COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 1 and 2 of the Judicial Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland on March 4, 2011.

Members present:

Hon. Alan M. Wilner, Chair
Linda M. Schuett, Esq., Vice Chair

F. Vernon Boozer, Esq.
John B. Howard, Esq.
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Hon. Thomas J. Love
Zakia Mahasa, Esq.
Robert R. Michael, Esq.
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Hon. W. Michel Pierson
Debbie L. Potter, Esq.
Kathy P. Smith, Clerk
Melvin J. Sykes, Esq.
Hon. Julia B. Weatherly
Hon. Robert A. Zarnoch

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Kara M. Kiminsky, Esq.

The Chair convened the meeting. He introduced Kara M. Kiminsky, Esq. who will be an additional Assistant Reporter to the Rules Committee. She will start in about two weeks. Ms. Kiminsky had been a clerk for the Honorable Angela Eaves, of the Circuit Court for Harford County, and then a clerk for the Honorable Alexander Wright, of the Court of Special Appeals. She is an extraordinarily bright young woman and will be a credit to the Rules Committee. The Chair welcomed Ms. Kiminsky.

The Vice Chair announced that the Chair had been chosen as one of the top 100 influential people in Maryland. The Committee congratulated the Chair.

The Chair said that he had a couple of items to update. The 167th Report of the Rules Committee pertaining only to the professionalism course that new admittees to the bar have to take will be heard by the Court of Appeals on Monday, March 7, 2011 at 2:00 p.m. After the Rules Committee meeting is over today, the Style Subcommittee will be meeting to revise the Rules that will be in the 168th Report. It contains ten categories of rules, some of which consist of many rules. The Report will be sent to the Court as soon as possible after the Style Subcommittee meeting. The Court has already set a hearing date for that report on May 19, 2011.

The Chair explained that the issue of comparative fault has piqued the interest of lobbyists who are expressing strong opinions about it. The Special Subcommittee had one meeting in January, and many lobbyists came to the meeting and made their presentation. A draft of the first half of the report has been circulated to the Subcommittee. All of the consultants and interested persons could submit any written materials before March 1, and a number of them did so. The Subcommittee will be meeting again on March 25, 2011. The first half of the report addressed how comparative fault is handled around the country. It is all factual, and there should not be any dispute about it. The second half of the report will address the issues of whether

the Court could institute comparative fault in Maryland by rule; if so, what would such a rule look like; and in the 46 states and six American territories that have changed over to a comparative fault system, what, if any, adverse impact there has been in those jurisdictions. A preliminary proposal should be in the hands of the Subcommittee within a week. Then the entire proposed report will be distributed to all of the consultants, so that they have it for the March 25 meeting.

The Chair said that he was hopeful that if there are no delaying issues, the draft report would be on the agenda of the April 2011 Rules Committee meeting. The Committee can make any changes they wish, and the report would be sent to the Court of Appeals. It has been apparent from articles in The Daily Record and other newspapers that there has been a great deal of legislative activity in response to the request by the Court of Appeals, including a bill to codify contributory negligence as it existed on January 1, 2010 without taking account of what the Court of Appeals may have done with it in the meantime, which may raise some interesting constitutional issues. There had been an attempt by one of the business groups to strip the appropriations to the Rules Committee from the judicial budget.

Judge Norton inquired if the Committee was being asked what the appropriate mechanism is for change if deemed to be advisable, or also to comment as to whether it is advisable. The Chair replied that the Committee had not been asked for a recommendation on whether the Court of Appeals should do this,

only if, in the Committee's view, the Court could change to comparative fault by Rule if the Court so chose.

Agenda Item 1. Consideration of a Resolution in Honor of the Memory of Lowell R. Bowen, Esq.

The Chair said that Agenda Item 1 was partially an announcement. He noted with sadness the passing of Lowell Bowen, Esq. who had been a member of the Committee for more than 30 years and a very valuable member. A resolution had been prepared in honor of the memory of Mr. Bowen. The Chair said that he hoped that the Committee would approve the resolution. The resolution would go into the minutes of the meeting, and the original Resolution would be sent to Mr. Bowen's family. The Chair read the Resolution which was entitled "Resolution in Honor of the Memory of Lowell R. Bowen, Esq." The Resolution read as follows:

RESOLUTION
IN HONOR OF THE MEMORY OF
LOWELL R. BOWEN, ESQ.

A RESOLUTION to honor the memory of Lowell R. Bowen, Esq.

WHEREAS, it was with great sadness and a profound sense of loss that the members of this Committee learned of the passing of Lowell Bowen; and

WHEREAS, Lowell Bowen served on the Standing Committee on Rules of Practice and Procedure for thirty-one years and gave outstanding service to the Committee and Court; and

WHEREAS, during those years, Lowell chaired the Judgments and Style Subcommittees; and

WHEREAS, without complaining and without seeking public acclaim, he selflessly devoted many hours to the difficult and often tedious task of crafting precise, concise language for the Maryland Rules of Procedure; and

WHEREAS, he possessed an unparalleled breadth and depth of knowledge of the law, literature, history, grammar, and many other subjects; and

WHEREAS, throughout his service on the Committee, he exhibited extraordinary intellect, patience, fairness, integrity, and humor; now, therefore, be it

RESOLVED, by the members of the Standing Committee on Rules of Practice and Procedure of the Court of Appeals of Maryland, that we honor the memory of Lowell Bowen, remembering fondly the positive influence and indelible legacy of his proficient public service; and, be it further

RESOLVED that we extend our condolences to Lowell Bowen's family, friends, and colleagues, and we express our gratitude to them for sharing Lowell with us.

_____ _____

Alan M. Wilner, Chair *Linda M. Schuett, Vice-Chair*

March 4, 2011

The Chair asked for the Committee's approval of the Resolution. By consensus, the Committee adopted the Resolution.

The Chair added that the Legislative Code Revision Committee would be adopting a similar resolution, because Mr. Bowen had served on the Code Revision Committee since 1973 and was an equally valued member of that Committee.

Emergency Agenda Item.

The Chair explained that a minor emergency had arisen. When the Committee had approved the Rules on Post Conviction DNA Testing and then had sent them to the Court of Appeals, which adopted them, the Committee had provided in the Rules that a copy of any petition filed under that statute and a copy of any response of the State's Attorney would be sent to the Public Defender's Inmate Services Division so they could look at it, although they had no obligation to get involved. The term "Public Defender's Inmate Services Division" was put into the Rule. The same language was proposed for new Rule 4-332, Writ of Actual Innocence.

Subsequently, the Committee found out that this division has been renamed the "Collateral Review Division." The Chair said that earlier in the day, he had spoken with the Public Defender, Paul DeWolfe, Esq., about this, and because the Public Defender's Office goes through periodic reorganizations, his recommendation was to use the term "Office of the Public Defender" rather than name the specific division. The Chair noted that Rule 4-332 would be sent to the Court of Appeals in the 168th Report, and he asked for the Committee's approval to change that Rule to strike the language "Inmate Services Division" and replace it with the language "Office of the Public Defender." He also asked for approval to request the Court to change the language that already exists in Post Conviction DNA Testing Rules 4-705, Notice of

Petition, and 4-706, Answer; Motion to Transfer. The language is currently "Inmate Services Division," and it would be changed to the language "Office of the Public Defender." By consensus, the Committee agreed to make these changes.

Agenda Item 2. Consideration of a proposed amendment to Rule 16-110 (Cell Phones; Other Electronic Devices; Cameras)

The Chair presented Rule 16-110, Cell Phones; Other Electronic Devices; Cameras, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

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

AMEND Rule 16-110 by deleting subsection (d)(2), as follows:

Rule 16-110. CELL PHONES; OTHER ELECTRONIC DEVICES; CAMERAS

(a) Definitions

In this Rule the following definitions apply:

(1) Court Facility

"Court facility" means the building in which a circuit court or the District Court is located, but if the court is in a building that is also occupied by county or State executive agencies having no substantial connection with the court, then only that part of the building occupied by the court.

(2) Electronic Device

"Electronic device" means (A) a cell phone, a computer, and any other device that is capable of transmitting, receiving, or recording messages, images, sounds, data, or other information by electronic means or that, in appearance, purports to be a cell phone, computer, or such other device; and (B) a camera, regardless of whether it operates electronically, mechanically, or otherwise and regardless of whether images are recorded by using digital technology, film, light-sensitive plates, or other means.

(3) Local Administrative Judge

"Local administrative judge" means the county administrative judge in a circuit court and the district administrative judge in the District Court.

(b) Possession and Use of Electronic Devices

(1) Generally

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

(2) Restrictions and Prohibitions

(A) Rule 5-615 Order

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

(B) Photographs and Video

Except as permitted in accordance with this Rule, Rule 16-109, Rule 16-405, or Rule 16-504 or as expressly permitted by the local administrative judge, a person may not

(i) take or record a photograph, video, or other visual image in a court facility, or (ii) transmit a photograph, video, or other visual image from or within a court facility.

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

(C) Interference with Court Proceedings or Work

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

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

(D) Jury Deliberation Room

An electronic device may not be brought into a jury deliberation room.

(E) Courtroom

(i) Except with the express permission of the presiding judge or as otherwise permitted by this Rule, Rule 16-109, Rule 16-405, or Rule 16-504, all electronic devices inside a courtroom shall remain off and no electronic device may be used to receive, transmit, or record sound, visual images, data, or other information.

(ii) Subject to subsection (b)(2)(F), the court shall liberally allow the attorneys in a proceeding currently being heard, their employees, and agents to make reasonable and lawful use of an electronic device in connection with the proceeding.

(F) Security or Privacy Issues in a Particular Case

Upon a finding that the circumstances of a particular case raise special security or privacy issues that justify a restriction on the possession of electronic devices, the local administrative judge or the presiding judge may enter an order limiting or prohibiting the possession of electronic devices in a courtroom or other designated areas of the court facility. The order shall provide for notice of the designated areas and for the collection of the devices and their return when the individual who possessed the device leaves the courtroom or other area. No liability shall accrue to the security personnel or any other court official or employee for any loss or misplacement of or damage to the device.

(c) Violation of Rule

(1) Security personnel or other court personnel may confiscate and retain an electronic device that is used in violation of this Rule, subject to further order of the court or until the owner leaves the building. No liability shall accrue to the security personnel or any other court official or employee for any loss or misplacement of or damage to the device.

(2) An individual who willfully violates this Rule or any reasonable limitation imposed by the local administrative judge or the presiding judge may be found in contempt of court and sanctioned in accordance with the Rules in Title 15, Chapter 200.

(d) Notice

~~(1)~~ Notice of the provisions of sections (b) and (c) of this Rule shall be:

(A) posted prominently at the court facility;

(B) included on the main judiciary website and the website of each court; and

(C) disseminated to the public by any other means approved in an administrative

order of the Chief Judge of the Court of Appeals.

~~(2) Notice that the possession and use of cell phones and other electronic devices may be limited or prohibited in designated areas of the court facility shall be included prominently on all summonses and notices of court proceedings.~~

Source: This Rule is new.

Rule 16-110 was accompanied by the following Reporter's Note.

Subsection (d)(2) had been added to Rule 16-110 when, during development of the Rule, it appeared that cell phones would be banned from court facilities. When the Rule was redrafted to permit cell phones and other electronic devices to be brought into court facilities, subsection (d)(2) became less needed.

Incorporating the information required by subsection (d)(2) into all of the forms of summonses and notices that are generated by the courts has proved problematic. There is no room on many of the forms for any additional language. Court clerks and administrators have observed that printing addenda containing the required information and attaching the addenda to the summonses and notices is time-consuming, costly, and of little benefit to the public.

Rule 16-110, therefore, is proposed to be amended by the deletion of subsection (d)(2).

The Chair said that the Committee's initial view had been that cell phones should not be allowed in any of the courts. Ultimately, the Committee decided otherwise. At the time Rule 16-110 was drafted when the cell phones were not going to be

allowed, the Committee agreed that there should be a requirement in the Rule that notice of this prohibition should be put on all summonses and other notices sent to litigants and witnesses so that they would know in advance not to bring their cell phones into the courthouses. This had caused a problem, particularly in the circuit courts, because the forms were all pre-printed, and they would have to be amended. One of the forms could not be amended, because the new language had to go on a second page when no room was available on the first page. Since the cell phones are now permitted in the courthouses, there is no reason to notify people that restrictions exist. The Committee is being requested to approve the deletion of only that provision. Ms. Smith added that this deletion is necessary.

Judge Kaplan suggested that the notice be deleted. Judge Norton commented that he had been against the change to allow cell phones into the courthouse, but he acknowledged that the decision to allow them had been working well. The Chair remarked that the sheriffs in those counties that did not allow cell phones were pleased with the new Rule because they did not have to confiscate the phones. Judge Norton said that the bailiffs had commented that their interaction with the public is much more pleasant. By consensus, the Committee approved the deletion of the notice prohibiting cell phones that had been provided for in subsection (d)(2) of Rule 16-110.

Agenda Item 3. Consideration of "housekeeping" amendments to: Rule 1-326 (Proceedings Regarding Victims and Victims' Representatives), Rule 1-351 (Order Upon Ex Parte Application Prohibited - Exceptions), Rule 4-327 (Verdict - Jury), Rule 5-605 (Competency of Judge as Witness), Rule 16-808 (Proceedings Before Commission), Rule 16-813 (Maryland Code of Judicial Conduct), Rule 16-815 (Financial Disclosure Statement), Rule 17-105 (Qualifications and Selection of Persons Other than Mediators and Neutral Experts), Rule 8.2 of the Maryland Lawyers' Rules of Professional Conduct - Judicial and Legal Officials and Rule 8.4 of the Maryland Lawyers' Rules of Professional Conduct - Misconduct

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The Chair presented Rules 1-326, Proceedings Regarding Victims and Victims' Representatives; 1-351, Order Upon Ex Parte Application Prohibited - Exceptions; 4-327, Verdict - Jury; 5-605, Competency of Judge as Witness; 16-808, Proceedings Before Commission; 16-813, Maryland Code of Judicial Conduct; 16-815, Financial Disclosure Statement; 17-105, Qualifications and Selection of Persons Other than Mediators and Neutral Experts; 8.2 of the Maryland Lawyers' Rules of Professional Conduct - Judicial and Legal Officials; and 8.4 of the Maryland Lawyers' Rules of Professional Conduct - Misconduct, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

AMEND Rule 1-326 to conform it to revisions of Rules 16-813 and 16-814, as follows:

Rule 1-326. PROCEEDINGS REGARDING VICTIMS AND VICTIMS' REPRESENTATIVES

. . .

Cross reference: See Maryland Declaration of Rights, Article 47; Rule~~s~~ 16-813, Maryland Code of Judicial Conduct, ~~Canon 3B (6)(a)~~ Rule 2.6 (a); and Rule 16-814, Maryland Code of Conduct for Judicial Appointees, ~~Canon 3B (6)(a)~~ Rule 2.6 (a). For definitions of "victim" and "victim's representative," see Code, Courts Article, §3-8A-01 and Code, Criminal Procedure Article, Title 11.

Source: This Rule is new.

Rule 1-326 was accompanied by the following Reporter's Note.

In light of the revision of Rules 16-813 (Maryland Code of Judicial Conduct) and 16-814 (Maryland Code of Conduct for Judicial Appointees), conforming amendments to Rules 1-326, 1-351, 4-327, 5-605, 16-808, 16-813, 16-815, and 17-105 and Rules 8.2 and 8.4 of the Maryland Lawyers' Rules of Professional Conduct are proposed.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

AMEND Rule 1-351 to conform it to the revision of Rule 16-813, as follows:

Rule 1-351. ORDER UPON EX PARTE APPLICATION PROHIBITED - EXCEPTIONS

No court shall sign any order or grant any relief in an action upon an ex parte application unless:

(a) an ex parte application is expressly provided for or necessarily implied by these rules or other law, or

(b) the moving party has certified in writing that all parties who will be affected have been given notice of the time and place of presentation of the application to the court or that specified efforts commensurate with the circumstances have been made to give notice.

Source: This Rule is new and is consistent with Rule 16-812 (Maryland Lawyers' Rules of Professional Conduct, Rule 3.5) and Rule 16-813 (Maryland Code of Judicial Conduct, ~~Canon 3~~ Rule 2.9).

Rule 1-351 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 1-326.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-327 to conform it to the revision of Rule 16-813, as follows:

Rule 4-327. VERDICT - JURY

. . .

Cross reference: See Rule 16-813, Maryland Code of Judicial Conduct, ~~Canon 3B (1)~~ Rule 2.8, regarding praise or criticism of a jury's verdict.

. . .

Rule 4-327 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 1-326.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 600 - WITNESSES

AMEND Rule 5-605 to conform it to the revisions of Rule 16-813, as follows:

Rule 5-605. COMPETENCY OF JUDGE AS WITNESS

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Cross reference: See Rule 16-813, Maryland Code of Judicial Conduct, ~~Canon 3D (1)(a) and (d)(iv)~~ Rule 2.11 (a)(1) and (a)(2)(D).

Source: This Rule is derived from F.R.Ev. 605.

Rule 5-605 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 1-326.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-808 to conform it to the revision of Rule 16-813, as follows:

Rule 16-808. PROCEEDINGS BEFORE COMMISSION

(a) Charges

After considering the report and recommendation of the Board or Investigative Counsel submitted pursuant to Rule 16-805 (j), and upon a finding by the Commission of probable cause to believe that a judge has a disability or has committed sanctionable conduct, the Commission may direct Investigative Counsel to initiate proceedings against the judge by filing with the Commission charges that the judge has a disability or has committed sanctionable conduct. The charges shall (1) state the nature of the alleged disability or sanctionable conduct, including each ~~Canon of Judicial Conduct~~ Rule of the Maryland Code of Judicial Conduct allegedly violated by the judge, (2) allege the specific facts upon which the charges are based, and (3) state that the judge has the right to file a written response to the charges within 30 days after service of the charges.

. . .

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

See the Reporter's note to Rule 1-326.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGE, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-813, Rule 3.8 to add the word "former" to the source note, as follows:

Rule 16-813. MARYLAND CODE OF JUDICIAL CONDUCT

. . .

Rule 3.8. APPOINTMENTS TO FIDUCIARY

POSITIONS

(a) A judge shall not accept appointment to serve in a fiduciary position, such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative, except for the estate, trust, or person of a **member of the judge's family**, and then only if such service will not interfere with the proper performance of judicial duties.

(b) A judge shall not serve in a fiduciary position if the judge as **fiduciary** will likely be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves, or one under its appellate jurisdiction.

(c) A judge acting in a **fiduciary** capacity shall be subject to the same restrictions on engaging in financial activities that apply to a judge personally.

(d) If a person who is serving in a **fiduciary** position becomes a judge, he or she must comply with this Rule as soon as reasonably practicable, but in no event later than one year after becoming a judge.

(e) Paragraph (a) of this Rule does not apply to retired judges approved for recall under Maryland Constitution, Article IV, §3A.

COMMENT

[1] A judge should recognize that other restrictions imposed by this Code may conflict with a judge's obligations as a fiduciary; in such circumstances, a judge should resign as fiduciary. For example, serving as a fiduciary might require frequent disqualification of a judge under Rule 2.11 because a judge is deemed to have an economic interest in shares of stock held by a trust if the amount of stock held is more than de minimis.

Source: Paragraphs (a) through (d) of this Rule are derived from Rule 3.8 of the 2007 ABA Code. Paragraph (e) is derived from Canon 6C of the former Maryland Code of Judicial Conduct. The Comment is derived from the ABA Comment to Rule 3.8 of the 2007 ABA Code.

Rule 16-813, Rule 3.8 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 1-326.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-815 to conform it to the revision of Rule 16-813, as follows:

Rule 16-815. FINANCIAL DISCLOSURE STATEMENT

. . .

h. This rule applies to each judge of a court named in ~~Canon 6A~~ Rule 16-813, Maryland Code of Judicial Conduct, A-109 (General Provisions) who has resigned or retired in any calendar year, with respect to the portion of that calendar year prior to the judge's resignation or retirement and to each former judge with respect to the previous calendar year.

. . .

Rule 16-815 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 1-326.

MARYLAND RULES OF PROCEDURE

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

AMEND Rule 17-105 to conform it to revisions of Rules 16-813 and 16-814, as follows:

Rule 17-105. QUALIFICATIONS AND SELECTION OF PERSONS OTHER THAN MEDIATORS AND NEUTRAL EXPERTS

. . .

Cross reference: Rule 16-813, Maryland Code of Judicial Conduct, ~~Canon 4F~~ Rule 3.9 and Rule 16-814, Maryland Code of Conduct for Judicial Appointees, ~~Canon 4F~~ Rule 3.9.

. . .

Rule 17-105 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 1-326.

MARYLAND RULES OF PROCEDURE

APPENDIX: THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT

AMEND Rule 8.2 to conform it to the revision of Rule 16-813, as follows:

Rule 8.2. JUDICIAL AND LEGAL OFFICIALS

. . .

(b) ~~Canon 5C (4)~~ Rule 4.1 (c)(2)(D) of the Maryland Code of Judicial Conduct, set forth in Rule 16-813, provides that a lawyer becomes a candidate for a judicial office when the lawyer files a certificate of candidacy in accordance with Maryland election laws, but no earlier than two years prior to the general election for that office. A candidate for a judicial office:

(1) shall maintain the dignity appropriate to the office and act in a manner consistent with the impartiality, independence and integrity of the judiciary;

(2) with respect to a case, controversy, or issue that is likely to come before the court, shall not make a commitment, pledge, or promise that is inconsistent with the impartial performance of the adjudicative duties of the office;

Committee note: Rule 8.2 (b)(2) does not prohibit a candidate from making a commitment, pledge, or promise respecting improvements in court administration or the faithful and impartial performance of the duties of the office.

(3) shall not knowingly misrepresent his or her identity or qualifications, the identity or qualifications of an opponent, or any other fact;

(4) shall not allow any other person to do for the candidate what the candidate is prohibited from doing; and

(5) may respond to a personal attack or an attack on the candidate's record as long as the response does not otherwise violate this Rule.

COMMENT

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

. . .

Rule 8.2 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 1-326.

MARYLAND RULES OF PROCEDURE

APPENDIX: THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT

AMEND Rule 8.4 to conform it to the revision of Rule 16-813, as follows:

Rule 8.4. MISCONDUCT

. . .

COMMENT

. . .

[4] Paragraph (e) reflects the premise that a commitment to equal justice under the

law lies at the very heart of the legal system. As a result, even when not otherwise unlawful, a lawyer who, while acting in a professional capacity, engages in the conduct described in paragraph (e) and by so doing prejudices the administration of justice commits a particularly egregious type of discrimination. Such conduct manifests a lack of character required of members of the legal profession. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. A judge, however, must require lawyers to refrain from the conduct described in paragraph (e). See Md. Rule 16-813, Maryland Code of Judicial Conduct, ~~Canon 3 B (11)~~ Rule 2.3.

. . .

Rule 8.4 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 1-326.

The Chair told the Committee that Agenda Item 3 consisted of various "housekeeping" amendments. The Vice Chair moved the adoption of all of the amendments to the Rules in Agenda Item 3. The motion was seconded, and it passed unanimously.

Agenda Item 4. Reconsideration of proposed new Title 12, Chapter 700 - Severed Mineral Interests - Rule 12-701 (Definitions), Rule 12-702 (Scope), Rule 12-703 (Trust for Unknown or Missing Owner of Severed Mineral Interest), and Rule 12-704 (Termination of Dormant Mineral Interest)

Ms. Ogletree presented Rules 12-701, Definitions; 12-702, Scope; 12-703, Trust for Unknown or Missing Owner of Severed Mineral Interests; and 12-704, Termination of Dormant Mineral Interest, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 12 - PROPERTY ACTIONS

CHAPTER 700 - SEVERED MINERAL INTERESTS

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(b) Service
(c) Late Notice of Intent to Preserve Interest
(d) Hearing
(e) Order

MARYLAND RULES OF PROCEDURE

TITLE 12 - PROPERTY ACTIONS

CHAPTER 700 - SEVERED MINERAL INTERESTS

ADD new Rule 12-701, as follows:

Rule 12-701. DEFINITIONS

In this Chapter, the terms "mineral," "mineral interest," "severed mineral interest," "surface estate," "surface owner," and "unknown or missing owner" have the meanings set forth in Code, Environment Article, §15-1201. A "dormant mineral interest" is a mineral interest that satisfies the criteria set forth in Code, Environment Article, §15-1203 (a)(2).

Source: This Rule is new.

Rule 12-701 was accompanied by the following Reporter's Note.

Chapter 269, Laws of 2010 (HB 320) authorizes the owner of surface real property subject to a mineral interest such as oil, metallic ores, or coal, to file an action to terminate a dormant mineral interest or, if the owner of a severed mineral interest is unknown or missing, to have the mineral interest placed in trust. If the unknown or missing owner cannot be ascertained or

located, the trustee later petitions for termination of the trust. Because these procedures involve property, the Rules administering the statute have been placed in Title 12.

Proposed new Title 12, Chapter 700 is based on the statute and comprises four Rules:

- Rule 12-701, containing definitions;

- Rule 12-702, containing the scope of the Chapter;

- Rule 12-703, containing procedures to establish and administer a trust for unknown or missing persons with a legal interest in a severed mineral interest and to terminate that trust; and

- Rule 12-704, containing procedures to terminate a dormant mineral interest.

The statute provides that an action to terminate a dormant mineral interest requires the same notice as an action to quiet title set forth in Code, Real Property Article, §14-108, in rem notice. However, the statute does not provide a method for notice of an action to establish the trust or to terminate the trust. The recommendation is to provide for in rem notice to persons who are unknown or missing, since (1) it is the method used in an action to terminate the dormant mineral interest, and (2) Rule 10-602 provides for notice to persons with an interest in a fiduciary estate whose identity or whereabouts are unknown in the manner provided by Rule 2-122, which is in rem notice.

The Committee discussed a Constitutional equal protection concern as to which the statute is silent – whether the known owner of a severed mineral interest and the unknown or missing owner of a severed mineral interest receive equal protection under the law. Under the statute, the interest of a

known owner is subject to termination after the expiration of a 20-year period of dormancy; whereas, the interest of an unknown or missing owner is subject to termination after only five years of dormancy. The Committee requested from the Office of the Attorney General additional information concerning the constitutionality of the statute. Having considered the information received, the Committee approved Rules that incorporate the time periods set forth in the statute. However, if a policy determination is made that no interest should be subject to termination until after the expiration of a 20-year period of dormancy, this can be effected by the addition of the language, "and the severed mineral interest has become a dormant mineral interest," to Rule 12-703 (f)(2)(A) and (E).

MARYLAND RULES OF PROCEDURE

TITLE 12 - PROPERTY ACTIONS

CHAPTER 700 - SEVERED MINERAL INTERESTS

ADD new Rule 12-702, as follows:

Rule 12-702. SCOPE

This Chapter does not apply to a mineral interest:

(a) held by the United State or a Native American tribe, except to the extent permitted by federal law; or

(b) held by the State or an agency or political subdivision of the State, except to the extent permitted by State law.

Source: This Rule is derived from Code, Environment Article, §15-1202 (a)(2).

Rule 12-702 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 12-701.

MARYLAND RULES OF PROCEDURE

TITLE 12 - PROPERTY ACTIONS

CHAPTER 700 - SEVERED MINERAL INTERESTS

ADD new Rule 12-703, as follows:

Rule 12-703. TRUST FOR UNKNOWN OR MISSING OWNER OF SEVERED MINERAL INTEREST

(a) Petition to Create Trust

(1) Generally

An owner in fee simple of a surface estate subject to a severed mineral interest that is vested, in whole or in part, in an unknown or missing owner may file a petition to place the mineral interest of the unknown or missing owner in trust. The petition shall be filed in the circuit court of any county in which the surface estate is located.

Cross reference: Code, Environment Article, §§15-1201 through 15-1206.

(2) Contents

The petition shall be captioned "In the Matter of ..." stating the location of the surface estate subject to the severed

mineral interest. It shall be signed and verified by the petitioner and shall contain at least the following information:

(A) the petitioner's name, address, and telephone number;

(B) the name and address of all other surface owners;

~~(B)~~ (C) the reason for seeking the assumption of jurisdiction by the court and a statement of the relief sought;

~~(C)~~ (D) a legal description of the severed mineral interest;

~~(D)~~ (E) to the extent known, the name, address, telephone number, and nature of the interest of all persons with a legal interest in the severed mineral interest, including any unknown or missing owners, and their heirs, successors, or assignees;

~~(E)~~ (F) an affidavit of the petitioner stating that the identity or whereabouts of one or more owners are unknown and describing the reasonable efforts made in good faith to identify and locate each unknown or missing owner who is the subject of the petition;

~~(F)~~ (G) the nature of the interest of the petitioner;

~~(G)~~ (H) the nature~~, value,~~ and location of the surface estate subject to the severed mineral interest; and

~~(H)~~ (I) an affidavit of the petitioner, affirming fee simple ownership of the surface estate and including a reference to each recorded document establishing such ownership.

(b) ~~Notice~~ Service

The proceeding shall be deemed in rem or quasi in rem. ~~Notice to~~ A copy of the petition and attached documents shall be served on all persons with a legal interest in the severed mineral interest named in the

petition ~~shall be given pursuant to Rule 2-122~~ and all surface owners that have not joined in the petition. Service on a person alleged to be unknown or missing shall be pursuant to Rule 2-122. Otherwise, service shall be pursuant to Rule 2-121.

(c) Hearing

The court shall hold a hearing on the petition.

(d) Order Creating Trust

~~(1)~~ If the court finds that the title to a severed mineral interest is vested, in whole or in part, in an unknown or missing owner, the court may enter an order:

~~(A)~~ (1) placing the severed mineral interest of the unknown or missing owner in trust;

~~(B)~~ (2) appointing a trustee for the unknown or missing owner;

~~(C)~~ (3) if it is likely that any revenue will accrue to the benefit of the unknown or missing owner, directing the trustee to create a separate trust bank account to manage all trust assets; and

~~(D)~~ (4) authorizing the trustee to lease the mineral interest to the owner of the surface estate, subject to any conditions the court deems appropriate.

~~(2) The court shall provide for notice of the order to be served on persons with a legal interest in the severed mineral interest in accordance with Rule 2-122.~~

Cross reference: See Rule 1-324 concerning notice of the order that is sent to the parties by the clerk.

(e) Administration of Trust

A trust created under this ~~section~~ Rule shall be administered pursuant to Rules 10-702 to 10-712.

(f) Termination of Trust

(1) Petition by Unknown or Missing Owner

(A) Generally

An unknown or missing owner whose interest in a severed mineral interest has been placed in trust, at any time prior to the filing of a petition under subsection (f)(2) or (f)(3) of this Rule, may file a petition to terminate the trust and convey the interest to the petitioner. The petition shall be signed and verified by the petitioner, filed in the court that created the trust, and name as respondents the trustee, ~~and~~ each surface owner, and each other person with a legal interest in the minerals.

(B) Contents

The petition shall be captioned "In the Matter of ..." and shall state:

(i) the petitioner's name, address, e-mail address, if any, and telephone number;

(ii) the name, address, e-mail address, if any, and telephone number of the trustee and each surface owner;

(iii) the nature and extent of the petitioner's legal interest in the severed mineral interest in trust and include a reference to each recorded document establishing that interest and be accompanied by any unrecorded document establishing that interest; and

(iv) whether, the petitioner has recorded or intends to record a notice of intent to preserve the mineral interest in accordance with Code, Environment Article, §15-1204.

(C) Service

The petition shall be served on ~~the trustee and each surface owner~~ each respondent in accordance with the provisions

of Rule 1-321 (a).

(D) Response

~~The trustee and each surface owner~~ A respondent shall file a response to the petition within the time prescribed by Rule 2-321.

(E) Hearing

Unless waived in writing by all parties, the court shall hold a hearing on the petition.

(F) Order

If the court finds that the petitioner is the unknown or missing owner whose severed mineral interest was placed in the trust, that the petition is timely and in compliance with this Rule, and that the trust with respect to that mineral interest should be terminated, it shall enter an order (i) terminating the trust as to that mineral interest, (ii) directing the trustee to file a final accounting, convey the mineral interest to the petitioner, and distribute all proceeds in accordance with the accounting, as approved by the court, and (iii) assessing costs as it deems just under the circumstances.

(2) Petition by Trustee

(A) Generally

If the unknown or missing owner of a vested severed mineral interest to whom notice of the petition or order was given does not contest or move to terminate a trust created under ~~section (d) of~~ this Rule on or before five years after the date that the court issued the order creating the trust, the trustee shall file a petition to terminate the trust and to convey to the surface owner title to the severed mineral interest. The petition shall name as respondents each surface owner and each person with a legal interest in the ~~severed mineral interest~~ minerals, including any

unknown or missing owners of the severed mineral interest.

(B) Contents

The petition shall be captioned "In the Matter of ..." stating the location of the surface estate subject to the severed mineral interest. It shall be signed and verified by the petitioner and shall contain at least the following information:

(i) a legal description of the severed mineral interest;

(ii) a description of the putative property interests of each party;

(iii) the last known address of each party;

(iv) an affidavit signed by each surface owner, affirming fee simple ownership of the surface estate and requesting the court to convey title to the severed mineral interest at issue; and

(v) an affidavit signed by the petitioner, affirming that after conducting a diligent inquiry, including a search in each county where the severed mineral interest is located, performed in accordance with generally accepted standards of title examination of the land records of the county, the records of the register of wills of the county, and the records of the circuit court for the county, the trustee cannot locate the unknown or missing owner.

(C) ~~Notice~~ Service

~~Notice to all respondents shall be given pursuant to Rule 2-122.~~ The petition shall be served on each respondent in accordance with the provisions of Rule 1-321.

(D) Hearing

The court shall hold a hearing on the petition.

(E) Order Terminating Trust

The court shall enter an order requiring the trustee to convey the unknown or missing owner's mineral interest to the named surface owner if (i) the unknown or missing owner does not appear to contest the petition, and (ii) the court finds that the person named in the petition as surface owner is in fact the fee simple owner of the surface estate. After receiving the final report of the trustee as required by Code, Environment Article, §15-1206, the court shall enter an order (a) terminating the trust as to that mineral interest, (b) directing the trustee to file a final accounting, convey the mineral interest to the ~~petitioner~~ surface owner, and distribute all proceeds in accordance with the accounting, as approved by the court, and (c) assessing costs as it deems just under the circumstances.

Committee note: If the mineral interest is located in more than one county, conveyance by the trustee requires recordation in each county in which the surface estate is located.

Cross reference: See Rule 1-324 concerning notice of the order that is sent to the parties by the clerk.

(3) Petition by Surface Owner or Other Interested Person

If the trustee does not file the petition within the time prescribed in subsection (f)(2) of this Rule, the surface owner or any person with a legal or beneficial interest in the severed mineral interest placed in trust may file a petition to direct the trustee to comply with subsection (f)(2) of this Rule or to appoint a substitute trustee to do so. The petition shall be served on the trustee in accordance with the provisions of Rule 2-121 and further proceedings shall be in accordance with subsection (f)(2) of this Rule.

Cross reference: For duties of the trustee, see Code, Environment Article, §15-1206.

Source: This Rule is new.

Rule 12-703 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 12-701.

MARYLAND RULES OF PROCEDURE

TITLE 12 - PROPERTY ACTIONS

CHAPTER 700 - SEVERED MINERAL INTERESTS

ADD new Rule 12-704, as follows:

Rule 12-704. TERMINATION OF DORMANT MINERAL INTEREST

(a) Petition

(1) Generally

At any time after October 1, 2011, a surface owner of real property that is subject to a severed mineral interest may ~~maintain~~ initiate an action to terminate a dormant mineral interest by filing a petition in the circuit court of any county in which the real property is located, but if a trust created under Rule 12-703 is in existence, then in the county where the trust was created.

(2) Contents

The petition shall be captioned "In the Matter of ...," stating the location of ~~the~~ each surface estate ~~or estates~~ subject to the mineral interest. It shall be signed and

verified by the petitioner and shall contain at least the following information:

(A) the petitioner's name, address, and telephone number;

(B) the name and address of all other surface owners;

~~(B)~~ (C) the reason for seeking the assumption of jurisdiction by the court and a statement of the relief sought;

~~(C)~~ (D) a legal description of the severed mineral interest;

~~(D)~~ (E) the name, address, telephone number, and nature of the interest of all interested persons, including each person who has previously recorded a notice of intent to preserve the mineral interest or a part of a mineral interest pursuant to Code, Environment Article, §15-1204;

~~(E)~~ (F) the nature of the interest of the petitioner;

~~(F)~~ (G) the nature~~, value,~~ and location of the surface estate or estates subject to a severed mineral interest; and

~~(G)~~ (H) an affidavit signed by each surface owner affirming fee simple ownership of the surface estate, including a reference to each recorded document establishing such ownership.

Cross reference: See Code, Environment Article, §§15-1203 through 15-1205.

(b) Service ~~– Notice~~

~~(1) Service~~

~~The petitioner shall serve notice in accordance with Rule 2-121 on each interested person and each person who has previously recorded a notice of intent to preserve the mineral interest or a part of a mineral interest pursuant to Code, Environment Article, §15-1204.~~

~~Cross reference: See Code, Environment Article, §15-1203 (c) for actions constituting use of an entire mineral interest.~~

~~(2) Notice~~

~~If an owner of the severed mineral interest is unknown or missing, the proceeding shall be deemed in rem or quasi in rem as to that owner, and notice to that owner shall be given pursuant to Rule 2-122.~~

The proceeding shall be deemed in rem or quasi in rem. A copy of the petition and attached documents shall be served on all persons with a legal interest in the severed mineral interest named in the petition and all surface owners that have not joined in the petition. Service on a person alleged to be unknown or missing shall be pursuant to Rule 2-122. Otherwise, service shall be pursuant to Rule 2-121.

(c) Late Notice of Intent to Preserve Interest

Unless the mineral interest has been unused for a period of 40 years or more proceeding the commencement of the action, the court shall permit the owner of the mineral interest to record a late notice of intent to preserve the mineral interest and dismiss the action, provided that the owner of the mineral interest pays the litigation expenses incurred by the surface owner of the real property that is subject to the mineral interest.

Cross reference: See Code, Environment Article, §15-1203 (c) for actions constituting use of an entire mineral interest.

(d) Hearing

The court, in its discretion, may hold a hearing on the petition.

(e) Order

The court shall enter an order granting or denying the petition.
Cross reference: See Code, Environment Article, §15-1203 (d)(2) for the effects of an order terminating a mineral interest.

Source: This Rule is new.

Rule 12-704 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 12-701.

Ms. Ogletree said that the last time proposed new Title 12, Chapter 700 Rules had been considered, it seemed as if they had been completed, but later a group of Western Maryland attorneys, who practice in this area, sent in a comment letter. The Chair and Ms. Ogletree had looked at the Rules together, and they had found some issues that may need to be addressed, but not all of the ones raised by the attorneys in the letter. The Chair and Ms. Ogletree had suggested some minor amendments to the Rules in proposed new Title 12, Chapter 700.

Ms. Ogletree noted that no changes had been made to Rules 12-701 and 12-702. In Rule 12-703, the Reporter had suggested the addition of the language "to Create Trust" in the tagline of section (a). Initially, the tagline did not identify which petition was being referred to. This was a clarification, since there is also a petition to terminate. In subsection (a)(2)(B), the "name and address of all other surface owners" has been added to the contents of the petition. As she reviewed the Rules, she

noticed that no one was being advised that there may be missing surface owners. She suggested adding the language from section (a) of Rule 12-205, Complaint, which pertains to condemnation cases, that reads as follows: "If any person is a nonresident or not known, that fact shall be stated. If any person is the unknown heir of a decedent, that person shall be described as the unknown heir of _____, deceased." She explained that she had suggested this because the identity of the person is not known, and she proposed that this language be added to Rule 12-703.

The Vice Chair pointed out that there are other rules addressing treating nonresidents differently. Ms. Ogletree said that she agreed with taking out the word "nonresident." She was more interested in using the rest of the suggested language to identify the unknown persons. By consensus, the Committee agreed with this change. Ms. Ogletree noted that the remainder of subsection (a)(2) had to be relettered, because of the addition of subsection (a)(2)(B). The Western Maryland attorneys suggested taking out the word "value" in subsection (a)(2)(H), which the Chair and Ms. Ogletree agreed with. The Chair noted that this word is not in the statute.

Ms. Ogletree told the Committee that the next change to Rule 12-703 was in section (b). The attorneys also had suggested that the service requirement should be that all of the known persons are served by personal service. It is only the unknown persons who are notified by in rem service. The Chair and Ms. Ogletree

felt that this was a good idea, so they amended section (b), which provides for general in rem notice, to state that all of the unknown persons get in rem notice. The known respondents are going to be served by regular service. By consensus, the Committee approved this change. The Vice Chair said that it is a good idea to strengthen the service provisions. Ms. Ogletree agreed. She noted that subsection (d)(2) had been stricken because of the change to section (b).

Ms. Ogletree noted that in subsection (f)(1)(A), the language "and each other person with a legal interest in the minerals" has been added, because there could be multiple mineral-interest holders as well. In subsection (f)(1)(C) and (D) in place of the language "the trustee and each surface owner," the language "each respondent" has been added, because of the possibility of multiple mineral-interest holders. In subsection (f)(2)(A), which refers to the petition by the trustee, some clarifying changes had been made. In subsection (f)(2)(C), since personal service is required, people are permitted to serve by certificate of service. By this time in the proceedings, the unknown persons will no longer be involved, because there will probably be an order of default, so that only those people who actually have an interest will be getting this notice. The Chair pointed out that after subsection (f)(2)(E), a cross reference to Rule 1-324 has been added.

Ms. Ogletree drew the Committee's attention to Rule 12-704. She requested that the language from Rule 12-205 (a) that had

been suggested for subsection (a)(2)(B) of Rule 12-703 be added to subsection (a)(2)(B) of Rule 12-704. The Vice Chair asked what that language was. Ms. Ogletree answered that it was as follows: "If any person is not known, that fact shall be stated. If any person is the unknown heir of a decedent, that person shall be described as the unknown heir of _____, deceased." The reference to "a nonresident" that is in Rule 12-205 (a) has been left out. This is the usual language referring to in rem service that is put in notices. The Vice Chair inquired if this modifies the name and address of all other surface owners. Ms. Ogletree replied affirmatively, and she asked how it would be possible to give a name and address for someone who is unknown.

Ms. Ogletree pointed out that in subsection (a)(2)(E) of Rule 12-704, language has been added that refers to each person who had previously recorded a notice of intent to preserve the mineral interest or a part of the mineral interest. Those individuals would be interested persons, and they had not been referred to previously in this provision. The word "value" had been deleted from subsection (a)(2)(G) as it had been from subsection (a)(2)(H) of Rule 12-703. The original service requirements in section (b) have been deleted, because they are set out later in the same provision. The new formulation states that the proceeding is deemed to be in rem or quasi in rem. It is the same as the language in section (b) of Rule 12-703 and provides that if the identity of the person is known, that person must served personally, and if the identity is not known, in rem

service is sufficient.

Ms. Ogletree noted that the last issue raised by the Western Maryland attorneys appears on page 4 of their letter, which is in the meeting materials. (See Appendix 1). Section (e) of Rule 12-704 currently states: "The court shall enter an order granting or denying the petition." The attorneys wanted to be sure that the order would describe the interests that were being merged and that the clerk would then record that order in the land records for purposes of title examination. Ms. Ogletree said that she and the Chair had thought that this was a good idea, but it has not been included in this draft. She suggested that the language proposed by the Western Maryland attorneys should be included in the Rule, because it will help title searchers. The Vice Chair asked if the language that would be added would be that proposed by the attorneys. Ms. Ogletree answered affirmatively. Ms. Smith inquired whether the recording would be automatic with no fees received. Ms. Ogletree remarked that currently, if a document is filed in the land records, there is a fee paid for miscellaneous documents. The filing of the final order of termination should be the same.

The Vice Chair questioned why the order has to be filed in the land records. Ms. Ogletree responded that it is because this procedure combines two estates, the underground estate and the surface estate; otherwise, it would not be obvious what happened to them. The Vice Chair noted that many court orders do not get recorded in the land records that affect title to property. Why

is this order any different? Ms. Ogletree answered that it would be easier if this order is filed in the land records. The Vice Chair remarked that filing any order in the land records would be more efficient. Ms. Ogletree agreed, but she added that filing this order of termination in the land records is a safer way to handle this. The costs should be taxed to the person who wants it recorded. The Chair commented that there are two questions: Should the order be recorded, and if so, should a fee be paid to do so? Ms. Ogletree said that the answer to both questions is "yes." The Vice Chair expressed the view that the people who work in land records do not charge fees when government employees record documents. It could be confusing to require that a fee be charged. Fee requirements are not provided for in the Rules of Procedure.

Ms. Ogletree observed that Rule 12-704 should provide that the petitioner can ask that the order be recorded in the land records. The Vice Chair added that the petitioner can take the order and record it. Ms. Ogletree responded that this is what often happens, but the new language would require that the order be recorded. The costs should be borne by the petitioner. A government agency is not asking for it. The Vice Chair pointed out that it is the court system that is mandating it, and not the party.

The Chair commented that the language used by the Western Maryland attorneys, which is "The Clerk shall record a copy..." suggests that it is the duty of the clerk to record, and there

would be no fee. He expressed the opinion that there should be a fee. The surface owner is getting the benefit of this procedure. Ms. Ogletree said that she had no problem if a fee would be charged and that it would be helpful for people who are searching title later to find it there. The Chair observed that the division of the estate had to be by deed. When the mineral interest was severed either by grant or reservation, it would be in the land records, but nothing would be in the land records showing that the two estates had been reunited. Ms. Ogletree noted that this is what the Western Maryland attorneys are asking for. It should be recorded in the land records. The Reporter inquired how this is handled in partition cases. Ms. Ogletree replied that a deed is issued that is recorded in the land records. The Reporter remarked that she was trying to think of a comparable action. Ms. Ogletree said that condemnation is similar, but it is the government agency filing the petition.

The Vice Chair noted that there are many cases where the court declares that a certain person owns the center of the road. That order affects the title to the property, but the court does not record it. Judge Pierson pointed out that sometimes by order, the court directs that the clerk record the document in the land records. The Vice Chair commented that there are cases where it is not recorded. Ms. Ogletree expressed the opinion that because the order pertains to the merger of the estates, it ought to be recorded. The Chair suggested that the following language could be added to the last sentence of the proposed

language: "Upon payment of the required fees by the petitioner...". The Vice Chair responded that there may not be any required fees. Ms. Smith said that if the clerks are being directed to record the order, there is no fee. Often people recording deeds for partition and other actions do not remember to bring the deed back in to the clerk.

Ms. Ogletree expressed the view that the order should be recorded, and the Rule can state that the petitioner shall pay any costs of the recordation of the order. The Chair noted that the surface owner is terminating the rights of the person who owns the mineral interest, and Ms. Ogletree added that the surface owner is getting the benefit. The Chair commented that the surface owner is the petitioner who is asking for termination of the rights of the holder of the mineral interest. Should this language also be added to the trust provision in section (f) of Rule 12-703? The trust is being terminated, the effect of which is a direction to deed that interest back to the surface owner.

Ms. Ogletree answered affirmatively, pointing out that the current practice in many title companies is that a last-owner search has to be done. If a property action happened a long time ago, it cannot be found unless it is in the land records. The Reporter said that the trust rule may not need to be changed, because the order terminating it directs the trustee to file a final accounting, convey the mineral interest to the surface owner, and distribute all proceeds in accordance with the accounting. The trustee would have to do a deed at that point.

The Vice Chair suggested that the language proposed by the Western Maryland attorneys be added to the Rule. The Reporter noted that another way to change the language would be to provide that the petitioner shall file the order of termination. However, what would happen if the petitioner does not file the order? Would the land records be affected? Ms. Ogletree repeated that it is the petitioner who is getting the benefit of the termination. The practice would probably be that if this proceeding concerns the merger or the underground and surface estate, it would be recorded anyway. The Western Maryland attorneys wanted this to happen automatically. There is some benefit to this. The Vice Chair asked if this could be a way of avoiding the fees. Ms. Ogletree responded that it is a $20 fee.

The Chair inquired if the county transfer taxes would be assessed on this proceeding. Ms. Ogletree replied negatively, noting that it is the recording of a court order. It is similar to recording a power of attorney. Ms. Smith said that someone is getting a conveyance without having to pay the taxes. The Chair said that these mineral interests could conceivably have some value. If the transfer tax is applied, the county could be getting some money out of this. Ms. Ogletree inquired whether the transfer tax applies. Ms. Smith asked if the Rule could provide that the petitioner shall record the order and pay any applicable fees. Ms. Ogletree remarked that the petitioner could record a copy of the order of termination and leave it up to the clerk as to whether this would require a transfer tax. This

procedure will develop. She did not know if any of these proceedings had taken place. The Chair said that a bill was pending in the General Assembly to put a moratorium on drilling, but this would not affect the procedures in the Rules being considered today as surface owners are able to terminate the rights of the holders of mineral interests.

The Vice Chair inquired if the word "clerk" could be changed to the word "petitioner." No reference to the word "fees" would be needed. Ms. Ogletree responded that she had no problem with that. She expressed the opinion that the order should be recorded. Mr. Sykes inquired what the consequence of not recording would be. The Chair answered that there would be a gap in the land records. Ms. Ogletree added that this proceeding involves two fee simple interests, the surface interest and the underground interest. This order would be what puts them back together, because two separate chains of title exist up until that point, one for the mineral interest and one for the surface interest. From this point on, the two interests are merged. This document reflects the merger. No other deed in the land records would show this. The Chair noted that the land records will still show a severed mineral interest if this is not recorded.

Mr. Klein expressed the opinion that this is beneficial from the public's standpoint. Is it better to rely on petitioners to record the order rather than making it automatic, which the practicing attorneys have recommended? Ms. Ogletree commented

that the petitioner is the one who has asked for the interests to be merged. If she were representing the petitioner, she would ensure that the petitioner recorded the order of termination. The practicing attorneys would like the clerk to record, because there could be a gap. Mr. Sykes said that the petitioner does not get hurt by that gap, because the order merges the interests. Mr. Ogletree commented that this may be discoverable if someone were very diligent, but if the order of termination is recorded, it obviates that problem.

Mr. Klein moved to adopt the language suggested by the Western Maryland attorneys. The motion was seconded, and it carried unanimously.

Judge Pierson noted that section (a) of Rule 12-703 provides that the petition shall be filed in any county in which the surface estate is located. Rule 12-704 provides in section (a) that the petition for termination is filed in the circuit court of any county in which the real property is located. Rule 12-703 (e) has been changed to provide that the order of termination shall be filed in the county in which the mineral interest is located. The three vary. Ms. Ogletree commented that the filing should be wherever the real property is located. There are two pieces of real property. Judge Pierson said that the filing should be in any county in which the surface estate or the underlying mineral estate is located. Ms. Ogletree clarified that the wording should be "and," not "or." Judge Pierson observed that the word "or" means one or the other. Ms. Ogletree

explained that it should be filed in both. If the mineral interest is located across two counties, the filing should be in both counties. The Reporter asked if the clerk can record for another county. Ms. Smith answered affirmatively.

The Chair stated that the petition to terminate can be filed in any county in which the mineral interest exists. Judge Pierson inquired as to the meaning of the term "real property." Ms. Ogletree answered that both the surface estate and the mineral interest are real property. Judge Pierson asked if Rule 12-704 should be more specific. Ms. Ogletree pointed out that subsection (a)(1) reads, as follows: "...a surface owner of real property that is subject to a severed mineral interest...". This would refer to a farm, for example. The Rule next provides that the petition is filed in the circuit court of any county in which the real property is located, and Ms. Ogletree again used the farm as an example. If the farm straddles the boundary line, it could be in either of the two counties. The petitioner has to give a legal description, and this is why the Western Maryland attorneys asked for this in the order. The petitioner would describe the property and give the recording references in both counties if it straddles the boundary line between two counties. It should be recorded in both counties. Judge Pierson said that section (e) of Rule 12-703 should refer to "the surface estate and the underlying mineral interest."

The Chair remarked that if the farm is in Charles County, and the mineral interest under it is in Charles and Calvert

Counties, the filing would have to be in Charles County. It would not affect the mineral interest in Calvert County. The surface estate is only in Charles County. The Chair asked whether it would be a different case if the mineral interest had been severed from land in Calvert County. Ms. Ogletree said that it may or may not be. There are counties on the Eastern Shore where the boundary line has moved, so that it might have started out in one county and ended up in another.

The Chair asked about the interest of the surface owner. If the surface owner's land is solely in County A, and under it is a mineral interest that goes also into County B, the surface owner in County A has no interest in what is in County B. It is not under his or her land. Ms. Ogletree responded that it depends on what the description of the mineral interest was to begin with. If the mineral interest at the beginning was under the land, and it went over to the next county, it should have a corresponding entry in the other county with another surface owner. The Chair pointed out that this surface owner may not be petitioning to terminate the dormant interest, and it may not even be dormant in his or her county. That severance may have happened 10 years ago rather than 25 years ago. Is this not a different case? Ms. Ogletree answered that it should be. The Chair observed that it does not have to be. What interest does the County A surface owner have in minerals that are in County B? Ms. Ogletree replied that the surface owner probably has no interest in that.

The Vice Chair inquired how this relates to the language in

the Rule. Judge Pierson explained that his point was that the proposed language for section (e) of Rule 12-703 is different from the language in section (a) of Rule 12-704. Section (a) states that the petition shall be filed in the circuit court of any county in which the surface estate is located. Section (e) states that it shall be recorded in any county in which the mineral interest is located. The Chair noted that Rule 12-703 pertains to the trust. Judge Pierson said that Rule 12-704 (a) then refers to the real property. Ms. Ogletree noted that Rule 12-704 pertains to the fee simple underground interest itself.

The Chair reiterated that subsection (a)(1) of Rule 12-703 provides that the petition shall be filed in the circuit court of any county in which the surface estate is located. This is the petition to create a trust. Judge Pierson said that his point was that all of the provisions related to the place of filing should be the same. Ms. Ogletree remarked that in Rule 12-704, there are two pieces of real property, so that the filing could be in either place. The Chair responded that if there are two pieces of real property that are separate, one in County A and one in County B, the petition would have to be filed in both counties in order to include all of it. Ms. Ogletree added that there would have to be two separate deeds. The Chair commented that the petitioner in the trust in Rule 12-703 and in Rule 12-704 is the surface owner. Why should the filing not be where the surface land is? Ms. Ogletree agreed with this. The Chair said that if the property is located in two counties, the filing could

be in either one. It is where the surface property is, not where the minerals are.

The Vice Chair asked if the language in section (a) of Rule 12-704 is being changed from "real property" to "surface estate." Ms. Ogletree agreed with this change. The Chair pointed out that the statute should be consistent with this. Ms. Ogletree noted that the term "surface estate" is used in subsection (a)(2). The Chair stated that Code, Environment Article, §15-1203 (d)(1) states: "a surface owner...shall bring the action in the circuit court of the jurisdiction in which the real property is located." Ms. Ogletree said that the legislature may not have understood that this proceeding involves two pieces of real property, the above ground one and the underground one.

The Chair commented that this is a venue issue, not a jurisdictional issue. A trial court could probably interpret the term "real property" as meaning a surface estate. Ms. Ogletree said that she had no problem changing the language in the Rules to "surface estate." The Chair explained that this would be a judicial interpretation of the statute. The term "real property" must have meant "surface estate." Mr. Sykes inquired if a mineral interest is a real property interest. Ms. Ogletree answered affirmatively. Mr. Sykes said that if the property is in County A and County B, he was not sure what good it does to construe the term "real property" as was suggested. If the language satisfies the people who are doing this kind of practice, and there is any ambiguity or imperfection, it will

show up in time. The Committee should not make any changes and should adopt the language suggested by the attorneys who practice this type of law. Mr. Sykes added that he personally knows very little about this, and he was concerned about the unintended consequences of making changes to subjects that are unknown.

The Vice Chair commented that in the context of Rule 12-704 (a)(1) where the language is from the statute ("a surface owner of real property"), and the statute provides that the petition to terminate is filed where the property is located, it has the same meaning. Ms. Ogletree said that she had no problem with changing the language to "surface owner." The Chair noted that someone who has a surface estate in County A under which there is a mineral estate that runs also into County B, and who has no interest in the mineral estate in the second county would probably not file the action to terminate the mineral interest in County B. The Marcellus Shale goes through several western counties in Maryland. Ms. Ogletree added that sand and gravel deposits often span several counties.

Master Mahasa inquired whether it would make a difference if the minerals were fluid, such as oil. How would this be separated if it runs from one county to another? Someone may have a property interest in minerals that ran into another county. Can interests that are fluid be severed? The Chair commented that another issue is someone siphoning off someone else's mineral interest.

Judge Pierson suggested that the language of section (e)

should be changed to "real property." The Chair cautioned that the Rule should not be substantively inconsistent with the statute. Mr. Leahy questioned whether the Western Maryland attorneys' suggestion to add language to Rule 12-703 (e) is a mistake. It should be added to Rule 12-704. The Reporter answered affirmatively, noting that Rule 12-702 was added after they had made their original comments, so the Rules have been moved up one number. In response to Judge Pierson's suggestion, should the language in subsection (a)(1) be changed to "surface estate" or should it remain as "real property?" The language "surface estate" would be an interpretation of what the legislature surely meant, but the term "real property" is the exact language of the statute. The Chair responded that the language in the first sentence of subsection (a)(1) that reads "a surface owner of real property" would be consistent with the statute. Ms. Ogletree suggested that no change to this language be made.

The Reporter suggested that the second sentence of the language from page 4 of the comment letter, which is to be added to Rule 12-704 could read,"...Land Records of each County in which the mineral interest is located" rather than the attorneys' suggested language, which is "...Land Records of the County...". By consensus, the Committee agreed to this change. By consensus, the Committee approved Rules 12-703 and 12-704 as amended.

Reconsideration of Agenda Item 3.

Master Mahasa said that she wanted to raise an issue concerning Rule 16-813, which had been discussed in Agenda Item 3. She noted that Rule 3.8 (b) reads, as follows: "A judge shall not serve in a fiduciary position if the judge as fiduciary will likely be engaged in proceedings that will ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves...". She inquired whether a judge who is acting as a fiduciary has to immediately stop, or whether he or she is given some time to notify the estate or the trust that the judge has to stop acting as fiduciary, so the court can appoint someone else if subsequent adversary proceedings begin.

The Reporter pointed out that the amendment to Rule 16-813 is merely a "housekeeping" amendment. The Chair added that Rule 3.8 is the current law. Judge Norton noted that the comment addresses this. The Chair said that this provision has been in the law for a long time. The revision of this Rule did not change what pre-existed. If someone is in a fiduciary position, which is allowed, and a case comes up that is going to create a conflict, the judge would have to recuse himself or herself in that case. A judge should not accept a fiduciary position if the judge knows it is likely to lead to this kind of situation. Master Mahasa pointed out that the first word "or" in section (b) refers to a subsequent situation. If an adversary proceeding is initiated after a judge has become a fiduciary, what should the

judge do? The Reporter responded that this is a question for the Judicial Ethics Committee. A judge can get an ethical opinion from that Committee if that situation starts developing. The Chair noted that at the very least, the judge must recuse.

Master Mahasa remarked that she was not facing this situation, but it is one that could happen. Mr. Leahy commented that if a judge is the personal representative for his or her sister's estate, and then another sibling files proceedings, the judge has to resign at that point. Master Mahasa asked who would take care of the estate if the judge resigns. Judge Norton said that his recollection was that in the Estates and Trusts law, there is a procedure for a successor personal representative. The more difficult situation is where no statutory scheme exists.

The Chair noted that when the Special Committee which revised the Code of Judicial Conduct was looking at the Model Code, the issue came up as to what the meaning of the term "fiduciary position" was, whether it included corporate directorships and being a trustee. The view of the Committee was that it was only intended to include positions such as executors, administrators, trustees, guardians, and not being on a board of directors of a corporation. This narrows the scope of what "fiduciary" was intended to mean. The Reporter added that it is a defined term. Master Mahasa explained that her concern was not the meaning of the word "fiduciary." The Chair said that this provision has been in existence for a long time, and he did not know the answer to Master Mahasa's question.

The Chair told the Committee that the April meeting would have a full agenda, and it may last most of the day. There being no further business before the Committee the Chair adjourned the meeting.