked that this issue had been discussed by the consultants. They would like the situation to be that all programs would be required to abide by a minimum agreement that will be provided to them and that will have all of the necessary information. The Chair commented these suggested changes will have to be drafted.

The Reporter summarized that the Rule is being amended by putting in the requirement that the agreement becomes part of the record, and she noted that a written agreement is required in addition to any advisement required under Rule 4-215 and Code, Courts Article, §3-8A-20, if applicable. Judge Axel suggested that subsection (c)(3) provide: "any rights waived by the participant, including any rights under Rule 4-215." The Reporter inquired as to whether it would include any rights under Code, Courts Article, §3-8A-20. Mr. Maloney answered affirmatively. The Reporter asked if language would be added providing that the range of sanctions should be included in the written agreement as one of the components. Will the administrative order sufficiently cover the fact that the participant has to sign that he or she understands the range of sanctions? The Chair responded that there seems to be a consensus that this should be in the agreement form.

Mr. Karceski said that he had a question about the process. He knew about the team concept where the participant meets with the team and if it is a drug court, discusses the nature of his or her problem and progress. There is a free flow of discussion about what is going on. The purpose of this is to make this program a success for the participants, so it is important to encourage them to be honest. In being honest, during the first stage, at least 90% of them must admit using the drugs. Does the team include the judge? The consultants answered affirmatively.

Mr. Maloney noted that the issue of the subsequent disqualification of the judge will be discussed soon. Mr. Karceski inquired as to whether the information provided by the participant is used to prosecute him or her. Judge Hueston answered that this information is specifically excluded. Mr. Maloney commented that there is an issue as to whether that same judge who has been exposed to ex parte communication should remain in the case for a later violation. Mr. Karceski remarked that it had been stated that the information could be used to violate the participant, but not to charge him or her with the act of using a drug. So, the person's admission could be used for the violation of probation.

The Chair observed that if the person is unrepresented, the following could happen: in the team meeting in the judge's office, the local health department notes that twice in that week the participant tested as using drugs, and no one challenges this, because neither an attorney nor the participant is at the

meeting, or the Department of Education states that the juvenile participant was truant four days last week, violating the condition of non-truancy, and no one challenges this statement. Judge Cox remarked that these are not effectively unchallenged, because before anything would happen in response to this, a hearing in open court would take place. The Chair pointed out that no attorney may be present there, either. Mr. Maloney said that this leads to the next issue which is the intermediate sanction for loss of liberty or termination from the program. At this point, the proceedings are in open court, and it triggers Rule 4-215. This is what section (d) addresses.

Judge Hueston commented that the premise of these programs is to get people well. The participants are constantly violating their probation. Because of the structure of the program, the people in charge know about it to a great extent. The participants rarely get violated for minor infractions. What causes violations or sanctions is not that the person admitted using drugs, but that the person is not complying with the treatment while the person is using, or the person is absconding from the programs. The administrators know that the person is using; otherwise he or she would not be in drug court. The usage is not the issue; it is the non-compliance with the conditions to get off the drugs. If a test comes back positive, not just an admission, and a report comes back stating that the participant has absconded from the program, this is what gets the person in trouble.

The Reporter inquired as to who has the right to be at the team meetings. Does the participant's attorney have the right to be at the meeting? If the participant is unrepresented, does he or she have the right to be at the meeting? Judge Hueston replied that the participant does not have the right to be present, but the attorney can be there.

Judge Axel noted that the treatment provider or probation agent or the case manager may report that he or she had met with the participant two times since the last court session. The urine test was positive, and the provider, agent, or manager confronted the participant about this. The participant admitted that he had relapsed. The treatment provider would be stepping up the treatment. What should be the initial response of the team–should it be a warning? If the participant just started the program, and the treatment has not really taken hold, that does not merit a prison sentence. A body of literature exists stating that early on, the response should be a warning or closer monitoring but not a prison sentence. If it is played out in court, the provider may feel that the person should be stepped up from outpatient to intensive outpatient treatment. The participant is warned. If it gets to the point that this scenario is continually repeated, or there is a serious absconding, then the loss of liberty becomes a factor while the person remains in the program.

The Chair said that it was his understanding that the participant progresses within six months or a year from phase 1

to phase 2. At the end of phase 1, the team or the judge can decide that the participant has not made sufficient progress and will remain in phase 1 for another six months. Judge Cox responded that the end of phase 1 is defined by sufficient progress, not time-defined. One does not get to the end of a phase until the person has progressed to a certain condition. The Chair inquired if this is true between phases 2 and 3 also. Judge Cox replied affirmatively. Judge Norton added that there are defined earmarks that one reaches as the person progresses. It is not a subjective decision. Mr. Michael asked how cumbersome it would be if a requirement were added that before incarceration is recommended as a sanction, notice would have to be provided, so that the participant could be represented. Mr. Maloney said that section (d) addresses this. The participant has reached the point where he or she is subject to sanctions which are defined as loss of liberty or termination from the program that usually leads to a loss of liberty. At that point, the participant should be afforded notice, an opportunity to be heard, and the right to be represented by counsel. If a hearing is required, and the participant is unrepresented by counsel, Rule 4-215 must be complied with.

The Chair commented that in this setting, the participant may state that he or she would like counsel although counsel had been waived previously. Assuming that the Public Defender or someone else comes in, can the attorney then challenge the underlying basis which has been found as a fact to get the case

to this point? The participant is being terminated, because the team has information received ex parte. Judge Hueston remarked that if the termination occurs because of a chemical analysis to show that the participant tested positive, this is not ex parte information. It comes from reports that can be challenged similar to any violation hearing. It comes from written reports showing that the participant is no longer participating in the program, that he or she is not showing up to treatment. Judge Cox added that the difficult part of this is not the termination, it is the sanctions.

Judge Hueston explained that for termination, the Rule requires due process requirements, including notice, an opportunity to be heard, and the right to counsel. This is easy, because everyone agrees that there is a right to counsel. The issue is the sanctions. The hallmark of problem-solving courts is immediate, swift, appropriate consequences for behavior. This can be positive incentives or negative sanctions. If the report indicates that the participant is using drugs and not attending treatment, the judge will take immediate action. Evidence shows that the immediacy is critical to positive change of behavior. It is no good for the judge to sanction someone weeks later. The literature suggests that immediacy compels the change of behavior.

Judge Hueston commented that in a hearing, the defendant will be confronted with the positive usage and will have the opportunity to respond. The judge can then decide what to do.

Sanctions are often one to three days in jail, or more depending on the extent of the noncompliance. The judges would prefer to give the least appropriate sanction. Notice is always given, and there is an opportunity to be heard. An issue is the right to counsel. A participant can be asked in open court if he or she would like an attorney. If the answer is affirmative, and the participant is told to come back in two or three weeks, the immediacy is lost.

The Chair inquired as to what Judge Hueston proposed about this issue. She replied that there has been a waiver when the participant is advised at the outset that sanctions are a part of the program. This is different from the usual procedure for drug violations which has not worked. The evidence shows tremendous success in the drug court program, because of the immediacy as well as the other components. The Chair hypothesized that at this point, the participant states that he or she has an attorney, and it will take the attorney a certain number of days to prepare. Could the participant be told that he or she cannot have an attorney? Judge Hueston replied that the participant could have the attorney, but the participant may be detained in the process. Judge Cox added that this is similar to a violation of probation. The judges never object to anyone having counsel. A concern is that the Rule will be drafted in such a way as to impose a time-consuming process. The net effect will be that the participant will get a notice of violation, and the person will likely be detained until counsel is in the case.

The Chair said that the participant will waive counsel up front, but the program will allow the participant an attorney any time the participant so chooses. Judge Cox agreed with the Chair's statement. The Chair added that no sanctions would be postponed during the period that the participant obtains counsel. Mr. Maloney pointed out that at this point in the proceedings, it is not a sanction. It is like being picked up on a violation of probation. Judge Norton commented that some drug courts are pre-sentence disposition courts with which he is involved. This alters the terms of the participant's being placed on recognizance. There are not always violations of probation. The result is the same, but the paperwork is different.

Mr. Maloney remarked that if sanctions are about to be imposed on a participant, he or she has an absolute right to counsel. However, this is an academic discussion, because at this juncture, any participant is going to be put in jail. The word "sanctions" should be used in the Rule, recognizing that termination is the real action. Judge Hueston pointed out that the use of the word "sanctions" creates another requirement. The participant will be locked up anyway. It is important that attorneys do not discourage people from getting into the program, because if this happens, people will not get the help that they need.

Mr. DeWolfe commented that the power that is given to the judges in these drug courts is the immediate loss of liberty without counsel or without a hearing. He asked the Committee to

think about a violation of probation where there is notice and a right to counsel as well as a hearing. What is being proposed in Rule 16-206 is an immediate loss of liberty without counsel for the unrepresented, and for those who are represented without a hearing. Judge Hueston countered that there is a hearing. Mr. DeWolfe responded that this is what the Rule proposes. Many of these drug court contracts across the country have built into them the right to counsel and an evidentiary hearing upon the loss of liberty.

Mr. DeWolfe said that in this Rule, most of the rights are waived, and there is no need for a hearing if the participant admits his transgression. If the participant states that he or she is innocent, then the Rule proposes that the judge be allowed to take away that liberty without counsel and without a hearing. In practice, benevolent judges, such as Judge Cox, who run these courts, help the clients of the Public Defender. However, he asked the attorneys in the room to consider the worst judge that they have ever appeared in front of. These Rules are made for those judges as well. This gives them a great deal of power to remove someone from the community, to take away their liberty without due process. The Office of the Public Defender is asking that a due process possibility be built into the Rule, so that they can challenge the factual nature of the allegation that a violation has occurred. They would like the right to be heard. Most of the time their clients will tell their attorney that they that they were using drugs, and then the due process aspect is

not an issue. The Rule takes away the participant's right to challenge that evidence.

The Chair asked Mr. DeWolfe what his proposed changes to the Rule were. Mr. DeWolfe replied that he would add a right to counsel upon the loss of liberty, but not for extra urine tests or whatever sanctions built into the program that do not include the loss of liberty. What he proposed, which is part of the Montgomery County program and many others across the country, is that there is a right to be heard and a right to counsel. Mr. Maloney noted that what Mr. DeWolfe was proposing is provided for in section (d) of the Rule. He inquired as to whether Mr. DeWolfe approved of section (d). Mr. DeWolfe answered that he disapproved of the part of section (d) addressing termination. As far as the loss of liberty, there should be an absolute right to a hearing.

The Chair suggested that since Mr. Karceski had to present Rule 4-331 before his departure from the meeting, the group of consultants and Subcommittee members could discuss the issues regarding Rule 16-206 and possibly reach a consensus. The Committee and consultants agreed with the Chair's suggestion.

Agenda Item 3. Reconsideration of proposed amendments to Rule 4-331 (Motions for New Trial)

Mr. Karceski presented Rule 4-331, Motions for New Trial, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-331 to change the title of the Rule, **to add a new section (d) pertaining to DNA evidence, to add a cross reference following section (d),** to revise the provisions pertaining to when the court is required to hold a hearing on a motion based on newly discovered evidence, and to make stylistic changes, as follows:

Rule 4-331. MOTIONS FOR NEW TRIAL<u>; REVISORY POWER</u>

(a) Within Ten Days of Verdict

On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial.

Cross reference: For the effect of a motion under this section on the time for appeal see Rules 7-104 (b) and 8-202 (b).

(b) <u>General</u> Revisory Power

The court has <u>general</u> revisory power and control over the judgment to set aside an unjust or improper verdict and grant a new trial:

(1) in the District Court, on motion filed within 90 days after its imposition of sentence if an appeal has not been perfected;

(2) in the circuit courts, on motion filed within 90 days after its imposition of sentence.

Thereafter, the court has revisory power and control over the judgment in case of fraud, mistake, or irregularity.

(c) Newly Discovered Evidence

The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule:

(1) on motion filed within one year after the date the court imposed sentence or the date it received a mandate issued by the Court of Appeals or the Court of Special Appeals, whichever is later;

(2) on motion filed at any time if a sentence of death was imposed and the newly discovered evidence, if proven, would show that the defendant is innocent of the capital crime of which the defendant was convicted or of an aggravating circumstance or other condition of eligibility for the death penalty actually found by the court or jury in imposing the death sentence;

(3) on motion filed at any time if the motion is based on DNA identification testing or other generally accepted scientific techniques the results of which, if proven, would show that the defendant is innocent of the crime of which the defendant was convicted.

Committee note: Newly discovered evidence of mitigating circumstances does not entitle a defendant to claim actual innocence. See *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992).

(d) DNA Evidence

If the defendant seeks a new trial or other appropriate relief under Code, Criminal Procedure Article, §8-201, the defendant shall proceed in accordance with Rules 4-701 through 4-711. On motion by the State, the court may suspend proceedings on a motion for new trial or other relief under this Rule until the defendant has exhausted the remedies provided by Rules 4-701 through 4-711.

Cross reference: For retroactive applicability of Code, Criminal Procedure Article, §8-201, see *Thompson v. State*, ___ Md. ___ (No. 78, September Term 2008, filed November 16, 2009).

~~(d)~~ (e) Form of Motion

A motion filed under this Rule shall (1) be in writing, (2) state in detail the grounds upon which it is based, (3) if filed under section (c) of this Rule, describe the newly discovered evidence, and (4) contain or be accompanied by a request for hearing if a hearing is sought.

~~(e)~~ (f) Disposition

The court may hold a hearing on any motion filed under this Rule. ~~and~~ Subject to section (d) of this Rule, the court shall hold a hearing on a motion filed under section (c) if a hearing was requested and the court finds that: (1) if the motion was filed pursuant to subsection (c)(1) of this Rule, it was timely filed, (2) the motion satisfies the requirements of section ~~(d)~~ (e) of this Rule, and ~~a hearing was requested~~ (3) the movant has established a prima facie basis for granting a new trial. The court may revise a judgment or set aside a verdict prior to entry of a judgment only on the record in open court. The court shall state its reasons for setting aside a judgment or verdict and granting a new trial.

Cross reference: Code, Criminal Procedure Article, §§6-105, 6-106, 11-104, and 11-503.

Source: This Rule is derived from former Rule 770 and M.D.R. 770.

Rule 4-331 was accompanied by the following Reporter's Note.

In light of recent statutory changes to Code, Criminal Procedure Article, §8-201 and the addition of new Rules 4-701 through 4-711, all of which pertain to DNA evidence, the Criminal Subcommittee recommends adding

> to Rule 4-331 a new section (d), which (1) directs the defendant to the new Rules pertaining to DNA evidence if the defendant seeks a new trial or other relief under Code, Criminal Procedure Article, §8-201, and (2) allows the court, on motion by the State, to suspend proceedings on a motion for new trial or other relief under Rule 4-331 until the defendant has exhausted the remedies provided by Rules 4-701 through 4-711.
>
> A proposed cross reference after section (d) draws attention to *Thompson v. State*, ___ Md. ___ (No. 78, September Term 2008, filed November 16, 2009), which held that Code, Criminal Procedure Article, §8-201 can be applied retroactively.
>
> Proposed amendments to section (e), relettered (f), provide that if a hearing on a motion under section (c) is requested, the court must hold one if: the motion satisfies the requirements of section (d), relettered (e); a prima facie basis for granting a new trial is established by the movant; and, if the motion was filed under subsection (c)(1), it was timely filed.

Mr. Karceski explained that a new section (d) pertaining to DNA evidence and a new cross reference is being proposed for addition to Rule 4-331. In section (b), there is an initial style change which is the addition of the word "general" to modify the term "revisory power." Because of this change, he had been thinking about the meaning of section (b). He personally had never been involved with a motion for a new trial pursuant to section (b). An opinion by the Honorable Charles E. Moylan, Jr., then a Court of Special Appeals judge, *Isley v. State*, 129 Md. App. 611 (2000), stated that Rule 4-331 (b) used to be known as a "motion for an arrest of judgment."

Mr. Karceski read from the opinion as follows: "The basic distinctions between a motion for a new trial and a motion for an arrest of judgment are that the former is predicated upon matters extrinsic to the record, and is not, as a general rule, appealable, while the latter is predicated upon matters intrinsic to the record and is appealable." The opinion is lengthy and covers the distinction between those two issues. Mr. Karceski said that did not know why the word "general" was added to section (b). He asked the Chair if he remembered why this change was made. The Reporter responded that she thought that this was changed by the Style Subcommittee. It may have been added to distinguish section (b) from the DNA revisory power which is outside of this context altogether.

The Reporter asked Mr. Karceski if his view was that the word "general" should be deleted. He answered that he could not see a reason to add it. The Chair commented that it may have been added, because the entire Rule addresses revisory power. Section (c) also pertains to a revisory power. Mr. Karceski again asked why the word "general" was added. The Chair replied that it was added to distinguish it from the revisory power due to newly discovered evidence. The Chair added that pursuant to the motion filed within 90 days under section (c), the judge can revise the judgment for any reason. Section (c) also addresses a revisory power, but it is only for newly discovered evidence. Mr. Karceski pointed out that section (b) is limited to certain issues, such as failure to charge a crime properly. *Isley* gives

three or four examples of what these issues are.

Mr. Bowen expressed the opinion that the word "general" should come out of the caption of section (b). He had no problem with the addition of the word "general" in the first part of the Rule, but it may be advisable to then refer to "all other cases." The word "general" in the caption is misleading. The Chair said that section (b) addresses two different issues. To set aside the verdict and grant a new trial, a 90-day motion has to be filed, but thereafter the court can only revise the judgment in case of fraud, mistake, or irregularity. If one of those reasons is found, the court can set aside the judgment at any time.

Master Mahasa asked whether language could be added to the Rule explaining the difference between sections (a) and (b). Section (a) is subsumed into section (b) if the difference is not explained. The Chair noted that section (a) provides that a new trial may be ordered within ten days after a verdict. Master Mahasa remarked that if that deadline is missed, one can still file for a new trial. However, what Mr. Karceski read from *Isley* is that the difference between section (a) and (b) is extrinsic vs. intrinsic evidence.

Mr. Karceski pointed out that a history of section (b) goes back to Fed. R. Crim. Proc. 34, and this crystallizes what section (b) is about. In his opinion, Judge Moylan refers to section (b) as the vestigial remains of a motion for arrested judgment. It may be utilized where the claimed defect is

apparent on the face of the record. That is the indictment, information, plea, verdict, and sentence as distinguished from the evidence introduced at the trial. Master Mahasa expressed the view that this should be clarified, because the way the Rule reads now, if the 10-day deadline is missed, the defendant can wait until after the sentence is imposed, and then move for a new trial, anyway. However, this is not the intent of the Rule.

Mr. Shellenberger told the Committee that he attended many of the Subcommittee meetings where Rule 4-331 was discussed, and he did not recall the Subcommittee adding the word "general" to section (b). This Rule has been in existence for a very long time. Why would something be added that would indicate to judges and attorneys that something is new from what has existed under the case law for decades? The Rule should not be changed, because specific case law exists pertaining to all of the sections of the Rule. Adding the word "general" appears to be adding something that was unintended.

Mr. Karceski suggested adding a reference to *Isley*. He guessed that most attorneys would not be able to explain section (b). The Chair disagreed, noting that attorneys use this section frequently. Mr. Karceski said that "general" revisory power is confusing. The Chair responded that if the word "general" is eliminated, the substance of that section is not changed. Mr. Karceski asked if anyone had ever heard an attorney advise his or her client on the record that the client has 90 days to revise

the judgment for an unjust or improper verdict. Mr. Maloney replied that he had never heard this. Mr. Karceski remarked that this is because attorneys do not understand this provision.

Master Mahasa inquired as to whether a defendant would be given two bites of the apple. If the defendant does not request a new trial within the ten days provided for in section (a), there is still the opportunity to request one under section (b). The Chair responded that he thought that section (a) applies when someone would like to get a new trial before sentence is imposed. He expressed the view that this Rule is "excess baggage." It is never used, and no one understands what it really means. Unless the meaning of the Rule is clarified, it will not serve its purpose which is to tell people that this is limited to the issues that he just read. Mr. Shellenberger asked if a cross reference to *Isley* could be added. The Chair inquired as to whether a petition for certiorari was filed in that case.

Judge Kaplan asked what the meaning of the word "general" is. He moved that the word "general" be deleted from section (b). The motion was seconded, and it passed unanimously.

The Chair said that there were two provisions in this Rule, one of which has already been approved by the Committee. This is the requirement that no hearing has to be held if the motion is not timely under section (c). The new language is in section (d) pertaining to DNA evidence.

Mr. Karceski explained that section (d) refers to Code,

Criminal Procedure Article, §8-201 and to Rules 4-701 through 4-711. These apply to a certain subset of criminal offenses and to DNA procedures which may ultimately lead to a grant of a new trial and which have to proceed through the named Rules. The motion for a new trial under subsection (c)(3), which pertains to a motion based on DNA testing or any other generally accepted scientific techniques, does not apply to the crimes that are enumerated in the Code provision, the very serious crimes of murder and rape. Under subsection (c)(3), the request for a new trial could apply to other crimes and convictions, not the ones enumerated in Code, Criminal Procedure Article, §8-201, and, in this provision, there would be a higher bar than the Code provision and the Post Conviction Rules created. The higher bar is that under subsection (c)(3), it would have to be shown that the defendant is innocent. In the Code provision, and the new Post Conviction Rules, a substantial possibility of innocence has to be shown as opposed to innocence.

Mr. Karceski noted that section (d) provides that the way to proceed is through Rules 4-701 up to Rule 4-711. If a motion is filed under this section, the State can request a suspension of the proceedings until all of the proceedings under Rules 4-701 through 4-711 have been completed or exhausted. New section (f) which was formerly section (e) remedies what the Chair had just pointed out. The former Rule put the court in a bind and required the court to grant a hearing, which, in many instances, should not have been granted by virtue of the way the Rule was

constructed. There was no discretion, and the court had to allow for a hearing. The real change in section (f) is subsection (3) which requires that the movant has established a prima facie basis for granting a new trial. If all of the other provisions of section (f) have been complied with, a hearing would be allowed as opposed to holding a hearing every time a petition is filed.

Master Mahasa moved that *Isley* should be referenced in Rule 4-331. The Chair inquired as to whether anyone had read the case. Master Mahasa responded that she had not, but what is important is the part of the case Mr. Karceski had read earlier, noting the difference between sections (a) and (b). Mr. Maloney expressed the opinion that no one knows the meaning of this Rule. Mr. Karceski remarked that reading the case does explain the meaning of the Rule. Mr. Maloney observed that unless the case is not good law, a reference to it should be there to explain a truly obscure Rule. The Chair stated that the Committee should look at whether the Rule needs to be revised after they consider how this fits with the revision of sentences.

Mr. Maloney remarked that the Rule may not be necessary. The Chair noted that the whole point of the current revision was that the new language on the DNA was important, so that parallel proceedings are not going on. Mr. Maloney pointed out that there are DNA cases, and there are cases under Code, Criminal Procedure Article, §8-301, Writs of Actual Innocence. The Chair agreed

that all of these laws and rules are not fitting together well. The Subcommittee may need to look at how each of these laws and rules fits into the general scheme. He said that he was reluctant to add to the Rule a cross reference to a case that he had never read. Master Mahasa said that the Subcommittee can read *Isley*, but the Chair stated that the entire Committee should read that case. Master Mahasa commented that if the case sheds light on this Rule, it is very important to make note of it.

Mr. Karceski remarked that it is preferable to not consider issues piecemeal and to get everything completed at one time, but he asked whether there is a sense of urgency to move section (d) forward. The Reporter answered affirmatively. The Chair said that originally, this came back to the Committee, not because of section (d), but because of section (f). He thought that the Committee had already approved section (f). The Committee tried to revise the Rule several years ago and did it imperfectly. A case arose, *Matthews v. State*, 187 Md. App. 496 (2009), in which the Court of Special Appeals held that the meaning of the Rule had not been changed. A hearing has to be held even if the motion is untimely. The Rule requires that the motion has to be filed within a year. Even if that deadline is missed, a hearing still has to be held. About six or seven years ago, the Committee intended to straighten out this Rule, but it was not done properly. Section (d) was added, since the Court just adopted the DNA Rules. If someone would like a new trial because

of DNA evidence under Code, Criminal Procedure Article, §8-201 pertaining to serious crimes, section (d) provides the procedure.

Mr. Karceski noted that Master Mahasa was suggesting changes to section (b). The Chair said that the Rule can go back to the Subcommittee. Mr. Karceski asked whether the Rule should go forward except for section (b). The Chair responded that there is no hurry to change the Rule. Mr. Shellenberger expressed his disagreement. His view was that section (d) is needed now. The DNA Rules are in effect, and motions are being filed. This creates a double track. If a motion for a new trial is filed, the defendant goes in front of the original judge who heard the case. There can be separate proceedings under the new DNA Rules, where a second judge is trying to decide whether the defendant has a right to get a new trial, whether the evidence has to be turned over, and whether it has to be tested. Two tracks will be running at the same time with two totally different standards, and this will create much confusion. It is imperative that section (d) be added. Defendants are being brought to court, causing a security risk. They are totally outside of the time limits and have no rights under these Rules, but there was no mechanism for not letting them come into court. Mr. Shellenberger expressed the view that the Committee should act on this language now, with the proviso that the *Isley* case be revisited. It can be shepardized now to find out whether it is still good case law.

Mr. Patterson told the Committee that he had not read *Isley* either, but in the Michie volume of the Rules, the case is annotated at the end of Rule 4-331, and the annotation reads as follows: "The focus in section (b) of this Rule is on the verdict, as opposed to other flaws or errors." Is there more to the case than this annotation indicates? Mr. Karceski answered affirmatively. Judge Pierson observed that there have been many decisions by the Maryland appellate courts construing rules that the Committee does not put in Committee notes to explain. Mr. Karceski responded that this would be more than just referencing a case. His opinion was that the case should be read and considered.

The Chair stated that there are two choices. The Committee can proceed with what is before them today. The Rule can go into the next report which will go up to the Court of Appeals in about a week. The hearing will be in March. This is without prejudice to the Subcommittee going back and looking at the entire Rule in context. The other choice is that the Rule can go back to the Subcommittee, and any action on the Rule would be delayed.

Ms. Holback expressed her agreement with Mr. Patterson and Master Mahasa. She was pleased that the word "general" is being taken out. Now that there are specific avenues for attacking convictions based on DNA and forensics, it is not advisable to allow people one more right to attack a conviction using this revisory power based on fraud or mistake. This needs to be

defined very clearly to avoid relitigation of the same issues by different judges. The Chair pointed out that the writ of innocence will make these issues even murkier. Subsection (c)(3) refers to a "motion filed at any time if the motion is based on DNA identification testing or other generally accepted scientific techniques." To make it clear in light of what is proposed in section (d), the following language could be added after the word "testing" and before the word "or": "not subject to the procedures of Code, Criminal Procedure Article, §8-201." This would clarify that subsection (c)(3) only applies to those cases not covered by the Code provision. By consensus, the Committee agreed with this suggestion. By consensus, the Committee approved Rule 4-331 as amended.

Agenda Item 4. Reconsideration of proposed: New Rule 2-513 (Testimony Taken by Telephone) and New Rule 3-513 (Testimony Taken by Telephone)

After lunch, the Chair presented Rules 2-513 and 3-513, Testimony Taken by Telephone, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 500 - TRIAL

ADD new Rule 2-513, as follows:

Rule 2-513. TESTIMONY TAKEN BY TELEPHONE

(a) Definition

In this Rule, “telephone” means a landline telephone and does not include a cellular phone.

(b) When Testimony Taken by Telephone Allowed; Applicability

A court may allow the testimony of a witness to be taken by telephone (1) upon stipulation by the parties or (2) subject to sections (e) and (f) of this Rule, on motion of a party to the action and for good cause shown. This Rule applies only to testimony by telephone and does not preclude testimony by other means allowed by law or, with the approval of the court, agreed to by the parties.

Cross reference: For an example of testimony by other means allowed by law, see Code, Family Law Article, §9.5-110.

(c) Time for Filing Motion

Unless for good cause shown the court allows the motion to be filed later, a motion to take the testimony of a witness by telephone shall be filed at least 30 days before the trial or hearing at which the testimony is to be offered.

(d) Contents of Motion

The motion shall state the witness’s name and, unless excused by the court:

(1) the address and telephone number of the witness;

(2) the substance of the witness’s testimony;

(3) the reasons why testimony taken by telephone should be allowed;

(4) the location from which the witness will be testifying;

(5) whether there will be any other individual present in the room with the witness while the witness is testifying and,

if so, the reason for the individual's presence and the individual's name, if known; and

(6) whether transmission of the witness's testimony will be from a wired handset, a wireless handset connected to the landline, or a speaker phone.

(e) Good Cause

A court may find that there is good cause to allow the testimony of a witness to be taken by telephone if:

(1) the witness is otherwise unavailable to appear because of age, infirmity, or illness;

(2) personal appearance of the witness cannot be secured by subpoena or other reasonable means;

(3) a personal appearance would be an undue hardship to the witness; or

(4) there are any other circumstances that constitute good cause for allowing the testimony of the witness to be taken by telephone.

Committee note: This section applies to the witness's unavailability to appear personally in court, not to the witness's unavailability to testify.

(f) When Testimony Taken by Telephone is Prohibited

If a party objects, a court shall not allow the testimony of a witness to be taken by telephone if the court finds that:

(1) the witness is a party or will be testifying as an expert;

(2) the testimony is to be offered in a jury trial;

(3) the demeanor and credibility of the witness are or may be critical to the outcome

of the proceeding;

(4) the issue or issues about which the witness is to testify are or may be so determinative of the outcome of the proceeding that face-to-face cross-examination is needed;

(5) a deposition taken under these Rules is a fairer way to present the testimony;

(6) the exhibits or documents about which the witness is to testify are so voluminous that testimony by telephone is not practical;

(7) adequate facilities for taking the testimony by telephone are not available;

(8) failure of the witness to appear in person will or may cause substantial prejudice to a party; or

(9) other circumstances require the personal appearance of the witness.

(g) Use of Deposition

A deposition of a witness whose testimony is received by telephone may be used by any party for any purpose for which the deposition could have been used had the witness appeared in person.

(h) Costs

Unless the court orders otherwise for good cause, all costs of testimony taken by telephone shall be paid by the movant and may not be charged to any other party.

Source: This Rule is new.

Rule 2-513 was accompanied by the following Reporter's Note.

Proposed new Rules 2-513 and 3-513 are based upon the request of the Section Council of the Judicial Administration Section of the Maryland State Bar Association. The Rules allow the testimony of witnesses to be taken by telephone, under certain circumstances.

The Rules Committee is working on the development of Rules proposals dealing with a broader range of remote access in court proceedings, including the use of video transmissions and access via computers. It is anticipated that the broader Rules will subsume Rules that pertain solely to telephone access.

The Section Council has specifically requested that rules pertaining to testimony by telephone be promulgated as quickly as possible. In accordance with this request, proposed new Rules 2-513 and 3-513 are being advanced.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 500 - TRIAL

ADD new Rule 3-513, as follows:

Rule 3-513. TESTIMONY TAKEN BY TELEPHONE

(a) Definition

In this Rule, “telephone” means a landline telephone and does not include a cellular phone.

(b) When Testimony Taken by Telephone Allowed; Applicability

A court may allow the testimony of a witness to be taken by telephone (1) upon stipulation by the parties or (2) subject to sections (e) and (f) of this Rule, on motion of a party to the action and for good cause shown. This Rule applies only to testimony by telephone and does not preclude testimony by other means allowed by law or, with the approval of the court, agreed to by the parties.

Cross reference: For an example of testimony by other means allowed by law, see Code, Family Law Article, §9.5-110.

(c) Time for Filing Motion

Unless for good cause shown the court allows the motion to be filed later, a motion to take the testimony of a witness by telephone shall be filed at least 30 days before the trial or hearing at which the testimony is to be offered.

(d) Contents of Motion

The motion shall state the witness’s name and, unless excused by the court:

(1) address and telephone number for the witness;

(2) the substance of the witness's testimony;

(3) the reasons why testimony taken by telephone should be allowed;

(4) the location from which the witness will be testifying;

(5) whether there will be any other individual present in the room with the witness while the witness is testifying and, if so, the reason for the individual's presence and the individual's name, if known; and

(6) whether transmission of the witness's testimony will be from a wired handset, a wireless handset connected to the landline, or a speaker phone.

(e) Good Cause

A court may find that there is good cause to allow the testimony of a witness to be taken by telephone if:

(1) the witness is otherwise unavailable to appear because of age, infirmity, or illness;

(2) personal appearance of the witness cannot be secured by subpoena or other reasonable means;

(3) a personal appearance would be an undue hardship to the witness; or

(4) there are any other circumstances that constitute good cause for allowing the testimony of the witness to be taken by telephone.

Committee note: This section applies to the witness's unavailability to appear personally in court, not to the witness's unavailability to testify.

(f) When Testimony Taken by Telephone is Prohibited

If a party objects, a court shall not allow the testimony of a witness to be taken by telephone if the court finds that:

(1) the witness is a party or will be testifying as an expert;

(2) the demeanor and credibility of the witness are or may be critical to the outcome of the proceeding;

(3) the issue or issues about which the witness is to testify are or may be so determinative of the outcome of the proceeding that face-to-face cross-examination is needed;

(4) a deposition taken under these Rules is a fairer way to present the testimony;

(5) the exhibits or documents about which the witness is to testify are so voluminous that testimony by telephone is not practical;

(6) adequate facilities for taking the testimony by telephone are not available;

(7) failure of the witness to appear in person will or may cause substantial prejudice to a party; or

(8) other circumstances require the personal appearance of the witness.

(g) Use of Deposition

A deposition of a witness whose testimony is received by telephone may be used by any party for any purpose for which the deposition could have been used had the witness appeared in person.

(h) Costs

Unless the court orders otherwise for good cause, all costs of testimony taken by telephone shall be paid by the movant and may not be charged to any other party.

Source: This Rule is new.

Rule 3-513 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 2-513.

The Chair told the Committee that Rules 2-513 and 3-513 have been in the works for some time. The Subcommittee had circumscribed the scope of this by defining the word "telephone" as a landline, not including a cell phone. The reason for this was that the Subcommittee did not feel that people should testify while they were shopping, driving, etc. Also, this would mean that there would not be as much opportunity to fade in and out while the testimony is being taken. The landline is more secure. The second sentence of section (b) was added because the Subcommittee was still looking at remote electronic proceedings in court by remote electronic means. This Rule only applied to the use of the telephone.

The Chair noted that section (c) has no change to it from what was previously approved by the Committee. Subsection (d)(2) should read as follows: "The substance of the witness's expected testimony." One would not know what it is until it happens. The Subcommittee wanted to specify the location from which the witness would be testifying, whether anyone else would be present, and if so, the reason for that person's presence and the witness's name. The reason for this is if the witness is in court, he or she can be seen, and it would be clear how the witness was testifying and what the witness has in front of him

or her. People could be testifying from hospital rooms, and a nurse could be present. This is acceptable. However, if a person is in the room coaching the witness, it is important to know this.

Mr. Maloney inquired as to whether a Maryland court clerk can swear in a witness in another state. Mr. Michael pointed out that the witness is not physically present. Mr. Maloney said that he had been counsel in a case where there had been out-of-state depositions, and a notary had stated who the witness was. The Chair asked if Mr. Maloney was referring to discovery depositions, and Mr. Maloney replied affirmatively. The Chair pointed out that there may be a distinction in the sense that testimony by telephone is testimony that is being given in Maryland. Does the Committee want to allow testimony of someone in another state? He noted that section (e) has no changes from the way it was presented earlier. Section (f) is mostly the same as before, except that in subsections (3) and (4), the language "or may be" has been added. One would not know when the motion was filed or whether there was a prospect of it.

The Chair said that in section (g), the Subcommittee took some time to work out what the deposition can be used for. The Subcommittee decided that it can be used for any purpose for which the deposition could have been used if the witness were there. They did not get into when it can and cannot be used, because it is equivalent to any other testimony. The Subcommittee added the clause "[u]nless the court orders

otherwise for good cause" to section (h). There may be circumstances in which the court prefers to spread the cost around or to assess someone else.

The Chair pointed out that in section (b) and in the cross reference that follows, the word "remote" should be added to the last sentence after the word "other" and before the word "means." Master Mahasa commented that this indicates that the testimony could be given by cell phone if everyone agrees. The Chair added that the court also has to approve this. He noted that in subsection (d)(3), which reads, "the reasons why testimony taken by telephone should be allowed," the Committee might want to include the following language: "including any circumstance listed in section (e) of this Rule." Section (e) is what constitutes good cause. Judge Pierson inquired about subsection (d)(2) which reads, "the substance of the witness's testimony." This is going to impose upon the moving party some obligation to set forth the entire body of testimony. He suggested that language such as "the nature of the witness's testimony" may guard against this. Mr. Maloney agreed with this suggestion. Judge Pierson said that he had originally thought about using the word "subject," but he changed it to the word "nature." Mr. Maloney added that without a change like this, a whole motions practice will develop. The Chair suggested the word "synopsis." Judge Hollander suggested the words "subject matter."

Judge Norton proposed the following language: "a brief proffer of the content." Judge Pierson responded that someone

may argue that something was not included in the proffer. The Chair expressed some doubt about the word "nature." Mr. Maloney expressed the opinion that the word "nature" is generic enough to allow flexibility. The Chair commented that the purpose of this language is to tell the other side what the witness will say.

Mr. Michael asked what the language of Rule 2-402, Scope of Discovery, is regarding disclosing the scope of the expert's advice. Mr. Leahy suggested "subject matter on which the expert is expected to testify," which is language in section (g) of Rule 2-402. The Chair noted that "subject matter" is not what the plaintiff is going to say. He suggested that the language read "subject matter of the witness's expected testimony." By consensus, the Committee approved the Chair's suggestion.

The Chair asked if anyone had an objection to adding the language "including any circumstance listed in section (e) of the Rule" to subsection (d)(3). Master Mahasa inquired as to whether this type of testimony is only for good cause. The Chair replied that it is not necessary to show good cause if there is a stipulation. If someone would like an agreement or would like the court to find good cause, it is important to state in the motion what the good cause is. Master Mahasa remarked that she did not see what the suggested language actually adds to subsection (d)(3). One can refer to section (e) regardless. The Chair noted that section (e) pertains to why the court can find good cause. Section (d) pertains to what the motion has to state. If a rule requires that an action can be taken only with

good cause, does the motion not have to state what the good cause is? By consensus, the Committee agreed with the Chair's suggested change.

The Chair asked whether the subsection (f)(4) should be changed to read as follows: "The issue or issues about which the witness is to testify are or may be so determinative of the outcome of the proceeding that the opportunity for face-to-face cross-examination is needed." By consensus, the Committee agreed to this change.

The Chair told the Committee that Rule 3-513 is the same as the Title 2 Rule. Judge Norton commented that the Reporter's note refers to other technologies. He asked if these technologies, such as Skype, are going to be addressed soon. The Chair responded that originally, he had wanted to defer the discussion of the Rule, but the Maryland State Bar Section Council on Judicial Administration was anxious that a Rule be put into effect. Telephone testimony is already being taken in courts. Judge Norton inquired if the second sentence of (b) which reads: "This Rule applies only to testimony by telephone and does not preclude testimony by other means allowed by law or, with the approval of the court, agreed to by the parties." would mean that the parties could agree to use Skype and still be under this Rule. The Chair answered that it would if the court approves it. By consensus, the Committee approved Rules 2-513 and 3-513 as amended.

Agenda Item 6. Consideration of a “housekeeping” amendment to Rule 13-702 (Resignation of Receiver or Assignee)

The Reporter presented Rule 13-702, Resignation of Receiver or Assignee, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 13 - RECEIVERS AND ASSIGNEES

CHAPTER 700 - REMOVAL AND RESIGNATION

AMEND Rule 13-702 to correct an internal reference, as follows:

Rule 13-702. RESIGNATION OF RECEIVER OR ASSIGNEE

. . .

(b) Report to be Filed

The receiver or assignee shall file with the petition a report pursuant to Rule ~~13-601~~ 13-501 for any period not covered in an annual report previously filed or, if no annual report has been filed, from the date the receiver or assignee took charge of the estate.

. . .

Rule 13-702 was accompanied by the following Reporter’s Note.

The proposed amendment to Rule 13-702 corrects an internal reference in section (b) of the Rule.

The Reporter explained that a typographical error has existed in section (b) of Rule 13-702 since the Rule was adopted. The reference to “Rule 13-601" does not pertain to this Rule, and

it should be to "Rule 13-501." By consensus the Committee approved this change.

Agenda Item 5. Consideration of proposed amendments to Rule 6-416 (Attorney's Fees or Personal Representative's Commissions)

The Reporter presented Rule 6-416, Attorney's Fees or Personal Representative's Commissions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 6 - SETTLEMENT OF DECEDENTS' ESTATES

CHAPTER 400 - ADMINISTRATION OF ESTATES

AMEND Rule 6-416 (b) to modify the "Consent to Compensation for Personal Representative and/or Attorney" form, as follows:

Rule 6-416. ATTORNEY'S FEES OR PERSONAL REPRESENTATIVE'S COMMISSIONS

(a) Subject to Court Approval

(1) Contents of Petition

When a petition for the allowance of attorney's fees or personal representative's commissions is required, it shall be verified and shall state: (A) the amount of all fees or commissions previously allowed, (B) the amount of fees or commissions that the petitioner reasonably anticipates will be requested in the future, (C) the amount of fees or commissions currently requested, (D) the basis for the current request in reasonable detail, and (E) that the notice required by subsection (a)(3) of this Rule has been given.

(2) Filing - Separate or Joint Petitions

Petitions for attorney's fees and personal representative's commissions shall be filed with the court and may be filed as separate or joint petitions.

(3) Notice

The personal representative shall serve on each unpaid creditor who has filed a claim and on each interested person a copy of the petition accompanied by a notice in the following form:

NOTICE OF PETITION FOR ATTORNEY'S FEES OR PERSONAL REPRESENTATIVE'S COMMISSIONS

You are hereby notified that a petition for allowance of attorney's fees or personal representative's commissions has been filed.

You have 20 days after service of the petition within which to file written exceptions and to request a hearing.

(4) Allowance by Court

Upon the filing of a petition, the court, by order, shall allow attorney's fees or personal representative's commissions as it considers appropriate, subject to any exceptions.

(5) Exception

An exception shall be filed with the court within 20 days after service of the petition and notice and shall include the grounds therefor in reasonable detail. A copy of the exception shall be served on the personal representative.

(6) Disposition

If timely exceptions are not filed, the order of the court allowing the attorney's fees or personal representative's commissions becomes final. Upon the filing of timely exceptions, the court shall set the matter for hearing and notify the personal

representative and other persons that the court deems appropriate of the date, time, place, and purpose of the hearing.

(b) Consent in Lieu of Court Approval

(1) Conditions for Payment

Payment of attorney's fees and personal representative's commissions may be made without court approval if:

(A) the combined sum of all payments of attorney's fees and personal representative's commissions does not exceed the amounts provided in Code, Estates and Trusts Article, §7-601; and

(B) a written consent stating the amounts of the payments signed by (i) each creditor who has filed a claim that is still open and (ii) all interested persons, is filed with the register in the following form:

BEFORE THE REGISTER OF WILLS FOR _____, MARYLAND

IN THE ESTATE OF:

_____ Estate No. _____

CONSENT TO COMPENSATION FOR

PERSONAL REPRESENTATIVE AND/OR ATTORNEY

~~I consent to the following payments of compensation to the personal representative and/or attorney and acknowledge that, if consented to by all unpaid creditors who have filed claims and all interested persons, these payments will not be subject to review or approval by the Court. I also understand that the total compensation does not exceed the amounts provided in Estates and Trusts Article, §7-601 which are 9% of the first $20,000 of the gross estate plus 3.6% of the excess over $20,000.~~

I understand that the law, Estates and Trusts Article, §7-601, provides a formula to establish the maximum total compensation to be paid for Personal Representative’s Commissions and/or Attorney’s Fees without order of court. If the total compensation being requested falls within the maximum allowable amount, and the request is consented to by all unpaid creditors

who have filed claims and all interested persons, then this payment need not be subject to review or approval by the Court. A creditor or an interested party may, but is not required to, consent to these fees.

The formula sets total compensation at:

9% of the first $20,000 of the gross estate PLUS 3.6% of the excess over $20,000.

Based on this formula, the total allowable statutory maximum known at this time = _____, LESS any Personal Representative's Commissions and/or Attorney's Fees previously paid. To date, $_____ in Personal Representative's Commissions and $_____ in Attorney's Fees have been paid.

Total combined fees being requested: $_____ to be paid as follows:

Amount	To	Name of Personal Representative/Attorney
_____	_____	
_____	_____	
_____	_____	
_____	_____	

~~Consented to by:~~ I have read this entire form and I hereby consent to the payment of Personal Representative and/or Attorney's Fees in the above amount.

Date	Signature	Name (Typed or Printed)
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

_____	_____
Attorney	Personal Representative
_____	_____
Address	Personal Representative
_____	
Address	
_____	
Telephone Number	

(2) Designation of Payment

When rendering an account pursuant to Rule 6-417 or a final report under modified administration pursuant to Rule 6-455, the personal representative shall designate any payment made under this section as an expense.

Cross reference: Code, Estates and Trusts Article, §§7-502, 7-601, 7-602 and 7-604.

Rule 6-416 was accompanied by the following Reporter's Note.

The Honorable Karen Friedman, Orphans' Court Judge in Baltimore City, suggested modifying the form in Rule 6-416 entitled "Consent to Compensation for Personal Representative and/or Attorney" to ensure that lay persons who sign the form are giving informed consent. The Probate/Fiduciary Subcommittee with the help of other Orphans' Court judges, Registers of Wills, and members of the bar has added language which explains more fully the formula to establish the maximum total compensation to be paid to the personal representative or the attorney who is handling an estate.

The Reporter asked if anyone from the Probate and Fiduciary Subcommittee was present at the meeting. The Conference of

Orphans' Court Judges would like this revised form to be used. Mr. Maloney said that he was on the conference call when the change to the Rule had been considered, but he was unable to hear most of the discussion. The Chair said that since the Maryland State Bar Association (MSBA) made its decision on the cell phone issue, it has come up with a proposal for a uniform rule permitting attorneys to use cell phones in the courthouse. The Chair had asked the Court of Appeals what it would like the Rules Committee to do. The Court would like a uniform rule, and they will decide what that rule will be.

Mr. Leahy inquired whether Rule 6-416 had been approved. The Chair asked if there were any objections to the Rule. Mr. Bowen referred to the second paragraph of the form itself, which read as follows: "Based on this formula, the total allowable statutory maximum known at this time...". He expressed the opinion that what is known should be based on the "gross estate known at this time." What could change is the gross estate. This is the only amount that would be altered. The phrase "known at this time" should come after the reference to "the gross estate."

Judge Pierson asked if it would be based on the commissionable estate. Mr. Bowen responded that it should be based on 9% of the first $20,000 of the gross estate, plus 3.6% of the excess over $20,000. The Chair said that the change could be made, and then the registers of wills could be asked if they approve. Mr. Bowen noted that the gross estate can change, such

as when the property was sold at above its appraised value. It may be more. The Chair added that it may be less. By consensus, the Committee approved Mr. Bowen's change to the Rule. By consensus, the Committee approved Rule 6-416 as amended.

Reconsideration of Agenda Item 2

Judge Pierson asked whether all of the issues pertaining to Rule 16-206 had been resolved. The Chair replied that during the lunch break, he had spoken with the consultants. They were concentrating on the agreement and what someone would have to do if there were going to be sanctions. The Chair encouraged them to address other issues that had not been resolved.

The Reporter told the Committee that the latest version of Rule 16-206 was being distributed for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 200 - THE CALENDAR - ASSIGNMENT AND DISPOSITION OF MOTIONS AND CASES

ADD new Rule 16-206, as follows:

Rule 16-206. PROBLEM-SOLVING COURT PROGRAMS

(a) Applicability

This Rule applies to problem-solving court programs, which are specialized court dockets or programs that address matters under a court's jurisdiction through a multi-disciplinary and integrated approach incorporating collaboration among courts,

other governmental entities, community organizations, and parties.

Committee note: Problem-solving court programs include adult and juvenile drug treatment, DUI, mental health, truancy, and family recovery programs.

(b) Submission of Plan

After consultation with the Office of Problem-Solving Courts and any officials whose participation in the program will be required, the Chief Judge of the District Court or the County Administrative Judge of a circuit court may prepare and submit to the State Court Administrator a detailed plan for a problem-solving program for their respective court consistent with the protocols and requirements in an Administrative Order of the Chief Judge of the Court of Appeals.

Committee note: Examples of officials to be consulted include individuals in the Office of the State's Attorney, Office of the Public Defender, Department of Juvenile Services, and Department of Human Resources.

(c) Approval of Plan

After review of the plan, the State Court Administrator shall submit the plan, together with any comments and a recommendation, to the Court of Appeals. The program shall not be implemented until it is approved by the Court of Appeals.

(d) Acceptance into Program

(1) Written Agreement Required; Contents

As a condition of acceptance into a program and after the advice of counsel, if any, a prospective participant shall execute a written agreement that sets forth:

(A) the requirements of the program,

(B) the protocols of the program, including protocols concerning the authority

of the judge to initiate, permit, and consider ex parte communications pursuant to Rule 2.9 of the Maryland Code of Judicial Conduct;

(C) the range of sanctions that may be imposed while the participant is in the program; and

(D) any rights waived by the participant, including any rights under Rule 4-215 or Code, Courts Article, §3-8A-20.

Committee note: The written agreement shall be in addition to any advisements that are required under Rule 4-215 or Code, Courts Article, §3-8A-20, if applicable.

(2) Examination on the Record

The court may not accept the prospective participant into the program until after an examination of the prospective participant on the record, the court determines and announces on the record that the prospective participant knowingly and voluntarily enters into the agreement and understands it.

(3) Agreement to be Made Part of the Record

A copy of the agreement shall be made a part of the record.

(e) Immediate Sanctions; Loss of Liberty or Termination from Program

In accordance with the protocols of the program, the court may impose an immediate sanction on a participant, except that if the participant is considered for the imposition of a sanction involving the loss of liberty or termination from the program, the participant shall be afforded notice, an opportunity to be heard, and the right to be represented by counsel before the court makes its decision. If a hearing is required by this section and the participant is unrepresented by counsel, the court shall comply with Rule 4-215 in a criminal action

or Code, Courts Article, §3-8A-20 in a delinquency action before holding the hearing.

Committee note: In considering whether a judge should be disqualified pursuant to Rule 2.11 of the Code of Judicial Conduct from post-termination proceedings involving a participant who has been terminated from a problem-solving court program, the judge should be sensitive to any exposure to ex parte communications or inadmissible information the judge may have received while the participant was in the program.

(f) Credit for Incarceration Time Served

If a participant is terminated from a program, any period of time for which the participant was incarcerated as a sanction during participation in the program shall be credited against any sentence imposed in the action.

Source: This Rule is new.

Rule 16-206 was accompanied by the following Reporter's Note.

Proposed new Rule 16-206 provides a uniform, State-wide procedure for the approval of new problem-solving court programs and the operation of those programs, while allowing jurisdictions flexibility in administering the programs based on each jurisdiction's needs.

The Reporter pointed out that the Committee note should be after section (e) instead of after section (d). The tagline for section (e) should read "Immediate Sanctions; Termination from Program," and it should not have the words "Exceptions - Loss of Liberty or." The policy question regarding section (d) was never fully resolved. Mr. Maloney referred to the Committee note after

section (d) that should also contain the sentence: "This would be in addition to any advisement that must occur under Rule 4-215." The Reporter responded that she would make sure that nothing else was left out. The Committee note after section (d) should read: "The written agreement shall be in addition to any advisements that are required under Rule 4-215 or Code, Courts Article, §3-8A-20, if applicable. Examples of other rights waived by a participant may be the right to a jury trial pursuant to Rule 4-246 and the right to confidentiality." Mr. Maloney noted that this was in the original draft. The Reporter added that this language should not have been removed.

The Chair asked about the right of a jury trial. Mr. Maloney responded that there may not be a jury trial, so the words "if any" could be added after the words "jury trial." The Chair said that this program is a diversion. Judge Hueston noted that the participant is giving up the right to a jury trial by being in the program. Mr. Maloney suggested the deletion of the examples in the Committee note. Judge Hueston commented that the participant is pleading guilty to enter the program. This is the motivation for pleading guilty. The Chair noted that there has to be the litany before the guilty plea is valid. The reference to a jury trial is not needed. The Reporter asked about the confidentiality issue when the participant is talking to his or her drug counselor. Judge Hueston observed that this would be one of the rights that would be waived in the agreement. Mr. Maloney expressed the opinion that the reference to

"confidentiality" should be taken out. It is more of an administrative detail.

The Chair pointed out that this gets to the issue that is still bolded in the Rule. Mr. Maloney said that the consultants have suggested a change to section (e). The Chair stated that the policy question relates to section (d). The issue pertains to whether the person is or is not represented. If the person is unrepresented, he or she has to sign an agreement, and the person will be qualified for a guilty plea and for waiver of counsel. From the context of both of those, and the requirement that the guilty plea and waiver have to be knowing and intelligent, should the judge be required to explain on the record how the program is going to work, the team approach, the fact that no attorney will be present, and the possible sanctions? This would be on the record, so that when the agreement is signed and made part of the record, there is a clear indication that this was explained to the participant.

Judge Pierson moved that since the individual will be signing the agreement, the Rule should provide that the court shall determine that the individual understands the contents of the agreement. This is similar to a guilty plea where the court must determine that the defendant understands the plea, but it does not give the details as to what the court has to do to make that determination. It imposes on the judge an affirmative duty. It would include this requirement, but not the requirement that in every case the judge would have to read the entire agreement,

except if the judge felt that this was necessary to make that determination. The Chair commented that this is better than nothing.

Judge Norton pointed out that similar language is used in other Rules, and he expressed the view that it would be a good idea to add this to Rule 16-206. The Chair said that he had no problem adding this language. He asked how this would work. If an unrepresented defendant is in court and he or she will sign the agreement, what would the colloquy be before the judge makes a finding? Judge Pierson replied that as Judge Hueston had said, in most of these cases, there is a process that happens before the individual ever signs the agreement when it is presented to him or her. In the vast majority of cases, the individual is represented by counsel. He had some trouble envisioning a situation where an individual who is not represented by counsel will be admitted to a drug court program. The Chair responded that this may be, but it is permitted by the Rule.

Judge Pierson remarked that the colloquy is up to the judge. It depends on what the judge perceives based upon the individual in front of the judge who can probably tell from the circumstances that this is an individual who is only saying that he or she understands, which is not true. This is a scenario that Master Mahasa had pointed out earlier. The judge can explain the contents of the agreement if necessary. In some cases there is no basis for doubt that the individual understands the agreement. Judge Pierson stated that he does not prescribe a

particular colloquy.

The Chair stated that the discussion that took place during the lunch break indicated that as part of their training, the judges do explain all of this on the record. Should this be a requirement in the Rule? Judge Hueston commented that this is the best practice, but she advocated that it should not be in the Rule. The Chair said that he understood not wanting to include in the Rule language that requires the judge to do what the judge has to do anyway. However, these issues will apply beyond drug courts and beyond the cadre of judges who started these programs. He expressed the concern that a participant will not understand that he or she can be put in jail as part of this program which is supposed to keep him or her out of jail. Even though it is in the agreement somewhere, the person may still not have understood this. He or she may have been nervous, he or she may not have had an attorney.

Judge Pierson said that he has had defendants before him who say this after they go through an entire guilty plea colloquy. The Chair said that a record at a guilty plea or a waiver of jury trial would exist to indicate the contrary of what the person says. Mr. Maloney suggested that a sentence be added that would state that the judge shall determine that the participant knowingly and voluntarily entered into the agreement and waived any rights. The Chair said that he would prefer that the sentence also provide that the participant understands what he or she is getting into. Master Mahasa suggested the language,

"knowingly and voluntarily understands." Mr. Maloney commented that the words "knowingly and voluntarily" should not be used, because they are in Rule 4-215. The Chair responded that is really what it is. What must one show to be knowing? The Reporter suggested the following language: "The court shall determine on the record that the participant knowingly and voluntarily entered into the agreement."

Mr. DeWolfe observed that this is a problem with the unrepresented participant. The defense attorney traditionally takes the role of making sure that by going through the agreement with the participant, he or she understands it and that he or she agrees to all of it. When the judge faces someone who is unrepresented, the agreement does not need to be read into the record every time, but something should be included, at least in the commentary to the Rule, that indicates that the judge inquired as to whether or not the participant knew what he or she was getting into in terms of sanctions. His suggestion would be to use the language "knowingly and voluntarily understands the contract" or to put into the commentary that the judge takes pains to make sure that an unrepresented participant understands. The Chair remarked that even if the participant is represented, without a record, there is only an inference that counsel has explained this agreement and explained it correctly. He has seen cases in which this does not always happen. This agreement should be transparent at the outset, and there should be a record showing that the participant clearly understood what he or she

was getting into.

Judge Norton suggested borrowing the language from Rule 4-215 that requires that after "an examination of the defendant on the record conducted by the court, the State's Attorney, or both, the court determines and announces on the record that the defendant is knowingly and voluntarily waiving the right to counsel." Without magic words, this requires the court to talk to the defendant and make sure that he or she understands. The Chair inquired if the State's Attorney and defense counsel should be included. Judge Norton answered that this could be done only by the court. Master Mahasa noted that with the agreement, often the court will let the attorney explain it. It is not always the court that explains it. The court can add to the explanation if necessary. The Chair responded that this is true. The down side is cases that have come to the appellate courts in which there is a gap that no one has filled. Master Mahasa noted that this could occur even if the judge explains the agreement. The Chair acknowledged that it could happen, but the judge often has a "crib sheet" to ensure that everything necessary is said.

Mr. Maloney pointed out again the language of section (b) of Rule 4-215: "...after an examination of the defendant on the record...the court determines and announces on the record that the defendant is knowingly and voluntarily waiving the right to counsel." By consensus, the Committee approved adding this language to Rule 16-206. The Reporter stated that the following sentence will also be added: "A copy of the written agreement

shall be made a part of the record." By consensus, the Committee agreed with this addition. By consensus, the Committee approved Rule 16-206 as amended. The Chair said that the new language can be added to the Rule.

The Chair stated that the next report to the Court of Appeals will be the 163rd Report. This includes the Code of Judicial Conduct. This has to go to The Maryland Register by noon on Wednesday, January 13, 2010 for a 30-day comment period to run, so that the Court can hear the report in March. There is not a great deal of time to revise the Rule. He asked if the Committee was comfortable with this. He noted that he could e-mail copies of the completed Rule to the members. If any glitches arise, there would be time to correct them before the hearing. The Committee expressed no opposition to this.

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