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 Judiciary Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland, on June 22, 2007.

Members present:

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

F. Vernon Boozer, Esq.
Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Hon. James W. Dryden
Hon. Michele D. Hotten
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Zakia Mahasa, Esq.
Timothy F. Maloney, Esq.
Hon. Albert J. Matricciani
Robert R. Michael, Esq.
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Kathy P. Smith, Clerk
Sen. Norman R. Stone, Jr.
Del. Joseph F. Vallario, Jr.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
George Perry, Rules Committee Intern
Steve Casey, Esq.
Susan M. Erlichman, Esq., Executive Director, Maryland Legal Services Corporation
Cynthia DiPasquale, The Daily Record
Michael L. Jeffers, Esq., Legal Aid Bureau, Inc.
Sharon E. Goldsmith, Esq., Pro Bono Resource Center of Maryland
Harriet Robinson, Esq., Maryland Legal Services Corporation
Edward J. Gilliss, Esq., Royston, Mueller, McLean & Reid
Yoanna Moisides, Esq., University of Baltimore School of Law
Cheryl L. Hystad, Esq., Legal Aid Bureau, Inc.
Russell P. Butler, Esq., Maryland Crime Victims Resource Center
Deniece Fields, AARP Maryland
Catherine E. Stavely, Esq.
D. Robert Enten, Esq., Gordon, Feinblatt, Rothman, Hoffberger, & Hollander, LLC
Steven H. Brownlee, Esq., Vice President, Chevy Chase Bank

Gordon M. Cooley, Esq., Mercantile Bankshares Corporation
Kenneth F. Krach, Esq., M & T Bank
Kathleen M. Murphy, President, Maryland Bankers Association
Maureen McAten, MD/DC Credit Union Association
Herbert S. Garten, Esq.
Joseph Surkiewicz, Esq., Legal Aid Bureau, Inc.
Dorothy Lennig, Esq., House of Ruth
Veronica Jones, Esq., Legal Officer, Court of Appeals
David R. Durfee, Jr., Esq., Executive Director, Legal Affairs, Administrative Office of the Courts
Joseph K. Pokempner, Esq., Legal Services, Administrative Office of the Courts
Wilhelm Joseph, Esq., Legal Aid Bureau, Inc.

The Chair convened the meeting.

The Reporter introduced George Perry, a summer intern for the Rules Committee, who is a student at the University of Baltimore School of Law. He is available to do research for the subcommittees.

The Chair told the Committee that this would be the last meeting that Judge Dryden would attend in his capacity as a District Court judge, because he will be retiring from the bench. His term on the Committee has not expired, and the hope is that he will continue to serve as a judge *emeritus*. The Chair said that Judge Dryden has been an excellent judge, administrative judge, and member of the Committee. The Chair thanked Judge Dryden for his service. Judge Dryden responded that he had enjoyed serving on the Committee.

The Chair said that Master Mahasa had a resolution to read to the Committee before Agenda Items 1 and 2 are considered. Master Mahasa told the Committee that she is a member of the Bar Association for Baltimore City. Under the leadership of Mark

Scurti, Esq., the Executive Council of the Bar Association of Baltimore City adopted the following resolution:

BAR ASSOCIATION OF BALTIMORE CITY
EXECUTIVE COUNCIL

> **RESOLVED**, that the Bar Association of Baltimore City supports the adoption of an 'IOLTA Comparability Rule' to ensure that Maryland attorneys earn no less on IOLTA accounts than the rates of return generally paid to the financial institution's non-IOLTA customers on comparable accounts when the IOLTA account meets or exceeds the same minimum balance and other eligibility requirements.
>
> **BE IT FURTHER RESOLVED**, that the Bar Association of Baltimore City encourages the Maryland Rules Committee to enact the IOLTA Comparability Rule as proposed.

The Chair stated that a number of guests were interested in Agenda Items 1 and 2. He said that Agenda Item 2 would be considered first.

Agenda Item 2. Consideration of proposed amendments to: Rule 2-645 (Garnishment of Property - Generally) and Rule 3-645 (Garnishment of Property - Generally)

Mr. Bowen presented Rules 2-645, Garnishment of Property - Generally, and 3-645, Garnishment of Property - Generally, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 600 - JUDGMENT

AMEND Rule 2-645 to direct the garnishee not to attach, freeze, or place a hold on certain funds and to require the garnishee to assert a defense on behalf of the judgment debtor under certain circumstances, as follows:

Rule 2-645. GARNISHMENT OF PROPERTY - GENERALLY

. . .

(c) Content

The writ of garnishment shall:

(1) contain the information in the request, the name and address of the person requesting the writ, and the date of issue,

(2) direct the garnishee to hold, subject to further proceedings, the property of each judgment debtor in the possession of the garnishee at the time of service of the writ and all property of each debtor that may come into the garnishee's possession after service of the writ, except as provided in subsection (c)(6) of this Rule,

(3) notify the garnishee of the time within which the answer must be filed and that the failure to do so may result in judgment by default against the garnishee,

(4) notify the judgment debtor and garnishee that federal and state exemptions may be available,

(5) notify the judgment debtor of the right to contest the garnishment by filing a motion asserting a defense or objection.,

(6) direct the garnishee not to attach, freeze, or place a hold on funds consisting solely of those that are deposited electronically with the garnishee on a recurring basis and that are readily

identifiable as exempt from levy, execution, or attachment under state or federal law.

. . .

(e) Answer of Garnishee

The garnishee shall file an answer within the time provided by Rule 2-321. The answer shall admit or deny that the garnishee is indebted to the judgment debtor or has possession of property of the judgment debtor and shall specify the amount and nature of any debt and describe any property. The garnishee may assert any defense that the garnishee may have to the garnishment, as well as any defense that the judgment debtor could assert. The garnishee shall assert a defense on behalf of the judgment debtor if the garnishee holds funds consisting solely of those that are deposited electronically with the garnishee on a recurring basis and that are readily identifiable as exempt from levy, execution, or attachment under state or federal law. After answering, the garnishee may pay any garnished indebtedness into court and may deliver to the sheriff any garnished property, which shall then be treated as if levied upon by the sheriff. A garnishee who has filed an answer admitting indebtedness to the judgment debtor or possession of property of the judgment debtor is not required to file an amended answer solely because of an increase in the garnishee's indebtedness to the judgment debtor or the garnishee's receipt of additional property of the debtor.

. . .

Rule 2-645 was accompanied by the following Reporter's Note.

At the suggestion of the Legal Aid Bureau, Inc. and others, amendments to Rules 2-645 and 3-645 are proposed that direct a garnishee not to "attach, freeze, or place a hold on funds consisting solely of those that are deposited electronically with the garnishee on a recurring basis and that are readily identifiable as exempt from levy, execution, or attachment under state or federal law." The proposed amendments also

require the garnishee to assert a defense on behalf of the judgment debtor if the funds it holds are in this category.

The proposed amendments are intended to prevent attachment of except funds such as Social Security and Veterans' Administration benefits deposited by electronic fund transfers into an account of the judgment debtor. So that the Rule does not prevent the attachment of non-exempt assets, the Judgments Subcommittee of the Rules Committee has added the words "consisting solely of those" to the language that was suggested by the Legal Aid Bureau.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE -- DISTRICT COURT

CHAPTER 600 - JUDGMENT

AMEND Rule 3-645 to direct the garnishee not to attach, freeze, or place a hold on certain funds and to require the garnishee to assert a defense on behalf of the judgment debtor under certain circumstances, as follows:

Rule 3-645. GARNISHMENT OF PROPERTY - GENERALLY

. . .

(c) Content

The writ of garnishment shall:

(1) contain the information in the request, the name and address of the person requesting the writ, and the date of issue,

(2) direct the garnishee to hold, subject

to further proceedings, the property of each judgment debtor in the possession of the garnishee at the time of service of the writ and all property of each debtor that may come into the garnishee's possession after service of the writ, except as provided in subsection (c)(6) of this Rule,

(3) notify the garnishee of the time within which the answer must be filed and that failure to do so may result in judgment by default against the garnishee,

(4) notify the judgment debtor and garnishee that federal and state exemptions may be available,

(5) notify the judgment debtor of the right to contest the garnishment by filing a motion asserting a defense or objection., and

(6) direct the garnishee not to attach, freeze, or place a hold on funds consisting solely of those that are deposited electronically with the garnishee on a recurring basis and that are readily identifiable as exempt from levy, execution, or attachment under state or federal law.

. . .

(e) Answer of Garnishee

The garnishee shall file an answer within 30 days after service of the writ. The answer shall admit or deny that the garnishee is indebted to the judgment debtor or has possession of property of the judgment debtor and shall specify the amount and nature of any debt and describe any property. The garnishee may assert any defense that the garnishee may have to the garnishment, as well as any defense that the judgment debtor could assert. The garnishee shall assert a defense on behalf of the judgment debtor if the garnishee holds funds consisting solely of those that are deposited electronically with the garnishee on a recurring basis and that are readily identifiable as exempt from levy, execution, or attachment under state or federal law. After answering, the garnishee may pay any garnished indebtedness into court and may deliver to the sheriff any garnished

> property, which shall then be treated as if levied upon by the sheriff. A garnishee who has filed an answer admitting indebtedness to the judgment debtor or possession of property of the judgment debtor is not required to file an amended answer solely because of an increase in the garnishee's indebtedness to the judgment debtor or the garnishee's receipt of additional property of the debtor.
>
> . . .

Rule 3-645 was accompanied by the following Reporter's Note.

> See the Reporter's note to Rule 2-645.

Mr. Bowen explained that the proposed changes to Rules 2-645 and 3-645 direct that a garnishee not hold funds that are deposited periodically and are exempt from attachment under federal law. At a recent meeting of the Judgments Subcommittee, all of the interested parties representing the Legal Aid Bureau, the Maryland Legal Services Corporation, and the banking industry discussed the suggested change to the Rules. They presented good arguments and backed them up with written materials. The Subcommittee then met by a telephone conference call and decided not to make a recommendation as to whether the Committee should approve the proposed changes to the Rules. The dilemma for the Subcommittee was that federal law provides that certain items, such as Veterans' and Social Security benefits, are not subject to attachment. Other funds in Maryland banks also may be exempt from attachment, and can then be released on motion of the owner of the bank account. The proposed changes would shift the duty to claim an exemption from the owner of the account to the bank

that was reporting the assets to the court and holding them in the meantime. The Subcommittee agreed to bring to the full Committee the Rules as they had been presented by Legal Aid with one exception: the addition of the word "solely" in subsection (c)(6) and section (e) of Rules 2-645 and 3-645, so that the Rules apply only if the assets in the account consist solely of those that are deposited electronically with the garnishee on a recurring basis and that are readily identifiable as exempt under State or federal law.

Mr. Bowen expressed his personal opinion of this matter, which is that the recommendation of Maryland legislators, Thomas V. Mike Miller, Jr., Senate President, and Michael E. Busch, Speaker of the House, should be followed. Their view, expressed in a letter included in the meeting materials, is that this is a matter for the legislature to decide. (See Appendix 1). This is a marked shift in garnishment practice in the State of Maryland. There are many funds not subject to attachment, and the legislature added several more, such as child support and alimony. None of these have shifted the burden from the parties who are the most involved to the innocent stakeholder as these Rules do.

The Chair commented that the Rules may be procedural, but they are "substantive" procedure, involving the kind of matters that are traditionally left to the legislature, particularly when the legislature has not asked the Committee to handle it. He asked the Committee if they had any questions or comments. The

Vice Chair inquired as to whether it is federal law that prohibits attachment of these benefits. Mr. Bowen answered that federal law states that these are not subject to being attached. The proponents of the change to the Rules take the position that the funds cannot be attached. The only other state that has a similar limitation is Pennsylvania, which was introduced by a judge in a court case. It was pointed out to the Subcommittee at its recent meeting that Virginia has made a change in its garnishment form that has the same effect. The Vice Chair noted that the addition of the word "solely" results in a situation where a person could have funds in the account that might be readily identifiable as exempt from levy, but nonetheless could go through the process of being temporarily held if any other funds also had been deposited in the account. Mr. Bowen observed that the Subcommittee made the change to use the word "solely," so that if there were funds in the account from another source, the Rule would require that funds be held. The burden should not be on the bank to analyze the source of each dollar in the account.

Mr. Brault remarked that it appears that the Subcommittee heard from the bankers and from the debtors, but he questioned as to whether there has been any input from creditors' rights attorneys as to the impact on judgment creditors. Mr. Bowen noted that the two sides who were present at the meeting briefed and argued the issues very well. The Chair expressed the view that this is a matter for the legislature, given the fact that it

is active in this area, making changes frequently. There are several ways to handle this. One is to craft a rule and transmit it to the Court of Appeals with supporting materials. Another is to find out whether the Court is interested in having this rule, and then the Committee could work on it. The Vice Chair said that she understood the concern of holding funds that are not subject to garnishment, but this does not warrant putting the burden on the banks to have to analyze which funds, if any, are not subject to garnishment. This is not a matter appropriate to address by rule.

Mr. Bowen moved to let the legislature handle this subject. The Vice Chair seconded the motion, and it passed unanimously.

Agenda Item 1. Consideration of proposed amendments to: Rule 16-610 (Approval of Financial Institutions), Rule 16-602 (Definitions), Rule 16-607 (Commingling of Funds), and Rule 16-608 (Interest on Funds in Attorney Trust Accounts)

Mr. Brault presented Rules 16-610, Approval of Financial Institutions, 16-602, Definitions, 16-607, Commingling of Funds, and 16-608, Interest on Funds in Attorney Trust Accounts, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 600 - ATTORNEY TRUST ACCOUNTS

AMEND Rule 16-610 b to add to the contents of the agreement a provision concerning interest rates on IOLTA accounts, as follows:

Rule 16-610. APPROVAL OF FINANCIAL INSTITUTIONS

a. Written Agreement to be filed with Commission

The Commission shall approve a financial institution upon the filing with the Commission of a written agreement, complying with this Rule and in a form provided by the Commission, applicable to all branches of the institution located in this State.

b. Contents of Agreement

1. Duties to be Performed

The agreement shall provide that the financial institution, as a condition of accepting the deposit of any funds into an attorney trust account, shall:

(A) Notify the attorney or law firm promptly of any overdraft in the account or the dishonor for insufficient funds of any instrument drawn on the account.

(B) Report the overdraft or dishonor to Bar Counsel as set forth in subsection b 1 (C) of this Rule.

(C) Use the following procedure for reports to Bar Counsel required under subsection b 1 (B) of this Rule:

(i) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the institution's other regular account holders. The report shall be mailed to Bar Counsel within the time provided by law for notice of dishonor to the depositor and simultaneously with the sending of that notice.

(ii) If an instrument is honored but at the time of presentation the total funds in the account, both collected and uncollected, do not equal or exceed the

amount of the instrument, the report shall identify the financial institution, the attorney or law firm maintaining the account, the account name, the account number, the date of presentation for payment, and the payment date of the instrument, as well as the amount of the overdraft created. The report shall be mailed to Bar Counsel within five banking days after the date of presentation, notwithstanding any overdraft privileges that may attach to the account.

(D) Pay on its IOLTA accounts (i) a rate that is no less than the highest interest rate generally available from the institution to its non-IOLTA customers when the IOLTA account meets or exceeds the same minimum balance and other eligibility requirements, if any, or (ii) a net yield equal to or exceeding 60% of the Federal Funds Target Rate.

Committee note: Participation in the IOLTA program is voluntary for financial institutions. A financial institution that chooses to offer and maintain IOLTA accounts must pay to its IOLTA customers no less than the highest interest rate generally available from the institution as is available to its non-IOLTA customers when IOLTA accounts meet or exceed the same minimum balance or other eligibility qualifications, if any, or the "safe harbor" net yield rate of 60% of the Federal Funds Target Rate. In determining the highest interest rate generally available to its non-IOLTA customers, a financial institution may consider factors, in addition to the IOLTA account balance, customarily considered by the institution when setting interest rates for its customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers, and that these factors do not include that the account is an IOLTA account. A financial institution may satisfy the requirement of subsection b 1 (D)(i) of this Rule by establishing the IOLTA account as one of the higher rate products that is offered to its non-IOLTA customers or by paying the comparable interest rate, net of any allowable fees tied to the higher interest

rate, such as sweep fees, on qualifying IOLTA checking accounts in lieu of actually establishing the IOLTA account as the higher rate product.

Examples of product options appropriate for consideration to achieve IOLTA rate comparability for qualifying IOLTA deposits include checking accounts paying preferred interest rates, such as money market or indexed rates; business checking accounts with an automated investment feature, such as an overnight sweep and investment in repurchase agreements fully collateralized by U.S. Government Securities (including Government Sponsored Entities); or any other comparable interest bearing checking accounts offered by the financial institution to its non-IOLTA customers.

~~(D)~~ (E) Not deduct from interest on the account that otherwise would be payable to the Maryland Legal Services Corporation Fund any fees for wire transfers, presentations against insufficient funds, certified checks, overdrafts, deposits of dishonored items, and account reconciliation services.
Cross reference: Rule 16-607 b 1.

~~(E)~~ (F) Allow reasonable access to all records of an attorney trust account if an audit of the account is ordered pursuant to Rule 16-722 (Audit of Attorney Accounts and Records).

2. Service Charges for Performing Duties Under Agreement

Nothing in the agreement shall preclude an approved financial institution from charging the attorney or law firm maintaining an attorney trust account ~~(1)~~ (A) a reasonable fee for providing any notice or record pursuant to the agreement or ~~(2)~~ (B) the fees listed in subsection b 1 ~~(D)~~ (E) of this Rule.

c. Termination of Agreement

The agreement shall terminate only if:

1. The financial institution files a petition under any applicable insolvency law or makes an assignment for the benefit of creditors; or

2. The financial institution gives thirty days' notice in writing to Bar Counsel that the institution intends to terminate the agreement on a stated date and that copies of the termination notice have been mailed to all attorneys and law firms that maintain trust accounts with any branch of that institution; or

3. The Commission finds, after prior written notice to the institution and adequate opportunity to be heard, that the institution has failed or refused without justification to perform a duty required by the agreement.

Source: This Rule is derived from former Rule BU10.

Rule 16-610 was accompanied by the following Reporter's Note.

In recent years, the gap between interest rates on IOLTA accounts and interest rates on comparable non-IOLTA accounts has widened. Proposed amendments to Rule 16-610 b add to the contents of an approved financial institution's written agreement a "comparability" provision with respect to IOLTA accounts. The provision requires that the interest rate on IOLTA accounts be not less than the interest rate on similar, non-IOLTA accounts; alternatively, the financial institution may pay a "safe harbor" net yield that equals or exceeds 60% of the Federal Funds Target Rate. Twelve states have adopted "comparability" provisions, and on April 17, 2007, the Maryland State Bar Association Board of Governors adopted a Resolution in support of the concept.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 600 - ATTORNEY TRUST ACCOUNTS

AMEND Rule 16-602 to add a definition of "IOLTA," as follows:

Rule 16-602. DEFINITIONS

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

a. Approved Financial Institution.

"Approved financial institution" means a financial institution approved by the Commission in accordance with these Rules.

b. Attorney.

"Attorney" means any person admitted by the Court of Appeals to practice law.

c. Attorney Trust Account.

"Attorney trust account" means an account, including an escrow account, maintained in a financial institution for the deposit of funds received or held by an attorney or law firm on behalf of a client or third person.

d. Bar Counsel.

"Bar Counsel" means the person appointed by the Commission as the principal executive officer of the disciplinary system affecting attorneys. All duties of Bar Counsel prescribed by these Rules shall be subject to the supervision and procedural guidelines of the Commission.

e. Client.

"Client" includes any individual, firm, or entity for which an attorney performs any legal service, including acting as an escrow agent or as a legal representative of a fiduciary. The term does not include a public or private entity of which an attorney is a full-time employee.

f. Commission.

"Commission" means the Attorney Grievance Commission of Maryland, as authorized and created by Rule 16-711 (Attorney Grievance Commission).

g. Financial Institution.

"Financial institution" means a bank, trust company, savings bank, or savings and loan association authorized by law to do business in this State, in the District of Columbia, or in a state contiguous to this State, the accounts of which are insured by an agency or instrumentality of the United States.

h. IOLTA.

"IOLTA" (Interest on Lawyer Trust Accounts) means interest on attorney trust accounts payable to the Maryland Legal Services Corporation Fund under Code, Business Occupations and Professions Article, §10-303.

~~h.~~ i. Law Firm.

"Law firm" includes a partnership of attorneys, a professional or nonprofit corporation of attorneys, and a combination thereof engaged in the practice of law. In the case of a law firm with offices in this State and in other jurisdictions, the Rules in this Chapter apply only to the offices in this State.

Source: This Rule is derived from former Rule BU2.

Rule 16-602 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 16-602 adds a definition of "IOLTA."

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 600 - ATTORNEY TRUST ACCOUNTS

AMEND Rule 16-607 to conform to amendments to Rule 16-610, as follows:

Rule 16-607. COMMINGLING OF FUNDS

. . .

b. Exceptions.

1. An attorney or law firm shall either (A) deposit into an attorney trust account funds to pay any fees, service charges, or minimum balance required by the financial institution to open or maintain the account, including those fees that cannot be charged against interest due to the Maryland Legal Services Corporation Fund pursuant to Rule 16-610 b 1 ~~(D)~~ (E), or (B) enter into an agreement with the financial institution to have any fees or charges deducted from an operating account maintained by the attorney or law firm. The attorney or law firm may deposit into an attorney trust account any funds expected to be advanced on behalf of a client and expected to be reimbursed to the attorney by the client.

. . .

Rule 16-607 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 16-607 conforms it to the amendments to Rule 16-610.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 600 - ATTORNEY TRUST ACCOUNTS

AMEND Rule 16-608 to conform to amendments to Rules 16-602 and 16-610, as follows:

Rule 16-608. INTEREST ON FUNDS IN ATTORNEY TRUST ACCOUNTS

a. Generally.

Any interest paid on funds deposited in an attorney trust account, after deducting service charges and fees of the financial institution, shall be credited and belong to the client or third person whose funds are on deposit during the period the interest is earned, except to the extent that interest is paid to the Maryland Legal Services Corporation Fund as authorized by law. The attorney or law firm shall have no right or claim to the interest.

Cross reference: See Rule 16-610 b 1 ~~(D)~~ (E) providing that certain fees may not be deducted from interest that otherwise would be payable to the Maryland Legal Services

Corporation Fund.

b. Duty to Report IOLTA Participation.

Each attorney admitted to practice in Maryland shall report annually information concerning all IOLTA ~~(Interest on Lawyer Trust Accounts)~~ accounts, including name, address, location, and account number, on a form approved by the Court of Appeals and mailed and returned annually as directed by the Court of Appeals.

Cross reference: See Code, Business Occupations and Professions Article, §10-303.

Source: Section a of this Rule is former Rule BU8. Section b is new.

Rule 16-608 was accompanied by the following Reporter's Note.

The proposed amendments to Rule 16-608 conform the cross reference following section a to the relettering of Rule 16-610 and delete from section b language that is unnecessary in light of the proposed addition of a definition of "IOLTA" to Rule 16-602.

Mr. Brault told the Committee that the amendments before the Committee today had been drafted by the Rules Committee's staff in an effort to provide a rapid response to correspondence from the Honorable Robert M. Bell, Chief Judge of the Corut of Appeals. (See Appendix 2.) The issue of changing the Rules to ensure that interest rates on IOLTA (Interest on Lawyer Trust Accounts) bank accounts are the same as for other bank accounts did not come before the Attorneys Subcommittee. The Subcommittee did not have the benefit of the two sides presenting their views, as the Judgments Subcommittee had on the previous issue. Mr.

Brault had discussed IOLTA at the recent Maryland State Bar Association meeting. It is difficult not to be completely in favor of IOLTA. This subject was initially introduced and explained by Herbert Garten, Esq. at its inception, and Mr. Brault remarked that he had not forgotten those lessons. Lawyers tend to favor IOLTA, which increases the ability of the Legal Services Corporation to provide help to the less fortunate. Mr. Brault has also discussed the problems perceived by the other side, the banks. It is difficult to define what is "comparable." This will cause much of the debate related to this issue. The question of legislative primacy is present in Rule 16-610, as well as in the Rules discussed earlier today. In the letters received from Senate President Miller and Speaker of the House Busch, they do not specify what it is they want to do, but they must have some interest in this subject, or they would not have sent the letters. (See Appendix 3).

Mr. Brault said that like most lawyers, he is involved with different types of bank accounts, such as his personal accounts and those relating to his law firm. He stated that he is not in a position to define what a "comparable" account is. He expressed his preference for the Attorneys Subcommittee to meet and for representatives of the Maryland Legal Services Corporation (MLSC) and the banking industry to attend the meeting to participate in drafting a rule. He commented that he hesitates to let an opportunity go by to improve the recovery of monies that go to the MLSC. Mr. Boozer expressed the view that

this issue is different from the garnishment matter that was just discussed. He sent a letter on this issue to Senate President Miller and Speaker Busch. (See Appendix 4.) The matter is in front of the Committee because of the March 22, 2007 letter from Chief Judge Bell, in which Chief Judge Bell noted that time is of the essence and that he is anxious to move forward with this matter as quickly as possible. Mr. Boozer asked that the matter be heard today, before a decision is made as to whether this is a matter for the legislature, which he believes is the wrong decision. Several interested persons are present, and their testimony should not be very lengthy. They have taken the time from their busy schedules to come to the meeting and are ready to answer any questions that the Committee may have. Some have come from out of town.

Mr. Boozer said that the Rule does not mandate that the banks pay a higher interest rate. He is on the board of the MLSC, and they have tried to work with the banks. Chief Judge Bell has asked for this matter to be considered as quickly as possible, and those interested persons present today should not have to be brought back again without having had the opportunity to speak. They can be heard today, and then the Subcommittee can discuss the matter.

The Chair agreed, noting that this matter has been put on a fast track because of the letter from Chief Judge Bell. This is the second of the two options previously referred to by the Chair when Agenda Item 2 was discussed to craft a rule to present to

the Court of Appeals, and the Court can decide whether it wants to defer to the legislature. There is no need to bring back the interested persons who are already present today.

Edward J. Gilliss, Esq., President of the Maryland State Bar Association (MSBA), told the Committee that he was speaking on behalf of the almost 23,000 members of the MSBA. On April 17, 2007, the MSBA Board of Governors, a representative group of lawyers from across the State, passed a resolution that is in the meeting materials for today. (See Appendix 5). The Board of Governors unanimously endorsed that the "comparability" rule be added to the Maryland Rules of Procedure. Along with its purpose of being a voice for Maryland lawyers and providing services to its members, the MSBA has in its mission a statement promoting access to justice. The Board of Governors decided that an excellent way to accomplish this is to increase funds to the MLSC. The MSBA supports the "comparability" rule.

Mr. Bowen asked whether the MSBA would support a sales tax on legal services if the proceeds were dedicated to the poor. Mr. Gilliss responded that he was not sure as to what the MSBA position would be on that. There have been other suggestions to tax legal services, and the MSBA has always opposed it. Mr. Maloney commented that, unlike a sales tax, which is solely within the province of the legislature, IOLTA "comparability" involves a legitimate question as to whether the matter falls within the province of the rule-making authority of the Court of Appeals. However, there is near universal agreement that

interest on IOLTA accounts should be maximized. He noted that the Bar of Maryland can publicize which financial institutions offer the higher interest rates. Most lawyers support IOLTA, and if they knew which institutions offered the higher rate, it would have an effect on the market. A minister, the Reverend Jackson Weaver, who has a Masters of Business Administration from Harvard Uniersity, published an article which informed the public as to which financial institutions gave the best interest rate for churches in Prince George's County, and this had a major impact on the financial services market.

Mr. Maloney said that he is not suggesting that something like this should be a substitute for changing the interest rate, but he asked why the Bar is not taking similar action. Mr. Gilliss replied that there is a published "Honor Roll" of banks that pay higher rates. The MSBA encourages its members to keep there IOLTA accounts at these banks, but it cannot require them to do so. Mr. Maloney inquired as to where the list can be found, and Mr. Gilliss answered that it is in materials published by the MSBA. The Chair added that the list has grown from two or three banks to about 12 banks. Ms. Potter remarked that it is very difficult for a lawyer transfer his or her escrow accounts to a different bank.

Susan Erlichman, Esq., Executive Director of the MLSC, thanked the Committee for the opportunity to speak. She said that she would be speaking on behalf of Chief Judge Bell's March 22, 2007 letter requesting the Rules Committee to consider

amending Rule 16-610, Approval of Financial Institutions. The IOLTA program in Maryland was created in 1982, and the legislature converted it to a mandatory program in 1989 to earn revenue for providing legal services to the poor. Since that time, all procedural activities regarding IOLTA have been undertaken by the Maryland Judiciary in the appropriate role of regulating the behavior of lawyers. Chapter 600 of Title 16 of the Maryland Rules of Procedure regulates lawyer behavior as to trust accounts generally and IOLTA specifically. In regulating the behavior of lawyers, Rule 16-610 speaks to the requirements that a financial institution must meet to be certified as an approved financial institution to hold trust funds. Current provisions include notifying the lawyer and Bar Counsel of overdrafts, allowing Bar Counsel reasonable access to trust accounts records, and stating that certain fees will not be charged against IOLTA revenue. The proposed amendments logically follow the court's adoption of the provision prohibiting extraordinary fees. The amendments add provisions to Rule 16-610 requiring financial institutions to pay rates on IOLTA accounts comparable to those paid on other similarly situated non-IOLTA accounts.

Ms. Erlichman acknowledged the objections that have been raised regarding the jurisdiction of the Court of Appeals. Maryland is in the minority of states where both the legislature and the judiciary have concurrently acted. Code, Business Occupations and Professions Article, §10-301 pertains to attorney

trust accounts, and the Title 16, Chapter 600 Rules also address the same subject. Notwithstanding the fact that this is addressed by both statute and rule, IOLTA comparability is clearly within the jurisdiction of the Court of Appeals. Rule 16-610 provides for the conditions under which a financial institution may hold attorney escrow accounts. The legislature has not acted in this area and has specifically recognized the Court's authority to do so. Code, Business Occupations and Professions Article, §10-302 (b) states: "Each attorney trust account shall be maintained at an approved financial institution, as provided in the Maryland Rules." The Rules Committee heard the same jurisdictional objections from the bankers ten years ago when the Committee considered the rules prohibiting banks from charging certain fees against IOLTA revenues. The Committee's view at that time was that the Court of Appeals had jurisdiction. The Court exercised its jurisdiction when it adopted section (b) of Rule 16-608, Interest on Funds in Attorney Trust Accounts.

Ms. Erlichman said that IOLTA revenue is a creature of economic activity and the interest rate environment, neither of which is static. In January 2001, the federal funds target rate began a steady decline, and the IOLTA revenue also declined. In response to this, the MSBA and MLSC created the IOLTA Honor Roll in an attempt to stem the impact of loss of funding. The creation of the Honor Roll occurred in a dramatically different interest rate environment than the one that exists today. The 1.5% rate (this continues to be the rate today) that was required

for banks to give to be an Honor Roll member was very aggressive at the time the Honor Roll was instated. The federal funds rate was under 2% and falling. Banks are not charitable institutions, and interest rates were going down. Although a few public-spirited banks came forward to join the Honor Roll, the MLSC had to suffer like other depositors and wait until the rates went back up. Rates began to turn around in mid-2004, and from June 2004 to June 2006, the federal funds short-term target rate increased 17 times to its current rate of 5 1/4%. That is when what is known as the “IOLTA phenomenon” that brings up the issue of comparability began to emerge. When rates went down, IOLTA rates went down. When rates went back up, IOLTA rates went nowhere.

Ms. Erlichman explained that she had distributed a chart at the meeting today labeled “MD Historical Interest Rate Comparison: 2003 - 2007." (See Appendix 6). It provides a graphic picture of the issue being discussed today. The top line in dark blue represents the federal funds rate, and the bottom line in yellow represents the Maryland IOLTA rate. The pink line is the average rate currently paid in Maryland for a high balance account, and the light blue line is the “safe harbor” rate. This picture has been seen nationwide, not only in Maryland. The IOLTA program and courts around the country began to address this issue. Currently 14 states have adopted IOLTA comparability rules: Alabama, Arkansas, Connecticut, Florida, Illinois, Indiana, Massachusetts, Michigan, Minnesota, New Jersey, Ohio,

Pennsylvania, Texas, and Utah. Six other jurisdictions, including the District of Columbia, are moving forward to adopt similar rules. The Vice Chair inquired as to whether the listed states have adopted a comparability statute or rule. Ms. Erlichman replied that most of the states have a rule, but not all of them. New York's regulation, which will be in effect in the next 10 days, was put into place by an executive regulation issued by the Governor.

Mr. Maloney asked what the market reaction was to these rules or statutes –- did banks comply, or did lawyers move their accounts to other banks? Ms. Erlichman responded that as of today, there is not one bank in the states that have implemented comparability that has not come into compliance with the comparability rule. Master Mahasa questioned whether the states are paying the highest interest rate or comparable interest rates. Some of the drafts of the Rule refer to the former and some to the latter. Ms. Erlichman answered that the states are paying the highest interest rates generally available on comparable accounts. Mr. Steve Casey, a consultant to the MLSC, who is present at the meeting, will speak to this later. Many IOLTA accounts in Maryland have balances of well over $100,000; some have over $1,000,000. This Rule requires that if a non-IOLTA customer, who needs absolute liquidity and access to the funds but wants to earn the highest interest rate, opens an appropriate account, without other specific requirements, the bank must offer an IOLTA customer the same interest rate if the

fact pattern is the same for the two customers. The bank sets its rates; this Rule does not set bank rates.

Mr. Brault commented that recently, a set of mandatory ethical rules was revised relating to the maintenance and accounting of client funds and trust accounts, with precise ethical requirements. A failure to observe those requirements would result in disciplinary proceedings against the lawyer. If the changes to Rule 16-610 are adopted, would it mean that every lawyer would have to shop around for the best rates on the trust accounts or risk getting into trouble for violating the ethical rules? Ms. Erlichman replied that it would not, explaining that to implement the Rule, the MLSC will work with all of the banks individually to make sure that each bank is in compliance. The lawyers do not have to look at the rates at all. No lawyer is required to change banks unless the bank decides to end its participation in the IOLTA program.

The Chair questioned whether the proposed change to the Rules is, in reality, regulating the banks. Ms. Erlichman said that it is not regulating banks, noting that as in many other states, the Rule pertains to the regulation of lawyers. The Chair responded that if that is the case, then this provision can go into the Rules of Professional Conduct as a rule providing that the lawyer has to place his or her escrow account with a financial institution that pays the highest interest. Ms. Ogletree disagreed, explaining that there are lawyers with a small-town practice, including real estate settlements that are

not handled by title companies. Each bank requires that the lawyer have an escrow account with it; Ms. Ogletree has five different escrow accounts. At some time, each account may have a balance of $3 in it, or whatever the minimum is to retain the account. When there is a large real estate settlement, there is more money in the account, and MLSC receives the interest. One of the banks with which Ms. Ogletree does the most business is not on the Honor Roll list. She would like MLSC to receive as much money as possible, but the way to do that is to provide that the banks must pay a rate comparable with whatever they are paying their other customers. The specific rate does not matter as long as MLSC is not getting short-changed.

Mr. Bowen expressed the view that regulating the banks is more appropriate for the legislature and that the issue of comparability makes no sense, because there are no accounts comparable to IOLTA accounts with their specific provisions. The Vice Chair pointed out that to the extent that this discussion pertains to the regulation of banks, this has already been the subject of some of the Rules of Procedure. The Chair added that the applicable statute expressly refers to the Rules of Procedure.

The Vice Chair expressed the opinion that this is not a matter for the legislature, because it has been part of the Rules for such a long time. She said that she did not like the Committee note in Rule 16-610, because it seems to create more problems than it solves. She suggested that the note be deleted,

so that the proposal would be to pay on IOLTA accounts the comparable rate that any equivalent customer would get or use the "safe harbor" provision. She asked what the sanction is if there are no comparable accounts. Ms. Erlichman replied that there is no sanction. The MLSC does not decide whether a bank is wrong or right. The issue is whether the rates are applied fairly. The Vice Chair then inquired as to what happens if the rates are not applied fairly. Ms. Erlichman answered that the MLSC would negotiate with each bank in the implementation phase. Her colleague, Mr. Casey, who is present today, has been involved in the implementation phase in states that have more banks than Maryland. If the banks have a reasonable basis for stating what the comparable rate is, the MLSC would not dispute this.

The Vice Chair commented that it is very difficult to disagree with the Rule. It simply provides that the bank should be as fair to an IOLTA account as it is to other accounts. It encourages banks to be equitable, but it has no sanction. Judge Matricciani remarked that the sanction is that a bank would not be approved to be part of IOLTA. The Vice Chair noted that although the Rule uses the word "shall," it is more of an encouragement rather than mandatory. Ms. Erlichman said that to her knowledge, there has not been opposition to implementing the Rule in other states. This is a rule that regulates lawyers. If a bank were paying 3% interest on other similarly situated accounts and .2% on a $500,000 IOLTA account, the bank would not be in compliance, and the lawyer would have to move his or her

IOLTA account to another bank. The Chair asked if that is much of a problem for practitioners in the smaller jurisdictions, who use several banks, because they must to be able to do so in conjunction with real estate transactions. If Ms. Ogletree's banks will not cooperate, how much of a problem is it for her to use other banks? How many lawyers around the State are likely to be in that situation? Ms. Ogletree responded that when she conducts a real estate settlement, she must escrow the funds in the bank that is providing the loan. Ms. Erlichman said that she had no reason to believe that Maryland is any different than the other 14 states that have a similar rule. Once the rule is in effect, compliance is not a problem.

The Chair inquired as to whether the banks have been asked about this program. Ms. Erlichman answered that the MLSC has been working with the banks to get them to voluntarily participate ever since the interest rates began to rise again. The Chair asked whether the banks have been resistant to participating. Ms. Erlichman replied that there has been resistance. 70% of Maryland financial institutions pay rates that are less than 1% to IOLTA. Half of them pay less than 1/4%. The Chair questioned as to how many banks refuse to cooperate in the absence of a legislative provision or a rule change. Ms. Erlichman responded that letters have been sent to every bank in Maryland asking each bank to raise its rate, because the interest rates have increased. The MLSC usually receives no response or a negative response. The Chair pointed

out that the headquarters of some banks with branches in Maryland are in other states. He inquired as to who makes the decision on behalf of the bank. If the letter is sent to the Bank of America, for example, it may be read by someone in North Carolina. Ms. Erlichman noted that the efforts of the MLSC have not been totally fruitless. The Bank of America has increased its rate, as have several other banks. IOLTA income has increased by $2 million. The bad news is that 70% of the banks pay less than 1%, despite the best efforts of the MLSC.

The Chair asked again how many banks have refused to increase their rates. There is a difference between sending a letter and asking a bank employee directly. Ms. Erlichman said that the personal communication was with the larger banks. Mr. Michael inquired as to what it is the banks are being requested to do. Ms. Erlichman answered that the banks are being asked to treat IOLTA customers the same as they treat other customers with similar banking needs. Mr. Maloney inquired as to what the financial impact would be for IOLTA if all banks were in compliance. Ms. Erlichman replied it could be an additional $6 million that would allow the MLSC to serve 20,000 more low-income Marylanders, who have many legal problems and are now proceeding *pro se*.

Ms. Ogletree questioned as to whether it would be considered to be comparable for a bank who pays .65% to its regular customers to pay the same to the IOLTA customers. Ms.

Erlichman responded that passbook interest rates may not be comparable, but Mr. Casey would address this. The Vice Chair asked Ms. Erlichman if she objected to elimination of the Committee note after subsection (b)(1)(D) of Rule 16-610. Ms. Erlichman answered that she would have to confer with Mr. Casey. Mr. Brault inquired as to whether there has been a study of comparability in terms of what the accounts do. An account may have a certain interest rate, and the account-holder writes four checks a month, while an IOLTA account-holder may write 400 checks a month. Has there been any study as to whether the service charges or the number of checks have an effect on the rates? Ms. Erlichman replied that Mr. Casey will speak to this.

The Chair announced that because Mr. Butler, who had suggested the changes to several rules in Agenda Item 3, had to leave the meeting very soon, the discussion of Agenda Item 1 would be interrupted at this point.

Agenda Item 3. Reconsideration of proposed amendments to: Rule 4-217 (Bail Bonds), Rule 4-242 (Pleas), Rule 4-265 (Subpoena for Hearing or Trial), and Rule 4-264 (Subpoena for Tangible Evidence Before Trial in Circuit Court)

Mr. Karceski presented Rules 4-265, Subpoena for Hearing or Trial, and 4-264, Subpoena for Tangible Evidence Before Trial in Circuit Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-265 to add definitions to a new section (a); to delete language from section (b); to change the tagline of and delete language from section (c); to add a new section (d) providing that the request for a subpoena contain a designation of the materials, not privileged, which constitute or contain evidence to be produced; to add a new section (e) pertaining to filing and service; to add a cross reference after section (e); and to make stylistic changes, as follows:

Rule 4-265. SUBPOENA FOR HEARING OR TRIAL

(a) Definitions

(1) Trial

For purposes of this Rule, "trial" shall also include any "hearing."

(2) Trial Subpoena

For purposes of this Rule, "trial subpoena" shall also include any "hearing subpoena."

~~(a)~~ (b) Preparation by Clerk

On request of a party, the clerk shall prepare and issue a subpoena commanding a witness to appear to testify at ~~a hearing or~~ trial. ~~Unless the court waives the time requirements of this section, the request shall be filed at least nine days before trial in circuit court, or seven days before trial in District Court, not including the day of trial and intervening Saturdays, Sundays, and holidays.~~ The request for subpoena shall state the name, address, and county of the witness to be served, the date and hour when the attendance of the witness is required, and the party requesting the subpoena. ~~If the request is for a subpoena *duces tecum*, the request also shall contain a designation of the documents, recordings, photographs, or other tangible things, not~~

~~privileged, which constitute or contain evidence relevant to the action, that are to be produced by the witness. At least five days before trial, not including the day of trial and intervening Saturdays, Sundays, or holidays, the clerk shall deliver the subpoena for service pursuant to Rule 4-266 (b).~~

~~(b)~~ (d) Preparation by Party or Officer of the Court

On request of a party entitled to the issuance of a subpoena, the clerk shall provide a blank form of subpoena which shall be filled in and returned to the clerk to be signed and sealed before service. On request of an attorney or other officer of the court entitled to the issuance of a subpoena, the clerk shall issue a subpoena signed and sealed but otherwise in blank, which shall be filled in before service. ~~Unless impracticable, a party shall make a good faith effort to cause a trial or hearing subpoena to be served at least five days before the trial or hearing.~~

(e) Subpoena *Duces Tecum*

If the subpoena is a subpoena *duces tecum*, the request also shall contain a designation of the documents, recordings, photographs, or other tangible things, not privileged, which constitute or contain evidence relevant to the action, that are to be produced by the witness.

(d) Filing and Service

Unless the court waives the time requirements of this section, the request for subpoena shall be filed at least nine days before trial in the circuit court, or seven days before trial in the District Court, not including the date of trial and intervening Saturdays, Sundays, and holidays. At least five days before trial, not including the date of the trial and intervening Saturdays, Sundays, or holidays, the clerk shall deliver the subpoena for service pursuant to Rule 4-

266 (b). Unless impracticable, there must be a good faith effort to cause a trial subpoena to be served at least five days before the trial.

Cross reference: Code, Health General Article, §4-306 requires that a subpoena to produce medical records without the authorization of a person in interest be accompanied by a certification that a copy of the subpoena has been served on the person whose records are being sought or that the court has waived service for good cause.

Source: This Rule is derived from former Rule 742 b and M.D.R. 742 a.

Rule 4-265 was accompanied by the following Reporter's Note.

Russell Butler, Esq. pointed out an inadvertent omission in Rule 4-265. Current section (a), pertaining to subpoenas prepared by the clerk, provides that privileged material should not be subpoenaed, but current section (b), pertaining to subpoenas prepared by a party, does not contain that prohibition. Mr. Butler suggests adding a new section (d) to Rule 4-265 that would contain language similar to that currently in section (a) providing that the request for a subpoena contain a designation of the materials, not privileged, which constitute or contain evidence, relevant to the action, that are to be produced by the witness. The Criminal Subcommittee is in agreement with Mr. Butler's suggestion to add a new section (d).

In discussing the proposed changes to Rule 4-265, the Rules Committee pointed out that the Rule refers to both "hearing or trial" as well as only to "trial." To correct this ambiguity, a definitions section is proposed to be added as section (a). The Committee also expressed the view that the timing provisions of the Rule should be the same whether the subpoena is prepared by the clerk or by a private process server. The Subcommittee proposes to add a new section (e) pertaining to filing and service that

does not differentiate between subpoenas prepared by the clerk or subpoenas prepared by a private process server.

To address privacy issues related to medical records required by Public Law 104-191 (1996), the Health Insurance Portability and Accounting Act, the Subcommittee recommends adding a cross reference to the Code; the same cross reference was also previously added to Rule 2-510.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-264 to add a cross reference at the end of the Rule, as follows:

Rule 4-264. SUBPOENA FOR TANGIBLE EVIDENCE BEFORE TRIAL IN CIRCUIT COURT

On motion of a party, the circuit court may order the issuance of a subpoena commanding a person to produce for inspection and copying at a specified time and place before trial designated documents, recordings, photographs, or other tangible things, not privileged, which may constitute or contain evidence relevant to the action. Any response to the motion shall be filed within five days.

Cross reference: Code, Health General Article, §4-306 requires that a subpoena to produce medical records without the authorization of a person in interest be accompanied by a certification that a copy of the subpoena has been served on the person

whose records are being sought or that the court has waived service for good cause.

Source: This Rule is derived from former Rule 742 a.

Rule 4-264 was accompanied by the following Reporter's Note.

See the third paragraph of the Reporter's Note to Rule 4-265.

Mr. Karceski explained that Mr. Butler had pointed out that existing Rule 4-265 consists of sections (a) and (b). Section (a) provides that a request for a subpoena *duces tecum* shall contain a designation of the documents, recordings, photographs, or other tangible things, not privileged, which constitute or contain evidence, while section (b) does not refer to privileged items. Mr. Butler suggested that a new section be added to the Rule that would address subpoenas *duces tecum* and include a reference to privileged information as well as have a cross reference to Code, Health General Article, §4-306. The same cross reference appears in Rule 2-510, Subpoenas. The most recent version of Rule 4-265 was handed out today. The Code provision requires that a subpoena to produce medical records without the authorization of a person in interest be accompanied by a certification that a copy of the subpoena has been served on the person whose records are being sought. Rule 4-265 has been reconstituted. A new section (a), Definitions, has been added indicating that the word "trial" includes any hearing and that the term "trial subpoena" includes a hearing subpoena for the

purposes of the Rule.

Mr. Karceski explained that section (b) of Rule 4-265 had been section (a). It does not include all of the language that originally was in section (a), because the language referring to "a designation of the documents, recordings, photographs, or other tangible things, not privileged" has been deleted from new section (b) and moved to new section (e), which refers to the privileged information. Relettered section (d), Filing and Service, pertains to every kind of subpoena. The Subcommittee agrees that a request for subpoena must be filed at least nine days before trial in the circuit court, which has been the rule for some time, not including the date of trial and intervening Saturdays, Sundays, and holidays. In the District Court, cases are often set quickly. In some jurisdictions, the trial is within 30 days after the case is filed, particularly in a criminal case, so the Subcommittee agrees that the time for filing a request for a subpoena in the District Court should remain at least seven days before trial. The subpoena should be delivered to the party and served on the witness at least five days before trial, unless there is some issue that makes this impractical.

The Assistant Reporter pointed out that the numbering of the sections of the Rule is not correct. Mr. Karceski responded that he had noticed this, and he noted that section (d), Preparation by Party or Officer of the Court, should be section (c); section (e), Subpoena *Duces Tecum*, should be section (d); and section

(d), Filing and Service, should be section (e). Mr. Karceski told Mr. Butler that not all of the changes to the Rule that Mr. Butler had requested were made. Mr. Butler said that the indicated changes are substantially what he felt was necessary. It had been unclear that rules for privilege apply to all subpoenas, and that has been clarified. Once privileged information is obtained, the damage cannot be undone.

The Chair hypothesized a case where the defendant is charged with sexual child abuse, and the history is that the abuse is alleged to have occurred ten years ago. The defense attorney knows that the alleged victim has been in and out of mental institutions. Would the defense attorney be prohibited from issuing a subpoena *duces tecum* for the records? The records of the prior hospitalizations under the Health Insurance Portability and Accounting Act, PL 104-191 and Code, Health General Article are either privileged, confidential, or both and may be inadmissible for other reasons. The Rule should not state that the records cannot be subpoenaed. Privilege can be asserted, and the judge will resolve the issue. Mr. Butler responded that the Rule already provides that records containing privileged information cannot be subpoenaed. The Rule is consistent with various cases, including *U.S. v. Nixon*, 418 U.S. 683 (1974) and *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), which hold that there must be a judicial determination. This is consistent with the Maryland case law in *Zaal v. State*, 326 Md. 54 (1992) and

Fisher v. State, 128 Md. App. 79 (1999). The existing Rule requires that records as to which a privilege is asserted may be obtained only by court order, not by subpoena. The Chair said that if the Rule is to be changed, the current language can be deleted. The Rule should state that the records can be subpoenaed, and if a privilege is asserted, the judge will decide. Mr. Karceski remarked that when he has been in the type of situation similar to the Chair's hypothetical situation, he has sent a subpoena with a letter to the medical institution and filed a copy with the State's Attorney and the court. The letter explains that he is asking for the information, but he does not want it until the court has been able to rule upon it. His feeling is that the subpoena should go out to the person who will know that this information is being sought, so that the trial date of the case is not delayed. If there is to be an objection, it can be dealt with by way of a hearing or by way of a court's order. If the language precluding subpoenas of records is deleted from the Rule, this procedure may be left to occur in an unbridled manner. The Chair agreed with Mr. Karceski. The Rule does not provide for the procedure described by Mr. Karceski, but it has worked well for him.

The Chair asked Mr. Butler if he had any other comments. Mr. Butler reiterated that it appears to have been an oversight to exclude the reference to privileged information in existing section (b). Mr. Karceski explained that the addition of the

cross reference that is also in Rule 2-510 was in response to Mr. Butler's suggestion. Mr. Butler clarified that at the previous Rules Committee meeting, the Chair had asked for a reference to health record privacy issues. By consensus, the Committee approved Rules 4-265 and 4-264 as presented.

Agenda Item 1. (continued)

Mr. Casey told the Committee that he was with the Massachusetts IOLTA program, and that Massachusetts recently enacted a similar provision to the one being proposed in Rule 16-610. He said that prior to working with the IOLTA program, he had been in the banking industry for eight years and he is the immediate past President of the National Association of IOLTA. He wanted to share with the Committee the experience of the Massachusetts IOLTA Committee. The same problems of rates occurred in Massachusetts; a few banks paid reasonable rates on IOLTA accounts, but far too many paid .1 of 1%. To achieve a standard of fairness, the Massachusetts comparability rule was adopted in August 2006, with an effective date of January 1, 2007. There are approximately 200 financial institutions in Massachusetts, and all of those are certified to be in compliance with the Rule. No bank opted out of participating in IOLTA. The average interest rate increased from approximately 1.25% to 2.5%, effectively doubling the IOLTA interest rate.

Judge Matricciani inquired as to whether the banks in Massachusetts had a problem determining comparability. Mr. Casey replied that there was no problem. The Rule in Massachusetts is

more lengthy than in Maryland and was purposely crafted to identify comparability. It includes some of the provisions of the Committee note that is proposed to be added to Rule 16-610 to give the banks guidance. The program in Illinois had an effective date of June 1, 2007. All of that state's financial institutions have been certified as in compliance with the IOLTA program. The Vice Chair questioned as to who in Massachusetts certifies that the banks are in compliance. Mr. Casey replied that the IOLTA program certifies. The Vice Chair asked if the certification in Maryland is done by the Attorney Grievance Commission. Ms. Erlichman responded that the MLSC works in conjunction with the Attorney Grievance Commission.

Mr. Casey commented that across the country, in the 14 states that have IOLTA programs in place, there are 1500 certified banks. National banks operating in Maryland such as Citibank and Bank of America, as well as regional banks such as Suntrust and Wachovia, have already gone through this process in other states. The Chair asked whether these banks have refused to cooperate in Maryland. Ms. Erlichman replied affirmatively. For example, for one bank, it took her some time to track down the correct bank representative, who was located in North Carolina. The bank representative refused to cooperate. The bank has increased its rate somewhat, but the bank pays much more competitive rates in the "comparability" states, where it is required to do so if it wishes to provide IOLTA accounts. The bank was not going to increase IOLTA rates any higher, unless it

is required to do so. The Chair observed that the bank had increased the rate some, but it was not what the MLSC was hoping for. Ms. Erlichman said that the Federal Funds Target Rate had increased from 1% to 5 1/4%, but the bank increased the IOLTA rate only slightly. Although MLSC is grateful for any increase, the new rate is not a comparable interest rate with the rate paid to other customers. The Chair noted that it is interesting that the bank offers comparable rates in some states, but not in others. Ms. Erlichman responded that they offer comparable rates in states that have the Rule being discussed today.

The Vice Chair inquired as to whether the Rules in other states specify which accounts are comparable to the IOLTA accounts. Mr. Casey replied that some states do, while some do not. Massachusetts is one that so specifies. The Vice Chair questioned Mr. Casey as to whether there was much argument over what is comparable. Mr. Casey answered that once the Rule became effective, the arguments ended. The Chair asked what the exact language of the Massachusetts Rule is that seems to have solved the problem. Mr. Casey responded that it is comparable to the language in the Committee note proposed to be added to Rule 16-610, but the Massachusetts version is much lengthier. It explains which accounts are not comparable, such as money market accounts. The Vice Chair inquired as to which accounts are considered to be comparable. Mr. Casey replied that checking accounts with preferred interest rates are comparable. Most institutions offer three or four types of checking accounts.

Generally, the IOLTA accounts are on the low end of interest rates. The Vice Chair pointed out that the devil seems to be in the details as to what comparability is. The Chair added that it must be defined as specifically as possible. Mr. Casey responded that another way is to provide in the Rule for the IOLTA program to have the authority to negotiate with the banks.

The Vice Chair said that in Maryland, the authority would be given to the Attorney Grievance Commission whose members are not really qualified to determine comparability. Mr. Casey told the Committee that to explain comparability standards, it is necessary to look at the language in subsection b 1 (D) of Rule 16-610 that reads: "a rate that is no less than the highest interest rate generally available from the institution to its non-IOLTA customers...". The standard is not the highest yield account that the bank offers, but the interest rate any customer can ask for, depending on the amount of money in the account. The Chair asked which states have instituted this procedure by statute as opposed to by rule. Mr. Casey answered that three states have the procedure created by statute. Judge Norton inquired as to how the process to compare accounts was designed. Was it a dialogue between the courts and the banks? Mr. Casey answered that what is relevant is a relatively small universe of accounts that have to be transactional accounts. They are checking accounts with preferred rates or an account with an overnight investment feature. Judge Norton questioned as to whether the accounts have certain common features, and Mr. Casey

answered affirmatively.

Mr. Michael inquired if there is any data as to whether there is greater compliance with the statutes that have more specific language as opposed to the statutes with more general language. Mr. Casey replied that the process is more lengthy in the states that do not have the specific language. The Chair asked if Mr. Casey's recommendation is for Maryland to follow the lead of Massachusetts and provide the details as to the accounts that are relevant instead of just using the term "comparable." Mr. Casey agreed that that was his recommendation. Judge Matricciani questioned as to whether Mr. Casey could provide examples of this in writing. Mr. Casey answered that they are in the guidelines of the courts, and he would provide the Committee with a copy of it.

Mr. Brault asked how a sweep feature would work in an IOLTA account. Mr. Casey replied that he had planned to talk about sweep accounts, because they are one of the best vehicles for IOLTA accounts. Massachusetts first started using sweep accounts in 1996. They are commonly used by law firms for investing short-term funds and are swept into secure investments. Invisible to the attorney, the funds are swept out overnight, then come back into the account, effectively giving a much better interest rate. This feature is usually offered by banks on accounts with large balances. There is some administrative cost to setting this up. Massachusetts and other states have used this as a benchmark for interest rates, including calculating the

administrative cost of setting up this account.

The Vice Chair commented that a sweep account means that the bank has the ability to sweep the money out of the account for a period of time. She inquired if the bank pays the account-holder a higher interest rate for the ability to do this. Mr. Casey replied affirmatively. The Vice Chair asked whether an IOLTA account would have to be set up as a sweep account in order to get the best interest rate. Mr. Casey answered in the negative. The Vice Chair questioned as to how an account that is not a sweep account would deserve the same high interest rate. Mr. Casey responded that often the banks will offer a similar rate without having to set up the account as a sweep account. The banks may offer a comparable product which is cost-effective for them to offer at a slightly lower interest rate. The Vice Chair inquired if this involves a negotiation process, and Mr. Casey answered that sometimes it does involve this process. Master Mahasa inquired as to whether this offer is for some limited period of time. Mr. Casey explained that it is a floating rate product based on whatever the current ratio is at that point in time. Senator Stone questioned as to whether the comparable rate being discussed is a rate comparable to other checking accounts. Mr. Casey responded that it is not comparable to certificates of deposit or money market accounts, but only to other checking accounts.

The Chair asked what the difference would be with respect to the money being raised in Massachusetts for IOLTA if instead of

telling the bank that it has six options, the Rule simply stated that the interest rate would be equal to a stated percentage of the net yield of the federal funds target rate. There would be no dispute as to what the obligation is and no fight over what is comparable. Using a percentage would simplify the process. The lawyer is informed that the lawyer's money must be put into certain approved institutions, and then the institution is told what it has to do to get approved. Mr. Casey remarked that banks cannot be told what rates they have to pay. The Vice Chair commented that this may be preferable to arguing endlessly as to what a "comparable" rate means. Judge Dryden noted that small banks may not be able to do this.

Delegate Vallario said that he would give the Committee a history of this issue. In 1982, when IOLTA was created, all of the real estate companies, including the title companies, had to pay interest to wherever the legislature instructed them. The real estate lobbyists were successful in getting real estate companies excluded from paying interest to IOLTA. Years later, a bill was passed that placed the money from title and escrow companies, which is the majority of the money that is in escrow in the State, into affordable housing. That would be a comparable rate, probably identical to what is now being paid by IOLTA. He expressed the view that the legislature should look at this entire issue at one time. The issue of the interest paid by title companies, who are not lawyers, cannot be addressed by rule. Delegate Vallario inquired as to whether there is any risk

associated with sweep accounts. Mr. Casey replied that the risk is the same as putting the money in any bank account.

Ms. Potter asked Mr. Casey if the average rate of interest on IOLTA accounts went up after the new rule was instated. Mr. Casey confirmed that the rate in Massachusetts doubled, which has been a fairly common experience. It went up to 2.5%, although that is not the highest rate in the region. The Vice Chair inquired as to whether, in Massachusetts, if one bank offered both checking accounts paying preferred interest rates and checking accounts with one of the automated investment features, and the interest rates are different, how the comparable rate is determined. Mr. Casey answered that it is basically a negotiation with the bank to arrive at a blended rate. Senator Stone questioned as to whether the Massachusetts bank commissioner is involved in the process. Mr. Casey replied that the bank commissioner is aware of this but is not directly involved.

Wilhelm Joseph, Executive Director of the Legal Aid Bureau, was the next speaker. He said that he wished to speak about the people whom the Rule is trying to help. There is precedent for the Committee to act, since the Committee has acted before. The IOLTA concept is very interesting. The U.S. Supreme Court has ruled that the money generated by the work of lawyers that produces interest may be used in all states to help people in civil legal situations who are experiencing poverty conditions. The interest is small in individual accounts, but when it is

aggregated it becomes a substantial amount of money that does not belong to the lawyer or the client. A lawyer who has personal money in the bank has the motivation to act if the bank does not act fairly, and the client who has money in the bank has the motivation to act. Who has the motivation to protect low-income people? It is the banks against the little people who have no voice.

Mr. Joseph told the Committee that he is a 1972 graduate of the University of Mississippi Law School. He ran Legal Aid programs in Mississippi, New York, and Maryland. The subject of how lawyers should protect the interest that is generated from their respective clients' funds is on the agenda today for a critical reason. In Maryland, as in all other states, there is an intolerable amount of suffering and hardship in every one of the 24 counties. In Maryland, 500,000 persons are economically disadvantaged and eligible for the civil legal services provided by the Legal Aid Bureau and other entities.

The Chair said to Mr. Joseph that the Committee is in agreement as to the need for legal services for the disadvantaged citizens of Maryland and is very sensitive to the need of the Legal Aid Bureau and the poor. The purpose of the discussion today is whether a rule should be passed.

Mr. Garten was the next speaker. He told the Committee that he had been the Chair of the MLSC for nine years and was fortunate to have been appointed by President Bush to one of the Democratic slots on the National Legal Services Corporation

Board. He stated that there is no question about the need for the funds for legal services. Twenty years ago, only 20 to 25% of poor citizens needing legal services were receiving those services. That percentage has not changed, notwithstanding the fact that there have been more dollars to put into the Fund. Mr. Garten commented that he would like to clarify that what is being discussed is checking accounts. The MLSC and Ms. Erlichman feel that the proposed Rule with the Committee note will put Maryland in substantially the same position as Massachusetts. Mr. Garten inquired if Mr. Casey had been referring to the interest rates paid on checking accounts, in particular, the high balance checking accounts, and Mr. Casey replied in the affirmative.

The Vice Chair asked Mr. Casey for an example of an interest rate on a checking account paying preferred interest rates. Mr. Casey answered that such an account could pay 1½%. She then inquired what the interest rate would be for a sweep account. Mr. Casey replied that it could be 3½%. The Vice Chair expressed the opinion that she believes in providing funding for those people who need help, is 100% in favor of IOLTA, and is 100% against the banks paying less on an IOLTA account than on a similar other account. She stated her dislike for talking about the specific rates that banks pay. She added that she is interested in clarity, and suggested that it may be preferable to draft a rule requiring payment of not less than the lowest interest rate generally available on a comparable product. She is not so sure that a sweep account is comparable, since the

IOLTA account may not be a sweep account. She remarked that she was focusing on the particulars and not on the concept.

Mr. Brault commented that he had had a bank account as to which there was a limit on the number of checks that could be written. The account paid a higher interest rate because of this limit. At one point, he exceeded the allowed number of checks, and the bank sent him a letter chastising him. An attorney writing 100 checks a month is different than someone writing five checks a month. How can comparability be measured if only the rate is taken into consideration? Mr. Casey replied that it has to be comparable on all of the facts that Mr. Brault set out. The type of account he just described is not suitable for an IOLTA account. Mr. Brault inquired as to how the bank debates with legal service agencies on the number of transactions as it relates to bank costs to maintain the accounts. Mr. Casey answered that in Maryland, some banks are in the IOLTA program, some are not. Some banks charge maintenance fees, some do not. Some charge sweep fees, some do not. Mr. Brault remarked that problems with transactional limits can be offset with service fees. Mr. Casey agreed with this statement.

Mr. Karceski expressed his agreement with the Vice Chair, noting that it is difficult to determine the highest comparable rate of return. If the goal is payment of a fair rate, it might be preferable to write the rule as suggested by the Vice Chair. It will be twice the rate currently paid, and any number of checks can be written. Mr. Casey observed that Maryland probably

is already at the lowest rate. The Vice Chair remarked that the language of the rule would be the lowest comparable rate. The Chair said that he looked at the Massachusetts IOLTA Guidelines dated July 26, 2006 that were distributed at the meeting today. On page 2, under subsection 1. (a) Comparability Options, number 6. reads: "a safe harbor rate equal to 55% net yield of the Federal Funds Target Rate." The Committee can follow this example and propose a rule, if it chooses to do so, that will eliminate the issue regarding negotiation to determine comparability. There will then be a rule that everyone will understand. Ms. Ogletree pointed out that this might not be appropriate for some of the smaller local banks that do not pay this much on their other accounts. The Chair responded that this is a problem.

Mr. Casey observed that not all IOLTA accounts are "created equal." Some have small amounts of money in them, some have huge amounts. The legal services organizations try to reconcile that problem with the banks. The Rule should be as clear as possible, leaving the details up to the program. The Chair said that an interest-bearing checking account that pays a rate based on the Federal Funds Target Rate is easy to understand. If that is what is used to compute the interest rate, it should be clear to everyone. Then the banks do not have to offer a higher rate, with additional service fees charged, or devise other arrangements. Everyone knows what the rule is, and they either comply with it, or they opt out of offering IOLTA accounts. The

problem is for the smaller communities, with smaller banks. Ms. Ogletree pointed out that her community does not have a big bank. Mr. Casey acknowledged that a small bank may have only one product to offer. Mr. Karceski asked Mr. Casey if there are banks in Massachusetts participating in IOLTA that are comparable to small banks with which Ms. Ogletree does business. Mr. Casey replied that there are similar banks, and they all participate in IOLTA. Several had to work out some problems, but none opted out.

Master Mahasa inquired as to whether the negotiations with the banks to participate in IOLTA have been extensive. Mr. Casey answered that this varies state by state. The banks understand the system, and the negotiations have not been very protracted.

Mr. Garten told the Committee that at the national level, the Federal Legal Services Corporation, as well as the American Bar Association, tracks what is happening with IOLTA throughout the country. Maryland has always been at the forefront with mandatory reporting, but Maryland has been lagging as to comparable rates for IOLTA accounts. This is one of the reasons why Chief Judge Bell asked that this issue be put on a fast track. To further delay this would prevent 20,000 needy citizens from receiving the legal services they need. Whatever the Committee can do to put this matter on a fast track would be appreciated.

Mr. Enten told the Committee that he is an attorney with the law firm of Gordon, Feinblatt in Baltimore. He said that he was

speaking today on behalf of the Maryland Bankers' Association. He has represented the Association for 23 years and has appeared in front of several subcommittees of the Rules Committee, the Committee itself, and the Court of Appeals on rules changes that affect the banking industry. The issue today is a very, very important one to the banking industry. He said that he did not know what the bankers' associations did in other states. Some states do not notify interested parties, unlike the procedure of the Rules Committee, which goes to great lengths to notify interested persons. Without the notice from the Reporter or Cathy Cox, Administrative Assistant, it would be difficult to know that a certain issue is being discussed.

Mr. Enten said that for the first time in the 23 years that he has represented the Bankers' Association, an important issue bypassed subcommittee consideration. He received notice on May 1 that the issue was going to be discussed at the May 11, 2007 Rules Committee meeting. The matter was then postponed until the meeting today. He and the Maryland Bankers' Association had spent the last six weeks gathering information and trying to talk to bankers in other states and learn what their position is and how the Rule differs. He has a chart that took a long time to prepare comparing the details of each state and how they handle the comparability issue. Each state is different in its approach. He expressed the view that the Attorneys Subcommittee should have the opportunity to bring the parties to the table to discuss this issue in depth, because of its importance not only

to the Association members, but to the advocacy groups that are present today.

Mr. Enten continued that as to the exigent circumstances that brought the issue before the Committee today, a look at the website of the MLSC revealed that as published in their annual report for the fiscal year ending June 30, 2007, the agency awarded $10.9 million in grants to finance legal services for Maryland's needy population, representing their highest grant level since their inception. They reached this level from a filing fee surcharge and a 25% increase in IOLTA income. He acknowledged the importance of the issue being discussed today for the MLSC and for Chief Judge Bell, but he pointed out that it is also important for his clients and constituents. He asked that the process be deliberative.

Mr. Enten observed that the IOLTA Honor Roll program was instituted in 2001. A look at the MLSC website revealed that since 2004, the number of banks joining the Honor Roll has tripled in Maryland. As was previously mentioned, the yield in Massachusetts is 2½ %, and the Honor Roll banks in Maryland attain a yield of 2%, a threshold set by the MLSC. In July of 2006, the second largest depository institution in Maryland joined the Honor Roll and agreed to pay 2%, and the largest institution doubled its IOLTA rate of interest. The Chair inquired as to what the doubled amount was, but Mr. Enten responded that he did not know. Ms. Erlichman answered that the rate became 1½%. The gold level Honor Roll banks, the ones that

pay at least 2%, represent about 62% of the deposits in Maryland. The Bankers' Association sent out a survey to get information about this comparability issue from its members. One of the questions asked of the banks was whether they were contacted by the MLSC about increasing their rates for IOLTA. Out of 38 banks that responded to the survey, only five said that they were contacted. There has been a 300% increase in the number of banks now paying above 2%. The current program is working.

Mr. Enten told the Committee that the Association has represented almost every single depository institution in the State. For at least the eight years that Kathleen M. Murphy has been President and CEO of the Association, the Association has never been contacted to encourage the banks to cooperate with IOLTA. The Association would be eager to work with the MLSC to reach out to its members to stress the importance of the IOLTA program and what the members can do to support it in addition to what is already being done.

Mr. Enten stated that the issue being discussed today is the regulation of banks. The banks are being told that to do business with a potential customer, the law firms, they must pay a certain interest rate. The Vice Chair pointed out that the banks are already regulated by rule. Mr. Enten responded that earlier in the discussion, someone had mentioned a dispute with the banks over the fees. When the Committee meetings were held at the prior location of the Rules Committee Office, Mr. Enten remembered a discussion about what fees banks should and should

not charge. That was negotiated within the Attorneys Subcommittee, and all parties reached an agreement. None of the past recommendations of the Rules Committee involved telling the banks that they must pay a certain rate of interest. Under this proposed Rule, if a bank does not pay what the MLSC or the Massachusetts Legal Services Corporation tell the bank to pay, the legal services corporation does not approve the bank's agreement. To whom can the bank appeal this decision? There is no provision in the Rule for an appeal. Attorneys cannot put their money in a bank unless the MLSC, the beneficiary of the interest, has approved the agreement. The sweep accounts are applicable to the accounts being discussed. Most banks do not put the money in a sweep account, they are willing to simply pay the rate of interest. Under the proposed Rule, the banks have no choice but to pay a certain rate of interest or forego the business from the attorneys.

The Vice Chair asked whether there are situations where one customer has a checking account with a minimum balance of $100,000 and is getting 4% interest, but someone with an IOLTA account has the same account with the same terms and is getting less interest. Mr. Enten answered that this is not the case, but the Vice Chair noted that the people representing the MLSC are indicating the opposite. Mr. Enten remarked that business transactional checking accounts in which 100 or 200 checks a month are written pay about 25 to 50 basis points in interest, because they are checking accounts. The Committee note points

out that examples of product options appropriate for consideration to achieve IOLTA rate comparability include checking accounts paying preferred interest rates, such as money market or indexed rates. In response to the Chair's question as to whether there is a rate that could be set, this might be preferable, although Mr. Enten noted that he could not speak for all of his clients on this. The Association does not believe that rates should be dictated. The Chair commented that the Massachusetts guideline keys into the Federal Funds Target rate. Mr. Enten reiterated that the "comparable rate" is not referring to money market accounts or to sweep accounts. Law firms, including his own, are not getting 4% on their accounts.

The Chair stated that the Rule has to make sense. It has to be easy to administer for the banks and easily understood by lawyers. It cannot put the lawyers out of business. The banks are probably better off if there is some system in place rather than having to determine a comparable rate of interest. Mr. Enten observed that this would be setting rates of interest, and the Chair agreed. He added that Judge Matricciani had already pointed out in the discussion today that if the banks would like to participate, they have to be approved. It is the regulation of lawyers, but the statute provides that the Rules of Procedure are applicable, and the Rules are in place. Mr. Enten expressed his agreement with the legislature's presiding officers that this is under the jurisdiction of the legislature. The fact that the legislature provided that the Rules of Procedure could deal with

the IOLTA program does not mean that it is necessarily a matter to be handled in the Rules. The bill that created the mandatory IOLTA program had no language stating that the Judiciary sets interest rates. The Vice Chair said that the decision as to whether the Rule will be changed as suggested will be decided by the Court of Appeals, so there is no point in continuing the discussion on this aspect of the topic.

Mr. Karceski questioned as to which of the states have approved a rule similar to the one being proposed today. Mr. Enten replied that 14 or 15 states have approved a rule, but the others have not. Not all states require banks to pay the highest rate. The state of Texas gives more flexibility to financial institutions. Some states offer a "safe harbor" of 55% of the Federal Funds Target Rate; some offer 60% or 70%. The Federal Funds Target Rate has nothing to do with the rates that are paid on deposit accounts. The Vice Chair noted that the bank chooses whether or not to pay the "safe harbor" rate. Mr. Enten responded that this rate has gone up the most. Mr. Karceski asked Mr. Enten which state's rule he preferred. Mr. Enten replied that he did not like any of the rules, but the rule from Texas would be the closest to what the Bankers' Association could live with, because it gives more flexible choices and does not require the highest rate. However, none of the rules provide that if the bank pays a comparable rate, it can charge a comparable fee. The discussion needs to focus on what is a "comparable rate." Business checking accounts do not pay

interest rates of 2½ to 4%. These are preferred rates, not the "comparable rate." The bank must be able to charge a comparable fee.

The Chair observed that the discussion has become a discussion of minutiae. There should be one number that everyone can understand that will generate income for IOLTA. If a bank can comply in Massachusetts, then there is no reason the bank cannot comply with whatever rule is chosen in Maryland. Mr. Enten stated that the question is what is fair and right. The issue is complicated, and there needs to be a discussion among the parties, including the bankers. If the goal is 2½%, this is almost in place. The Bankers' Association will work with the MLSC to improve participation in IOLTA. The Chair remarked that he did not believe that the goal was 2½%. The Vice Chair expressed the view that there should not be a goal, except to be sure that the banks are paying to IOLTA what they would have paid if the account did not have the IOLTA designation.

Mr. Bowen pointed out that the chart provided by the MLSC indicates that two-thirds of the banks participating in IOLTA in Maryland are on the Honor Roll, but that leaves many that are not. One large bank has the largest number of Honor Roll accounts, so that the weight of the IOLTA accounts are Honor Roll accounts. The Vice Chair asked if it is possible to be an Honor Roll bank and still not pay the percentage of interest that a comparable non-IOLTA account customer would get. Mr. Bowen observed that the problem is whether there is such thing as a

"comparable account." The Vice Chair asked whether there is such a thing as a "comparable account," because of the extra procedures that go along with IOLTA accounts. Mr. Enten answered that IOLTA accounts are not comparable to other accounts, because IOLTA accounts have reporting and monitoring requirements that other accounts do not have. Not considering that aspect, an IOLTA account is like any other business checking account. On these accounts, the banks pay .25% rate of interest. The Vice Chair inquired if keeping a minimum balance would affect this rate. Mr. Enten replied that the higher the balance, the higher the rate may go, but it never is as high as 3 or 4% on a business checking account.

The Chair questioned as to whether the banks would object to paying to IOLTA what they pay on business checking accounts. Mr. Enten responded that IOLTA accounts would be treated like any other business transactional account. The problem is that the Rule requires the banks to pay a comparable rate, then it provides what the rate is. The Chair asked if the banks would agree to a rule that states that IOLTA accounts will be treated exactly like other business checking accounts. Mr. Enten answered that the banks would like to see the exact language of a proposed rule, but they do not feel that they are discriminating against IOLTA accounts. The Chair asked Ms. Erlichman if the MLSC would agree to such a rule. Ms. Erlichman replied that they would not. She gave an example of a business checking account with a million dollars in it. When the bank adds a sweep feature

to the account, the funds earn a higher rate of interest. She expressed her disagreement with the statement by Mr. Enten that the only account that would be used when an IOLTA account is a high balance account is a regular business checking account. Other options often are available for high balance accounts.

Ms. Ogletree remarked that on behalf of those attorneys who work for small firms or are solo practitioners, most do not have accounts with a balance of $1 million. Most are accounts of a few hundred dollars. She said that she cannot understand why these accounts are not treated like a business checking account. Ms. Erlichman responded that they should be. She pointed out that the discussion today refers to only about 15% of IOLTA accounts. Most of the IOLTA accounts are not affected by the proposed Rule. They are receiving fair interest rates and are being treated similarly. The high balance accounts are not.

The Chair stated that his recommendation is to present the Court of Appeals with the proposed Rule and the correspondence from the legislative presiding officers whose view is that this is a matter for the legislature. The Court of Appeals will decide whether it is under its jurisdiction or under that of the legislature. The issue will be referred to the Attorneys Subcommittee. Mr. Brault noted that there is a meeting of that Subcommittee set for July 12. The Chair suggested that the Subcommittee and consultants draft language for the Rule to avoid a long debate as to what is comparable and what service charges may be deducted from high-yield accounts. The Rule should have

sensible language that will provide more money to MLSC.

Judge Matricciani asked when the proposed Rule change would become effective. The Chair answered that the IOLTA Rule will be reconsidered by the full Committee at the September meeting. It will then go on a fast track to the Court of Appeals, which hopefully will approve it before the end of the year unless the Court decides to wait to see if the legislature acts on it. The Vice Chair noted that the language proposed in the Rule in the draft before the Committee makes perfect sense –- the banks should pay on an IOLTA account what they pay on a comparable account. The various interested parties are disagreeing as to what that means. Relying on a Committee note should not be the method to solve the problem. The Chair added that the language must be more specific. What each person believes to be a comparable account will not solve the problem. There must be a term of art understandable to everyone. The bottom line is that the IOLTA account should be treated as if a potential new customer walked into the bank to set up a similar, non-IOLTA bank account.

Mr. Brault requested that the bankers come to the Subcommittee meeting with specific suggestions. Mr. Michael asked that representatives of the MLSC be invited to the meeting, and Ms. Erlichman said that she would attend. Mr. Karceski requested that any proposals be submitted before the meeting. Mr. Maloney suggested that the bankers meet before the Subcommittee meeting, so that they are in agreement as to what

language would go into the Rule. Mr. Enten told the Committee that bankers from all over the State were present at today's meeting, including Mr. Kenneth Krach from M & T Bank, Ms. Murphy, Mr. Steven Brownlee from Chevy Chase Bank, and Mr. Gordon Cooley from PNC Bank, which formerly was Mercantile Bank. They believe very strongly about this issue. Their view is that IOLTA accounts are being treated fairly. Mr. Enten noted that he cannot make decisions for each bank that is a member of the Bankers' Association -- the members make their own decisions. The Chair thanked all of the interested persons for attending the meeting.

The Chair stated that the next step will be the Attorneys Subcommittee meeting on July 12, 2007. The Reporter asked the bankers to submit a detailed report of what they would find to be acceptable language a few days before the Subcommittee meeting. Ms. Erlichman said that the MLSC was amenable to a version of the Rule similar to the one from Texas.

Agenda Item 3. Reconsideration of proposed amendments to: Rule 4-217 (Bail Bonds), Rule 4-242 (Pleas), Rule 4-265 (Subpoena for Hearing or Trial), and Rule 4-264 (Subpoena for Tangible Evidence Before Trial in Circuit Court)

Mr. Karceski presented Rule 4-217, Bail Bonds, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-217 by adding a Code reference to section (g), as follows:

Rule 4-217. BAIL BONDS

. . .

(g) Form and Contents of Bond - Execution

Except as provided in Code, Criminal Procedure Article, §5-214, ~~Every~~ every pretrial bail bond taken shall be in the form of the bail bond set forth at the end of this Title as Form 4-217.2, and shall be executed and acknowledged by the defendant and any surety before the person who takes the bond.

. . .

Rule 4-217 was accompanied by the following Reporter's Note.

The General Assembly enacted Chapter 178, Acts of 2007 (SB 685), which allows a defendant who has already appeared before a commissioner or judge in a criminal case to post bond by means of electronic transmission or hand delivery of the relevant documentation without appearing before the commissioner or judge, if authorized by the County Administrative Judge in the circuit court or the Chief Judge of the District Court in a District Court case. The Criminal Subcommittee recommends adding a reference to the new statute as the beginning of section (g) of Rule 4-217.

Mr. Karceski explained that Senate Bill 685 had been enacted by the 2007 legislature. It allows a defendant who has already appeared before a commissioner or judge in a criminal case to post bond by means of electronic transmission or hand-delivery of the relevant documentation without appearing before the commissioner or judge again, if authorized by the County

Administrative Judge in a circuit court or the Chief Judge of the District Court in a case in that court. The current Rule requires that the defendant and the surety appear in person before the individual who takes the bond. The Criminal Subcommittee suggests adding a clause at the beginning of section (g) noting the exception provided in the statute, Code, Criminal Procedure Article, §5-214.

Judge Dryden commented that this issue had been discussed before, and he had said that he would talk to the Honorable Ben Clyburn, Chief Judge of the District Court, about the present practices in District Court. Judge Dryden added that it was his understanding that Judge Clyburn planned to conduct a survey of the current practices. It appears that in most jurisdictions, the relevant documentation is accepted without the need for the defendant to appear. The Chair remarked that when Judge Clyburn has this information, it can be brought to the attention of the Court of Appeals.

The Reporter commented that the Assistant Reporter had said that the Subcommittee had looked at Form 4-217.2, Bail Bond, and was of the view that the form did not need to be modified. The Assistant Reporter confirmed that the Subcommittee had looked at the form and felt that no change was needed. By consensus, the Committee approved the Rule as presented.

Mr. Karceski presented Rule 4-242, Pleas, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-242 (e) to add a provision pertaining to the collateral consequences of pleading guilty to a sexual offense, as follows:

Rule 4-242. PLEAS

. . .

(e) Collateral Consequences of a Plea of Guilty or Nolo Contendere

Before the court accepts a plea of guilty or nolo contendere, the court, the State's Attorney, the attorney for the defendant, or any combination thereof shall advise the defendant (1) that by entering the plea, if the defendant is not a United States citizen, the defendant may face additional consequences of deportation, detention, or ineligibility for citizenship, ~~and~~ (2) that by entering a plea to the offenses set out in Code, Criminal Procedure Article, §11-701, the defendant shall have to register with the defendant's supervising authority as defined in Code, Criminal Procedure Article, §11-701 (i), and ~~(2)~~ (3) that the defendant should consult with defense counsel if the defendant is represented and needs additional information concerning the potential consequences of the plea. The omission of advice concerning the collateral consequences of a plea does not itself mandate that the plea be declared invalid.

. . .

Rule 4-242 was accompanied by the following Reporter's Note.

Dawson v. State, 172 Md. App. 633 (2007) involved a defendant who pleaded guilty to a

> sexual offense without realizing that a collateral consequence of the plea would be that he would be required to register as a sexual offender pursuant to Code, Criminal Procedure Article, §11-704 (a). After the defendant's plea was taken, he requested that the plea be withdrawn when he found about the required registration. The Court of Special Appeals remanded the case to the circuit court pursuant to the discretion afforded by the court in Rule 4-242 (g). The Rules Committee determined that because of the severity of the collateral consequence of pleading guilty to a sexual offense, a new provision should be added to section (e) of Rule 4-242 specifying that a defendant who intends to plead guilty to this type of offense must be advised of the collateral consequence of registration as a sexual offender as defined in Code, Criminal Procedure Article, §11-701.

Mr. Karceski explained that the changes to Rule 4-242 are proposed as a result of *Dawson v. State*, 172 Md. App. 633 (2007). The case is included in the meeting materials. The proposed language is in section (e), Collateral Consequences of a Plea of Guilty or Nolo Contendere. Previous changes had been made to the Rule to warn non-citizens of the possible collateral consequences of deportation, detention, or ineligibility for citizenship after pleading guilty. The Subcommittee discussed whether to include in the Rule a provision referring to the collateral consequence of registration as a sexual offender after a guilty plea to the sexual offenses set out in Code, Criminal Procedure Article, §11-701, and the Subcommittee decided it should be added. Section 11-701 lists the sexual offenses requiring registration with the supervising authority of the defendant. Section (i) defines the

term “supervising authority.” By entering a plea to an offense set out in §11-701, the defendant must register as a sexual offender. The change to the Rule will put everyone on notice about the registration, which, in some cases, may be worse than any period of incarceration that is imposed, because the registration obligation remains for many years. The Subcommittee believes that this collateral consequence is important enough to be included in the Rule, so that, in each case, it would become part of the advisement of rights.

By consensus, the Committee approved the Rule as presented.

Agenda Item 4. Consideration of proposed Rules changes recommended by the Attorneys Subcommittee: Rule 15-207 (Constructive Contempt; Further Proceedings), Rule 16-701 (Definitions), Rule 16-731 (Complaint; Investigation by Bar Counsel), Rule 16-771 (Disciplinary or Remedial Action Upon Conviction of Crime), and Rule 8.1 (Bar Admission and Disciplinary Matters)

Mr. Brault presented Rules 15-207, Constructive Contempt; Further Proceedings; 16-701, Definitions; 16-731, Complaint; Investigation by Bar Counsel; and 16-771, Disciplinary or Remedial Action Upon Conviction of Crime and Rule 8.1, Bar Admission and Disciplinary Matters, of the Maryland Lawyers’ Rules of Professional Conduct, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 - OTHER SPECIAL PROCEEDINGS

CHAPTER 200 - CONTEMPT

AMEND Rule 15-207 by adding a Committee note at the end of subsection (e)(1), as follows:

Rule 15-207. CONSTRUCTIVE CONTEMPT; FURTHER PROCEEDINGS

(a) Consolidation of Criminal and Civil Contempts

If a person has been charged with both constructive criminal contempt pursuant to Rule 15-205 and constructive civil contempt pursuant to Rule 15-206, the court may consolidate the proceedings for hearing and disposition.

(b) When Judge Disqualified

A judge who enters an order pursuant to Rule 15-204 or who institutes a constructive contempt proceeding on the court's own initiative pursuant to Rule 15-205 (b)(1) or Rule 15-206 (b)(1) and who reasonably expects to be called as a witness at any hearing on the matter is disqualified from sitting at the hearing unless (1) the alleged contemnor consents, or (2) the alleged contempt consists of a failure to obey a prior order or judgment in a civil action or a "judgment of restitution" as defined in Code, Criminal Procedure Article, §11-601 (g).

(c) Hearing

(1) Contempt of Appellate Court

Where the alleged contemnor is charged with contempt of an appellate court, that court, in lieu of conducting the hearing itself, may designate a trial judge as a special master to take evidence and make recommended findings of fact and conclusions of law, subject to exception by any party and approval of the appellate court.

(2) Failure of Alleged Contemnor to Appear

If the alleged contemnor fails to appear personally at the time and place set by the court, the court may enter an order directing a sheriff or other peace officer to take custody of and bring the alleged contemnor before the court or judge designated in the order. If the alleged contemnor in a civil contempt proceeding fails to appear in person or by counsel at the time and place set by the court, the court may proceed ex parte.

(d) Disposition - Generally

(1) Applicability

This section applies to all proceedings for contempt other than proceedings for constructive civil contempt based on an alleged failure to pay spousal or child support.

(2) Order

When a court or jury makes a finding of contempt, the court shall issue a written order that specifies the sanction imposed for the contempt. In the case of a civil contempt, the order shall specify how the contempt may be purged. In the case of a criminal contempt, if the sanction is incarceration, the order shall specify a determinate term and any condition under which the sanction may be suspended, modified, revoked, or terminated.

(e) Constructive Civil Contempt - Support Enforcement Action

(1) Applicability

This section applies to proceedings for constructive civil contempt based on an alleged failure to pay spousal or child support, including an award of emergency family maintenance under Code, Family Law Article, Title 4, Subtitle 5.

Committee note: Sanctions for attorneys found to be in contempt for failure to pay child support may include referral to Bar

Counsel pursuant to Rule 16-731. See Code, Family Law Article, §10-119.3.

(2) Petitioner's Burden of Proof

Subject to subsection (3) of this section, the court may make a finding of contempt if the petitioner proves by clear and convincing evidence that the alleged contemnor has not paid the amount owed, accounting from the effective date of the support order through the date of the contempt hearing.

(3) When a Finding of Contempt May Not be Made

The court may not make a finding of contempt if the alleged contemnor proves by a preponderance of the evidence that (A) from the date of the support order through the date of the contempt hearing the alleged contemnor (i) never had the ability to pay more than the amount actually paid and (ii) made reasonable efforts to become or remain employed or otherwise lawfully obtain the funds necessary to make payment, or (B) enforcement by contempt is barred by limitations as to each unpaid spousal or child support payment for which the alleged contemnor does not make the proof set forth in subsection (3)(A) of this section.

Cross reference: Code, Family Law Article, §10-102.

(4) Order

Upon a finding of constructive civil contempt for failure to pay spousal or child support, the court shall issue a written order that specifies (A) the amount of the arrearage for which enforcement by contempt is not barred by limitations, (B) any sanction imposed for the contempt, and (C) how the contempt may be purged. If the contemnor does not have the present ability to purge the contempt, the order may include directions that the contemnor make specified payments on the arrearage at future times and perform specified acts to enable the

contemnor to comply with the direction to make payments.

Committee note: Section (e) modifies the holding in *Lynch v. Lynch*, 342 Md. 509 (1996), by allowing a court to make a finding of constructive civil contempt in a support enforcement action even if the alleged contemnor does not have the present ability to purge. In support enforcement cases, as in other civil contempt cases, after making a finding of contempt, the court may specify imprisonment as the sanction if the contemnor has the present ability to purge the contempt.

If the contemnor does not have the present ability to purge the contempt, an example of a direction to perform specified acts that a court may include in an order under subsection (e)(4) is a provision that an unemployed, able-bodied contemnor look for work and periodically provide evidence of the efforts made. If the contemnor fails, without just cause, to comply with any provision of the order, a criminal contempt proceeding may be brought based on a violation of that provision.

Source: This Rule is derived in part from former Rule P4 c and d 2 and is in part new.

Rule 15-207 was accompanied by the following Reporter's Note.

Chapter 256, Acts of 2007 (HB 792) amends Code, Family Law Article, §10-119.3 to include the Court of Appeals as one of the licensing authorities that can issue a sanction against someone who is in arrears in paying child support. The statute provides that if the person in arrears is an attorney, the Child Support Enforcement Administration may refer the matter to the Attorney Grievance Commission for disciplinary action. If an attorney is found to be in arrears in paying child support, the Court of Appeals may suspend his or her license or take any action authorized by the Rules in Title 16. To make the Rules consistent with the

statutory change, the Attorneys Subcommittee recommends: (1) adding a Committee note after subsection (e)(1) of Rule 15-207 to indicate that sanctions for attorneys found to be in contempt for failure to pay child support may include a referral to Bar Counsel for possible discipline, (2) amending Rule 16-701 by adding a definition of “constructive civil contempt” that refers to a finding of contempt for failure to pay child support and by adding references to “constructive civil contempt” to the definition of “statement of charges,” (3) amending Rule 16-731 (a) and (c) to include constructive civil contempt as a subject of a complaint, and (4) making conforming changes to Rules 16-771 and 8.1.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

AMEND Rule 16-701 to add a definition of constructive civil contempt, and to add a reference to “constructive civil contempt” to section (n), as follows:

Rule 16-701. DEFINITIONS

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

(a) Attorney

"Attorney" means a person admitted by the Court of Appeals to practice law in this

State. For purposes of discipline or inactive status, the term also includes a person not admitted by the Court of Appeals who engages in the practice of law in this State, or who holds himself or herself out as practicing law in this State, or who has the obligation of supervision or control over another lawyer who engages in the practice of law in this State.

Cross reference: See Rule 8.5 of the Maryland Lawyers' Rules of Professional Conduct.

(b) Circuit

"Circuit" means Appellate Judicial Circuit.

(c) Commission

"Commission" means the Attorney Grievance Commission of Maryland.

(d) Conditional Diversion Agreement

"Conditional diversion agreement" means the agreement provided for in Rule 16-736.

(e) Constructive Civil Contempt

"Constructive civil contempt" means a finding of contempt for failure to pay child support pursuant to Rule 15-207 (e).

~~(e)~~ (f) Disbarment

"Disbarment" means the unconditional termination of any privilege to practice law in this State and, when applied to an attorney not admitted by the Court of Appeals to practice law, means the unconditional exclusion from the admission to or the exercise of any privilege to practice law in this State.

~~(f)~~ (g) Incapacity

"Incapacity" means the inability to render adequate legal service by reason of mental or physical illness or infirmity, or

addiction to or dependence upon an intoxicant or drug.

~~(g)~~ (h) Office for the Practice of Law

"Office for the practice of law" means an office in which an attorney usually devotes a substantial part of the attorney's time to the practice of law during ordinary business hours in the traditional work week.

~~(h)~~ (i) Petition for Disciplinary or Remedial Action

"Petition for disciplinary or remedial action" means the initial pleading filed in the Court of Appeals against an attorney alleging that the attorney has engaged in professional misconduct or is incapacitated or both.

~~(i)~~ (j) Professional Misconduct

"Professional misconduct" or "misconduct" has the meaning set forth in Rule 8.4 of the Maryland Lawyers' Rules of Professional Conduct, as adopted by Rule 16-812. The term includes the knowing failure to respond to a request for information authorized by this Chapter without asserting, in writing, a privilege or other basis for such failure.

~~(j)~~ (k) Reinstatement

"Reinstatement" means the termination of disbarment, suspension, or inactive status and the termination of any exclusion to practice law in this State.

~~(k)~~ (l) Serious Crime

"Serious crime" means a crime that is in at least one of the following categories: (1) a felony under Maryland law, (2) a crime in another state or under federal law that would have been a felony under Maryland law had the crime been committed in Maryland, and (3) a crime under federal law or the law of any state that is punishable by imprisonment for three years or more.

~~(l)~~ (m) State

"State" means (1) a state, possession, territory, or commonwealth of the United States or (2) the District of Columbia.

~~(m)~~ (n) Statement of Charges

"Statement of charges" means the document that alleges professional misconduct, constructive civil contempt, or incapacity and initiates disciplinary or remedial proceedings against an attorney pursuant to Rule 16-741.

~~(n)~~ (o) Suspension

"Suspension" means the temporary or indefinite termination of the privilege to practice law and, when applied to an attorney not admitted by the Court of Appeals to practice law, means the temporary or indefinite exclusion from the admission to or the exercise of any privilege to practice law in this State.

~~(o)~~ (p) Warning

"Warning" means a notice that warns an attorney about future misconduct.

Source: This Rule is derived in part from former Rule 16-701 (BV1) and is in part new.

Rule 16-701 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 15-207.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

AMEND Rule 16-731 by adding a reference to "constructive civil contempt" to sections (a) and (c), as follows:

Rule 16-731. COMPLAINT; INVESTIGATION BY BAR COUNSEL

(a) Complaints

A complaint alleging that an attorney has engaged in professional misconduct or constructive civil contempt or that the attorney is incapacitated shall be in writing and sent to Bar Counsel. Any written communication that includes the name and address of the person making the communication and states facts which, if true, would constitute professional misconduct by or demonstrate incapacity of an attorney constitutes a complaint. Bar Counsel also may initiate a complaint based on information from other sources.

(b) Review of Complaint

(1) Bar Counsel shall make an appropriate investigation of every complaint that is not facially frivolous or unfounded.

(2) If Bar Counsel concludes that the complaint is either frivolous or unfounded or does not allege facts which, if true, would demonstrate either professional misconduct or incapacity, Bar Counsel shall dismiss the complaint and notify the complainant of the dismissal. Otherwise, Bar Counsel shall (A) open a file on the complaint, (B) acknowledge receipt of the complaint and explain in writing to the complainant the procedures for investigating and processing the complaint,

(C) comply with the notice requirement of section (c) of this Rule, and (D) conduct an investigation to determine whether reasonable grounds exist to believe the allegations of the complaint.

Committee note: Before determining whether a complaint is frivolous or unfounded, Bar Counsel may contact the attorney and obtain an informal response to the allegations.

(c) Notice to Attorney

(1) Except as otherwise provided in this section, Bar Counsel shall notify the attorney who is the subject of the complaint that Bar Counsel is undertaking an investigation to determine whether the attorney has engaged in professional misconduct or is incapacitated. The notice shall be given before the conclusion of the investigation and shall include the name and address of the complainant and the general nature of the professional misconduct, constructive civil contempt, or incapacity under investigation. As part of the notice, Bar Counsel may demand that the attorney provide information and records that Bar Counsel deems appropriate and relevant to the investigation. The notice shall state the time within which the attorney shall provide the information and any other information that the attorney may wish to present. The notice shall be served on the attorney in accordance with Rule 16-724 (b).

(2) Bar Counsel need not give notice of investigation to an attorney if, with the approval of the Commission, Bar Counsel proceeds under Rule 16-771, 16-773, or 16-774.

(d) Time for Completing Investigation

Unless the time is extended by the Commission for good cause, Bar Counsel shall complete an investigation within 90 days after opening the file on the complaint. Upon written request by Bar Counsel establishing good cause for an extension for a specified period, the Commission may grant

one or more extensions. The Commission may not grant an extension, at any one time, of more than 60 days unless it finds specific good cause for a longer extension. If an extension exceeding 60 days is granted, Bar Counsel shall provide the Commission with a status report at least every 60 days. For failure to comply with the time requirements of this section, the Commission may take any action appropriate under the circumstances, including dismissal of the complaint and termination of the investigation.

Source: This Rule is new.

Rule 16-731 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 15-207.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

AMEND Rule 16-771 to correct an internal reference to a Rule in the cross reference after section (a), as follows:

Rule 16-771. DISCIPLINARY OR REMEDIAL ACTION UPON CONVICTION OF CRIME

(a) Duty of Attorney Charged

An attorney charged with a serious

crime in this State or any other jurisdiction shall promptly inform Bar Counsel in writing of the criminal charge. Thereafter, the attorney shall promptly notify Bar Counsel of the final disposition of the charge in each court that exercises jurisdiction over the charge.

Cross reference: Rule 16-701 ~~(k)~~ (l).

. . .

Rule 16-771 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 15-207.

MARYLAND RULES OF PROCEDURE

APPENDIX: THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT

AMEND Rule 8.1 to correct an internal reference to a Rule in the cross reference at the end of the Comment, as follows:

Rule 8.1. BAR ADMISSION AND DISCIPLINARY MATTERS

An applicant for admission or reinstatement to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule

does not require disclosure of information otherwise protected by Rule 1.6.

COMMENT

[1] The duty imposed by this Rule extends to persons seeking admission or reinstatement to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission or for reinstatement, it may be the basis for subsequent disciplinary action if the person is admitted or reinstated, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This Rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] The Court of Appeals has considered this Rule applicable when information is sought by the Attorney Grievance Commission from any lawyer on any matter, whether or not the lawyer is personally involved. See *Attorney Grievance Commission v. Oswinkle*, 364 Md. 182 (2001).

[3] This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[4] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship.

Cross reference: Md. Rule 16-701 ~~(j)~~ (k) (defining "Reinstatement").

Rule 8.1 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 15-207.

Mr. Brault explained that the changes to the Rules implement House Bill 792, enacted by the 2007 legislature, amended Code, Family Law Article, §10-119.3 to provide that a lawyer found delinquent in child support payments can be referred to the Attorney Grievance Commission and lose his or her license to practice law. The Attorneys Subcommittee suggests the addition of a Committee note after subsection (e)(1) of Rule 15-207. That provision pertains to constructive civil contempt in support enforcement actions. A change to Rule 16-731 adds constructive civil contempt as an action of a lawyer that could form the basis of a disciplinary complaint. The Vice Chair asked if constructive civil contempt is applicable only to a finding of contempt for failure to pay child support. The Reporter responded that as to the Rules in Title 16, Chapter 600, a suggested additional definition in Rule 16-701 narrows the definition of "constructive civil contempt" to a finding of contempt for failure to pay child support pursuant to Rule 15-207 (e). By consensus, the Committee approved the changes to the Rules as presented.

Agenda Item 5. Consideration of proposed Rules changes recommended by the General Court Administration Subcommittee: Rule 16-307 (Electronic Filing of Pleadings, Papers, and Real Property Instruments) and Rule 16-1006 (Required Denial of Inspection - Certain Categories of Case Records)

Judge Norton presented Rule 16-307, Electronic Filing of Pleadings, Papers, and Real Property Instruments for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 300 - CIRCUIT COURT CLERKS' OFFICES

AMEND Rule 16-307 by adding a reference to "real property instruments" to the title, by adding to section (a) language referring to the electronic filing of land instruments, by adding a cross reference to a certain Code provision after section (a), and by adding language to section (b) referring to "real property instruments," as follows:

Rule 16-307. ELECTRONIC FILING OF PLEADINGS<u>,</u> ~~AND~~ PAPERS<u>, AND REAL PROPERTY INSTRUMENTS</u>

a. Applicability; Conflicts with Other Rules

This Rule applies to the electronic filing of pleadings and papers in a circuit court <u>and to the electronic filing of instruments authorized or required by law to be recorded and indexed in the land records</u>. A pleading<u>,</u> ~~or~~ paper<u>, or instrument</u> may not be filed by direct electronic transmission to the court except in accordance with this Rule. To the extent of any inconsistency with any other Rule, this Rule and any administrative order entered pursuant to it shall prevail.

<u>Cross reference: Code, Real Property Article,</u>

§3-502.

b. Submission of Plan

A County Administrative Judge may submit to the State Court Administrator a detailed plan for a pilot project for the electronic filing of pleadings and papers or of real property instruments. In developing the plan, the County Administrative Judge shall consult with the Clerk of the Circuit Court, appropriate vendors, the State Court Administrator, and any other judges, court clerks, members of the bar, vendors of electronic filing systems, and interested persons that the County Administrative Judge chooses to ensure that: (1) the proposed electronic filing system is compatible with the data processing systems, operational systems, and electronic filing systems used or expected to be used by the judiciary; (2) the installation and use of the proposed system does not create an undue financial or operational burden on the court; (3) the proposed system is reasonably available for use at a reasonable cost, or an efficient and compatible system of manual filing will be maintained; (4) the proposed system is effective, secure and not likely to break down; (5) the proposed system makes appropriate provision for the protection of privacy and for public access to public records; and (6) the court can discard or replace the system during or at the conclusion of a trial period without undue financial or operational burden. The State Court Administrator shall review the plan and make a recommendation to the Court of Appeals with respect to it.

Cross reference: For the definition of "public record," see Code, State Government Article, §10-611.

c. Approval; Duration

A plan may not be implemented unless approved by administrative order of the Court of Appeals. The plan shall terminate two years after the date of the administrative order unless the Court terminates it earlier

or modifies or extends it by a subsequent administrative order.

d. Evaluation

The Chief Judge of the Court of Appeals may appoint a committee consisting of one or more judges, court clerks, lawyers, legal educators, bar association representatives, and other interested and knowledgeable persons to monitor and evaluate the plan. Before the expiration of the two-year period set forth in section c of this Rule, the Court of Appeals, after considering the recommendations of the committee, shall evaluate the operation of the plan.

e. Public Availability of Plan

The State Court Administrator and the Clerk of the Circuit Court shall make available for public inspection a copy of any current plan.

Source: This Rule is derived from former Rule 1217A.

Rule 16-307 was accompanied by the following Reporter's Note.

The General Assembly enacted Chapter 234, Acts of 2007, (HB 331) which allows the Administrative Office of the Courts to establish a pilot program for the electronic filing of instruments authorized or required by law to be recorded and indexed in the land records. The new law requires that the plans for the pilot program are to be governed and implemented by Rule 16-307. The General Court Administration Subcommittee recommends modifying Rule 16-307 to make it applicable to the pilot programs provided for in the statute.

Judge Norton explained that the 2007 legislature enacted House Bill 331 amending Code, Real Property Article §3-502, to

allow for the electronic filing of land instruments to be included in a pilot project of the Administrative Office of the Courts (AOC). Section a. of Rule 16-307 is proposed for amendment, citing directly the language of the statute that authorizes those type of instruments as included in the pilot project. Section b. of the Rule provides for a County Administrative Judge to submit a detailed plan for a pilot project for electronic filings of pleadings and papers, and language has been added to refer to a project for the electronic filing of real property instruments. By consensus, the Committee approved the Rule as presented.

Judge Norton presented Rule 16-1006, Required Denial of Inspection - Certain Categories of Case Records, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 300 - CIRCUIT COURT CLERKS' OFFICES

AMEND Rule 16-1006 (h) by adding a category of case records relating to a petition for an emergency evaluation to the list of confidential medical records, as follows:

Rule 16-1006. REQUIRED DENIAL OF INSPECTION - CERTAIN CATEGORIES OF CASE RECORDS

Except as otherwise provided by law, court order, or the Rules in this Chapter, the custodian shall deny inspection of:

(a) All case records filed in the

following actions involving children:

(1) Actions filed under Title 9, Chapter 100 of the Maryland Rules for:

(A) Adoption;

(B) Guardianship; or

(C) To revoke a consent to adoption or guardianship for which there is no pending adoption or guardianship proceeding in that county.

(2) Delinquency, child in need of assistance, and child in need of supervision actions in Juvenile Court, except that, if a hearing is open to the public pursuant to Code, Courts Article, §3-8A-13 (f), the name of the respondent and the date, time, and location of the hearing are open to inspection.

(b) The following case records pertaining to a marriage license:

(1) A physician's certificate filed pursuant to Code, Family Law Article, §2-301, attesting to the pregnancy of a child under 18 years of age who has applied for a marriage license.

(2) Until a license is issued, the fact that an application for a license has been made, except to the parent or guardian of a party to be married.

(c) In any action or proceeding, a record created or maintained by an agency concerning child abuse or neglect that is required by statute to be kept confidential.

Committee note: Statutes that require child abuse or neglect records to be kept confidential include Code, Article 88A, §§6 (b) and 6A and Code, Family Law Article, §5-707.

(d) The following case records in actions or proceedings involving attorneys or judges:

(1) Records and proceedings in attorney grievance matters declared confidential by Rule 16-723 (b).

(2) Case records with respect to an investigative subpoena issued by Bar Counsel pursuant to Rule 16-732;

(3) Subject to the provisions of Rule 19 (b) and (c) of the Rules Governing Admission to the Bar, case records relating to proceedings before a Character Committee.

(4) Case records consisting of Pro Bono Legal Service Reports filed by an attorney pursuant to Rule 16-903.

(5) Case records relating to a motion filed with respect to a subpoena issued by Investigative Counsel for the Commission on Judicial Disabilities pursuant to Rule 16-806.

(e) The following case records in criminal actions or proceedings:

(1) A case record that has been ordered expunged pursuant to Rule 4-508.

(2) The following case records pertaining to search warrants:

(A) The warrant, application, and supporting affidavit, prior to execution of the warrant and the filing of the records with the clerk.

(B) Executed search warrants and all papers attached thereto filed pursuant to Rule 4-601.

(3) The following case records pertaining to an arrest warrant:

(A) A case record pertaining to an arrest warrant issued under Rule 4-212 (d) and the charging document upon which the warrant was issued until the conditions set forth in Rule 4-212 (d)(3) are satisfied.

(B) Except as otherwise provided in

Code, State Government Article, §10-616 (q), a case record pertaining to an arrest warrant issued pursuant to a grand jury indictment or conspiracy investigation and the charging document upon which the arrest warrant was issued.

(4) A case record maintained under Code, Courts Article, §9-106, of the refusal of a person to testify in a criminal action against the person's spouse.

(5) A presentence investigation report prepared pursuant to Code, Correctional Services Article, §6-112.

(6) A case record pertaining to a criminal investigation by a grand jury or by a State's Attorney pursuant to Code, Article 10A, §39A.

Committee note: Although this Rule shields only case records pertaining to a criminal investigation, there may be other laws that shield other kinds of court records pertaining to such investigations. This Rule is not intended to affect the operation or effectiveness of any such other law.

(f) A transcript, tape recording, audio, video, or digital recording of any court proceeding that was closed to the public pursuant to rule or order of court.

(g) Backup audio recordings made by any means, computer disks, and notes disk of a court reporter that are in the possession of the court reporter and have not been filed with the clerk.

(h) The following case records containing medical information:

(1) A case record, other than an autopsy report of a medical examiner, that (A) consists of a medical or psychological report or record from a hospital, physician, psychologist, or other professional health care provider, and (B) contains medical or psychological information about an individual.

(2) A case record pertaining to the testing of an individual for HIV that is declared confidential under Code, Health-General Article, §18-338.1 or §18-338.2.

(3) A case record that consists of information, documents, or records of a child fatality review team, to the extent they are declared confidential by Code, Health-General Article, §5-709.

(4) A case record that contains a report by a physician or institution concerning whether an individual has an infectious disease, declared confidential under Code, Health-General Article, §18-201 or §18-202.

(5) A case record that contains information concerning the consultation, examination, or treatment of a developmentally disabled person, declared confidential by Code, Health-General Article, §7-1003.

(6) a case record relating to a petition for an emergency evaluation made under Code, Health-General Article, §10-622.

(i) A case record that consists of the federal or Maryland income tax return of an individual.

(j) A case record that:

(1) a court has ordered sealed or not subject to inspection, except in conformance with the order; or

(2) in accordance with Rule 16-1009 (b), is the subject of a motion to preclude or limit inspection.

Source: This Rule is new.

Rule 16-1006 was accompanied by the following Reporter's Note.

> In Chapter 557, Acts of 2007 (SB 472), the legislature added court records relating to a petition for a mental health emergency evaluation to the list of records that are not accessible to the public without a court order. The General Court Administration Subcommittee recommends amending Rule 16-1006 (h) by adding these records to the list of records containing medical information that are confidential and not open to the public.

Judge Norton told the Committee that in Senate Bill 472, the 2007 legislature added court records relating to a petition for mental health emergency evaluation as a category of records that are not accessible to the public without a court order. In light of this, language has been added to section (h) of the Rule, the list of records that are required to be confidential. The Subcommittee proposes adding a new subsection (h)(6) to the list. Eric Lieberman, Esq., counsel to The Washington Post, has made an additional suggestion that is a good idea. Subsections (2), (3),(4), and (5) of section (h) list the authorizing statute. Mr. Lieberman recommends adding to subsection (6) the language "declared confidential by Code, Health General Article, §10-630," the authorizing statute. The Committee agreed by consensus to this additional language. By consensus, the Committee approved the Rule as amended.

Agenda Item 6. Consideration of proposed Rules changes recommended by the Probate/Fiduciary Subcommittee: Rule 10-202 (Certificates), Rule 10-203 (Service; Notice), Rule 10-205 (Hearing), Rule 10-301 (Petition for Appointment of a Guardian of Property), Rule 10-302 (Service; Notice), and Rule 10-304 (Hearing)

Mr. Maloney presented Rules 10-202; Certificates; 10-203, Service; Notice; 10-205, Hearing; 10-301, Petition for Appointment of a Guardian of Property; 10-302, Service; Notice; and 10-304, Hearing, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 10 - GUARDIANS AND OTHER FIDUCIARIES

CHAPTER 200 - GUARDIAN OF PERSON

AMEND Rule 10-202 to add an exception to subsection (a)(1), to add a certain category of health care professional to sections (a) and (c), to move subsection (a)(2) to section (d), to reword the contents of the certificate in section (b), to change the word "Administrator" to the word "Secretary" in section (d), and to make stylistic changes, as follows:

Rule 10-202. CERTIFICATES ~~- REQUIREMENT AND CONTENT~~

(a) ~~To be Attached to Petition~~ Generally Required

~~(1) Generally~~

Except as provided in section (d) ~~If~~ if guardianship of the person of a disabled person is sought, the petitioner shall file with the petition signed and verified certificates of ~~(A)~~ (1) two physicians licensed to practice medicine in the United States who have examined the disabled person, or ~~(B)~~ (2) one licensed physician who has examined the disabled person and one licensed psychologist or certified clinical social worker who has seen and evaluated the disabled person. An examination or evaluation by at least one of the health care professionals under this subsection shall occur within 21 days before the filing of a

petition for guardianship of a disabled person.

(b) Contents

Each certificate shall state: (1) the name, address, and qualifications of the ~~physician or psychologist~~ person who performed the examination or evaluation, (2) a brief history of the ~~physician's or psychologist's~~ person's involvement with the disabled person, (3) the date of the ~~physician's~~ last examination ~~of the disabled person or the psychologist's last~~ or evaluation of the disabled person, and (4) the ~~physician's or psychologist's~~ person's opinion as to: ~~(1)~~ (A) the cause, nature, extent, and probable duration of the disability, ~~(2)~~ (B) whether ~~the person requires~~ institutional care is required, and ~~(3)~~ (C) whether the person under disability has sufficient mental capacity to understand the nature of and consent to the appointment of a guardian.

~~(2) Beneficiary of the Department of Veterans Affairs~~

~~If guardianship of the person of a disabled person who is a beneficiary of the United States Department of Veterans Affairs is being sought, the petitioner shall file with the petition, in lieu of the two certificates required by subsection (1) of this section, a certificate of the Administrator of that Department or an authorized representative of the Administrator stating that the person has been rated as disabled by the Department in accordance with the laws and regulations governing the Department of Veterans Affairs. The certificate shall be prima facie evidence of the necessity for the appointment.~~

~~Cross reference: Code, Estates and Trusts Article, §13-705.~~

~~(b)~~ (c) Delayed Filing of Certificates

(1) After Refusal to Permit Examination

If the petition is not accompanied by the required certificate and the petition alleges that the disabled person is residing with or under the control of a person who has refused to permit examination by a physician or evaluation by a psychologist or certified clinical social worker, and that the disabled person may be at risk unless a guardian is appointed, the court shall defer issuance of a show cause order. The court shall instead issue an order requiring that the person who has refused to permit the disabled person to be examined or evaluated appear personally on a date specified in the order and show cause why the disabled person should not be examined or evaluated. The order shall be personally served on that person and on the disabled person.

(2) Appointment of Health Care Professionals by Court

If the court finds after a hearing that examinations are necessary, it shall appoint two physicians or one physician and one psychologist or certified clinical social worker to conduct the examinations or the examination and evaluation and file their reports with the court. If both health care professionals find the person to be disabled, the court shall issue a show cause order requiring the alleged disabled person to answer the petition for guardianship and shall require the petitioner to give notice pursuant to Rule 10-203. Otherwise, the petition shall be dismissed.

(d) Beneficiary of the Department of Veterans Affairs

If guardianship of the person of a disabled person who is a beneficiary of the United States Department of Veterans Affairs is being sought, the petitioner shall file with the petition, in lieu of the two certificates required by section (a) of this Rule, a certificate of the Secretary of that Department or an authorized representative of the Secretary stating that the person has been rated as disabled by the Department in accordance with the laws and regulations

governing the Department of Veterans Affairs. The certificate shall be prima facie evidence of the necessity for the appointment.

Cross reference: Code, Estates and Trusts Article, §13-705.

Cross reference: Rule 1-341.

Source: This Rule is in part derived from former Rule R73 b 1 and b 2 and is in part new.

Rule 10-202 was accompanied by the following Reporter's Note.

Chapter 250, Acts of 2007 (HB 672) added a licensed certified clinical social worker as a health care professional who is allowed to evaluate the competency of disabled persons for whom a guardianship is being sought. The Probate/Fiduciary Subcommittee recommends amending Rules 10-202, 10-203, 1-205, 10-301, 10-302, and 10-304 to reflect this change.

The Subcommittee also recommends moving subsection (a)(2) to the end of Rule 10-202 to make clear that the certificates issued by the Secretary of Veterans Affairs are not the same certificates to which section (a) refers. The title of "Administrator of Veterans Affairs" has been changed to "Secretary of Veterans Affairs," so Rules 10-202 and 10-301 must be corrected to reflect this change.

AMEND Rule 10-203 (c) by deleting the reference to certain health care professionals, by adding a reference to Rule 10-202, by adding a reference to “health care professionals,” and by making stylistic changes, as follows:

Rule 10-203. SERVICE; NOTICE

(a) Service on Minor or Alleged Disabled Person

The petitioner shall serve a show cause order issued pursuant to Rule 10-104 on the minor or alleged disabled person and on the parent, guardian, or other person having care or custody of the minor or alleged disabled person. Service shall be in accordance with Rule 2-121 (a). If the minor or alleged disabled person resides with the petitioner, service shall be made upon the minor or disabled person and on such other person as the court may direct. Service upon a minor under the age of ten years may be waived provided that the other service requirements of this section are met. The show cause order served on a disabled person shall be accompanied by an "Advice of Rights" in the form set forth in Rule 10-204.

(b) Notice to Other Persons

(1) To Attorney

Unless the court orders otherwise, the petitioner shall mail a copy of the petition and show cause order by ordinary mail to the attorney for the minor or alleged disabled person.

(2) To Interested Persons

Unless the court orders otherwise, the petitioner shall mail by ordinary mail and by certified mail to all other interested persons a copy of the petition and show cause order and a "Notice to Interested Persons."

(c) Notice to Interested Persons

The Notice to Interested Persons shall be in the following form:

In the Matter of	In the Circuit Court for
_____	_____
(Name of minor or alleged disabled person)	(County)
	_____
	(docket reference)

NOTICE TO INTERESTED PERSONS

A petition has been filed seeking appointment of a guardian of the person of _____, who is alleged to be a minor or disabled person.

You are an "interested person," that is, someone who should receive notice of this proceeding because you are related to or otherwise concerned with the welfare of this person.

If the court appoints a guardian for the person, that person will lose certain valuable rights to make individual decisions.

Please examine the attached papers carefully. If you object to the appointment of a guardian, please file a response in accordance with the attached show cause order. (Be sure to include the case number). If you wish otherwise to participate in this proceeding, notify the court and be prepared to attend any hearing.

~~A physician's or psychologist's~~ The certificate or certificates filed pursuant to Rule 10-202 that are attached to the petition will be admissible as substantive evidence without

the presence or testimony of the ~~physician or psychologist~~ certifying health care professional or professionals unless you file a request that the ~~physician or psychologist~~ health care professional appear to testify. The request must be filed at least 10 days before the trial date, except that, if the trial date is less than 10 days from the date your response is due, the request may be filed at any time before trial.

If you believe you need further legal advice about this matter, you should consult your attorney.

Source: This Rule is in part derived from former Rule R74 and Code, Estates and Trusts Article, §1-103 (b) and is in part new.

Rule 10-203 was accompanied by the following Reporter's Note.

See the Reporter's note to proposed amendments to Rule 10-202.

MARYLAND RULES OF PROCEDURE

TITLE 10 - GUARDIANS AND OTHER FIDUCIARIES

CHAPTER 200 - GUARDIAN OF PERSON

AMEND Rule 10-205 by deleting a reference to certain health care professionals, by adding a reference to Rule 10-202, by adding references to "health care professionals," and by making stylistic changes, as follows:

Rule 10-205. HEARING

(a) Guardianship of the Person of a Minor

(1) No Response to Show Cause Order

If no response to the show cause order is filed and the court is satisfied that the petitioner has complied with the provisions of Rule 10-203, the court may rule on the petition summarily.

(2) Response to Show Cause Order

If a response to the show cause order objects to the relief requested, the court shall set the matter for trial, and shall give notice of the time and place of trial to all persons who have responded.

Cross reference: Code, Estates and Trusts Article, §13-702.

(b) Guardianship of Alleged Disabled Person

(1) Generally

When the petition is for guardianship of the person of an alleged disabled person, the court shall set the matter for jury trial. The alleged disabled person or the attorney representing the person may waive a jury trial at any time before trial. If a jury trial is held, the jury shall return a verdict pursuant to Rule 2-522 (c) as to any alleged disability. ~~A physician's or psychologist's~~ The certificate or certificates filed pursuant to Rule 10-202 are ~~is~~ admissible as substantive evidence without the presence or testimony of the ~~physician or psychologist~~ certifying health care professional unless, not later than 10 days before trial, an interested person who is not an individual under a disability, or the attorney for the alleged disabled person, files a request that the ~~physician or psychologist~~ health care professional appear to testify. If the trial date is less than 10 days from the date the response is due, a request that the ~~physician or psychologist~~ health care professional appear may be filed

at any time before trial. If the alleged disabled person asserts that, because of his or her disability, the alleged disabled person cannot attend a trial at the courthouse, the court may hold the trial at a place to which the alleged disabled person has reasonable access.

(2) Beneficiary of the Department of Veterans Affairs

If guardianship of the person of a disabled person who is a beneficiary of the United States Department of Veterans Affairs is being sought and no objection to the guardianship is made, a hearing shall not be held unless the Court finds that extraordinary circumstances require a hearing.

Source: This Rule is in part derived from former Rule R77 and is in part new.

Rule 10-205 was accompanied by the following Reporter's Note.

See the Reporter's note to the proposed amendments to Rule 10-202.

MARYLAND RULES OF PROCEDURE

TITLE 10 - GUARDIANS AND OTHER FIDUCIARIES

CHAPTER 300 - GUARDIAN OF PROPERTY

AMEND Rule 10-301 (d) by deleting a reference to certain health care professionals, by changing the word "Administrator" to the word "Secretary," and by making stylistic changes, as follows:

Rule 10-301. PETITION FOR APPOINTMENT OF A GUARDIAN OF PROPERTY

. . .

(d) Required Exhibits

The petitioner shall attach to the petition as exhibits (1) a copy of any instrument nominating a guardian; (2)(A) ~~any physician's or psychologist's~~ the certificates required by Rule 10-202, or (B) if guardianship of the property of a disabled person who is a beneficiary of the United States Department of Veterans Affairs is being sought, in lieu of the ~~certificates required by~~ requirements of Rule 10-202, a certificate of the ~~Administrator~~ Secretary of that Department or an authorized representative of the ~~Administrator~~ Secretary stating that the person has been rated as disabled by the Department in accordance with the laws and regulations governing the Department of Veterans Affairs; and (3) if the petition is for the appointment of a guardian for a minor who is a beneficiary of the Department of Veterans Affairs, a certificate of the Secretary of that Department or any authorized representative of the Secretary, in accordance with Code, Estates and Trusts Article, §13-802.

. . .

Rule 10-301 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 10-202.

AMEND Rule 10-302 by deleting a reference to certain health care professionals, by adding a reference to Rule 10-202, by adding references to “health care professionals,” and by making stylistic changes, as follows:

Rule 10-302. SERVICE; NOTICE

(a) Service on Minor or Alleged Disabled Person

The petitioner shall serve a show cause order issued pursuant to Rule 10-104 on the minor or alleged disabled person and on the parent, guardian, or other person having care or custody of the minor or alleged disabled person or of the estate belonging to the minor or alleged disabled person. Service shall be in accordance with Rule 2-121 (a). If the minor or alleged disabled person resides with the petitioner, service shall be made upon the minor or alleged disabled person and on such other person as the court may direct. Service upon a minor under the age of ten years may be waived provided that the other service requirements of this section are met. The show cause order served on an alleged disabled person shall be accompanied by an "Advice of Rights" in the form set forth in Rule 10-303.

(b) Notice to Other Persons

(1) To Attorney

Unless the court orders otherwise, the petitioner shall mail a copy of the petition and show cause order by ordinary mail to the attorney for the minor or alleged disabled person.

(2) To Interested Persons

Unless the court orders otherwise, the petitioner shall mail by ordinary mail and by certified mail to all other interested persons a copy of the petition and show cause order and a "Notice to Interested Persons."

(c) Notice to Interested Persons

The Notice to Interested Persons shall be in the following form:

In the Matter of _____ (Name of minor or alleged disabled person)

In the Circuit Court for _____ (County)

_____ (docket reference)

NOTICE TO INTERESTED PERSONS

A petition has been filed seeking appointment of a guardian of the property of _____, who is alleged to be a minor or alleged disabled person.

You are an "interested person", that is, someone who should receive notice of this proceeding because you are related to or otherwise concerned with the welfare of this person.

If the court appoints a guardian of the property for _____, that person will lose the right to manage his or her property.

Please examine the attached papers carefully. If you object to the appointment of a guardian, please file a response in accordance with the attached show cause order. (Be sure to include the case number). If you wish otherwise to participate

in this proceeding, notify the court and be prepared to attend any hearing.

~~A physician's or psychologist's~~ The certificate or certificates filed pursuant to Rule 10-202 that are attached to the petition will be admissible as substantive evidence without the presence or testimony of the ~~physician or psychologist~~ certifying health care professional or professionals unless you file a request that the ~~physician or psychologist~~ health care professional appear to testify. The request must be filed at least 10 days before the trial date, except that, if the trial date is less than 10 days from the date your response is due, the request may be filed at any time before trial.

If you believe you need further legal advice about this matter, you should consult your attorney.

Source: This Rule is in part derived from former Rule R74 and Code, Estates and Trusts Article, §1-103 (b) and is in part new.

Rule 10-302 was accompanied by the following Reporter's Note.

See the Reporter's note to the proposed amendments to Rule 10-202.

AMEND Rule 10-304 by deleting references to certain health care professionals, by adding references to "health care professionals," and by making stylistic changes, as follows:

Rule 10-304. HEARING

(a) No Response to Show Cause Order

If no response to the show cause order is filed and the court is satisfied that the petitioner has complied with the provisions of Rule 10-302, the court may rule on the petition summarily.

(b) Response to Show Cause Order; Place of Trial

If a response to the show cause order objects to the relief requested, the court shall set the matter for trial, and shall give notice of the time and place of trial to all persons who have responded. Upon motion by the alleged disabled person asserting that, because of his or her disability, the alleged disabled person cannot attend a trial at the courthouse, the court may hold the trial at a place to which the alleged disabled person has reasonable access.

Cross reference: Code, Estates and Trusts Article, §13-211.

(c) Request for Attendance of ~~Physician or Psychologist~~ Health Care Professional

When the petition is for guardianship of the property of a disabled person, ~~a physician's or psychologist's~~ the certificate or certificates filed pursuant to ~~that complies with~~ Rule 10-202 ~~is~~ are admissible as substantive evidence without the presence or testimony of the ~~physician or psychologist~~ health care professional unless, not later than 10 days before trial, an interested person who is not an individual under a disability, or the attorney for the disabled

person, files a request that the ~~physician or psychologist~~ health care professional appear to testify. If the trial date is less than 10 days from the date the response is due, a request that the ~~physician or psychologist~~ health care professional appear may be filed at any time before trial.

Source: This Rule is in part derived from former Rule R77 and is in part new.

Rule 10-304 was accompanied by the following Reporter's Note.

See the Reporter's note to the proposed amendments to Rule 10-202.

Mr. Maloney explained that House Bill 672 amended Title 13 of the Estates and Trusts Article pertaining to those professionals who are allowed to evaluate the competency of disabled persons for whom a guardianship is being sought. Previously, either two physicians or a physician and a psychologist could perform the evaluations. The 2007 legislation added a licensed certified clinical social worker to the list of professionals, so that the evaluation can be done by a physician and a licensed certified clinical social worker as well. The changes to the Rules conform to the statutory change. There are also two "housekeeping" amendments. One is that subsection (b)(2) of Rule 10-202 has been relettered as section (d), because the certificates to which the section refers are not the same as the certificates to which section (a) refers. The other is that because the title of the "Administrator of Veterans Affairs" has been changed to the "Secretary of Veterans Affairs," the new

title is now reflected in Rules 10-202 and 10-301. By consensus, the Committee approved the Rules as presented.

Agenda Item 7. Consideration of proposed Rules changes recommended by the Specific Remedies Subcommittee: Rule 2-510 (Subpoenas)

Mr. Zarnoch presented Rule 2-510, Subpoenas, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-510 by adding a cross reference at the end of the Rule, as follows:

Rule 2-510. SUBPOENAS

. . .

Cross reference: See Code, State Government Article, §§2-1802 and 2-1803 concerning legislative subpoenas.

. . .

Rule 2-510 was accompanied by the following Reporter's Note.

The legislature enacted Chapter 546, Acts of 2007 (SB 384), which added Code, State Government Article, §§2-1802 and 2-1803 pertaining to procedures for issuing and enforcing legislative subpoenas. The Specific Remedies Subcommittee recommends adding a cross reference at the end of Rule 2-510 to draw attention to the new statutes.

Mr. Zarnoch told the Committee that a cross reference is

proposed to be added to the end of the Rule referring to a new statute that deals with the issuance and enforcement of legislative subpoenas, i.e., Code, State Government Article, §§2-1802 and 2-1803. Chapter 546, Acts of 2007 (SB 384) was enacted because of difficulties encountered by the Special Committee on Employee Rights and Protections. By consensus, the Committee approved the Rule as presented.

The Chair stated that the minutes of today's meeting should acknowledge the excellent job Mr. Zarnoch does as Chair of the Legislative Subcommittee at the end of each legislative session, familiarizing the Committee with the legislative changes affecting the Rules of Procedure. The Reporter added that many of the Rules changes discussed today are the direct result of Mr. Zarnoch's good work in identifying the necessary changes resulting from legislation.

Agenda Item 8. Consideration of "housekeeping" amendments to: Rule 1-312 (Requirements of Signing Attorney), Rule 5-609 (Impeachment by Evidence of Conviction of Crime), and Rule 5-803 (Hearsay Exceptions: Unavailability of Declarant not Required)

The Reporter presented Rules 1-312, Requirements of Signing Attorney; 5-609, Impeachment by Evidence of Conviction of Crime; and 5-803, Hearsay Exceptions: Unavailability of Declarant Not Required, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

AMEND Rule 1-312 to correct internal references, as follows:

Rule 1-312. REQUIREMENTS OF SIGNING ATTORNEY

(a) General

In addition to having been admitted to practice law in this State, an attorney signing a pleading or paper in compliance with Rule 1-311 shall comply with one of the following three requirements. The attorney shall:

(1) maintain an office for the practice of law in the United States;

(2) be a regular employee of an agency of government or of a business or other nongovernmental organization or association and be authorized to sign pleadings on behalf of the employer. The attorney shall not sign pleadings and papers on behalf of other clients unless both of the following requirements are met: (A) a substantial portion of the attorney's duties performed for the regular employer in the regular course of employment must constitute the practice of law, and (B) the office address as shown on the pleadings must be located in the United States and a substantial amount of the attorney's time must be spent in that office during ordinary business hours in the traditional work week; or

(3) have a practice limited exclusively to participation in a legal services or pro bono publico program sponsored or supported by a local Bar Association as defined by Rule ~~16-701 b~~ 16-811 e 1, the Maryland State Bar Association, an affiliated bar foundation, or the Maryland Legal Services Corporation, and

the attorney shall include on the pleading or paper the address and telephone number of (A) the legal services or pro bono publico program in which the attorney is practicing, or (B) the attorney's primary residence, which shall be in the United States.

Cross reference: Rule ~~16-811 f 1~~ 16-811 e 2.

(b) Definition of "Office for the Practice of Law"

In this Rule, "office for the practice of law" means an office maintained for the practice of law in which a substantial amount of the attorney's time is usually devoted to the practice of law during ordinary business hours in the traditional work week. An attorney is deemed to be "in" such an office even though temporarily absent from it if the duties of law practice are actively conducted by the attorney from that office.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 302 c 2 and 3.
Section (b) is derived from former Rule 302 c 1.

Rule 1-312 was accompanied by the following Reporter's Note.

Due to the renumbering of some Rules, the references to "Rule 16-701 b" in subsection (a)(3) and to "Rule 16-811 f 1" in the cross reference after subsection (a)(3) need to be updated, so that they refer to the correct Rules.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 600 - WITNESSES

AMEND Rule 5-609 to update the cross reference, as follows:

Rule 5-609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) Generally

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if (1) the crime was an infamous crime or other crime relevant to the witness's credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.

Cross reference: Code, Courts Article, §10-905.

Committee note: The requirement that the conviction, when offered for purposes of impeachment, be brought out during examination of the witness is for the protection of the witness. It does not apply to impeachment by evidence of prior conviction of a hearsay declarant who does not testify.

(b) Time Limit

Evidence of a conviction is not admissible under this Rule if a period of more than 15 years has elapsed since the date of the conviction.

(c) Other Limitations

Evidence of a conviction otherwise admissible under section (a) of this Rule shall be excluded if:

(1) the conviction has been reversed or vacated;

(2) the conviction has been the subject of a pardon; or

(3) an appeal or application for leave to appeal from the judgment of conviction is pending, or the time for noting an appeal or filing an application for leave to appeal has not expired.

(d) Effect of Plea of Nolo Contendere

For purposes of this Rule, "conviction" includes a plea of nolo contendere followed by a sentence, whether or not the sentence is suspended.

Committee note: See Code, Courts Article, ~~§3-824~~ §3-8A-23 for the effect of juvenile adjudications and for restrictions on their admissibility as evidence generally. Evidence of these adjudications may be admissible under the Confrontation Clause to show bias; see *Davis v. Alaska*, 415 U.S. 308 (1974).

Source: This Rule is derived from F.R.Ev. 609 and Rule 1-502.

Rule 5-609 was accompanied by the following Reporter's Note.

Because of a reorganization of the Courts Article, the subtitle pertaining to juvenile causes was moved from Subtitle 8 to Subtitle 8A. The Code reference in the Committee note following section (d) of Rule 5-609 has to be corrected to reflect its new designation.

AMEND Rule 5-803 by correcting the cross reference after subsection (b)(6), as follows:

Rule 5-803. HEARSAY EXCEPTIONS: UNAVAILABILITY OF DECLARANT NOT REQUIRED

. . .

(b) Other Exceptions

(1) Present Sense Impression

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited Utterance

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for Purposes of Medical Diagnosis or Treatment

Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

(5) Recorded Recollection

See Rule 5-802.1 (e) for recorded recollection.

(6) Records of Regularly Conducted Business Activity

A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness. In this paragraph, "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Cross reference: Rule 5-902 ~~(11)~~ (b).

. . .

Rule 5-803 was accompanied by the following Reporter's Note.

The 155th Report renumbered subsection (a)(11) of Rule 5-902 as section (b). The cross reference after subsection (b)(6) of Rule 5-803 should be modified to reflect the change to Rule 5-902.

The Reporter said that the changes to these Rules are "housekeeping" changes. Attorneys or publishers point out that some Rules have been renumbered, or statutory numbers have changed, and these need to be reflected in Rules that cite them. By consensus, the Committee approved the Rules as presented.

Additional Agenda Items.

The Reporter told the Committee that there were two additional agenda items. One is Rule 15-401, Judicial Review - Health Claims Arbitration.

MARYLAND RULES OF PROCEDURE

TITLE 15 - OTHER SPECIAL PROCEEDINGS

CHAPTER 400- HEALTH CLAIMS ARBITRATION

AMEND Rule 15-401 to add a cross reference to a certain statute, as follows:

Rule 15-401. JUDICIAL REVIEW - HEALTH CLAIMS ARBITRATION

The rules in this Chapter apply to judicial review of an award determining a health care malpractice claim under Code, Courts Article, Title 3, Subtitle 2A and to an assessment of costs under an award.
Cross reference: See generally Code, Courts Article, §§3-2A-01 through 3-2A-09 (Health Care Malpractice Claims), relating to arbitration of certain claims against health care providers for medical injury. See Code, Courts Article, §5-118 for revival of a claim against a health care provider after a dismissal for failure to file a report in accordance with Code, Courts Article, §3-2A-04 (b)(3).

Source: This Rule is derived from former Rule BY1.

Rule 15-401 was accompanied by the following Reporter's Note.

The 2007 Legislature enacted Chapter 324, Acts of 2007 (SB 309) which allows a claim against a health care provider that was dismissed once for failure to file a report in accordance with Code, Courts Article, §3-2A-04 (b)(3) to be filed again. The Trial Subcommittee recommends adding a cross reference to the new statute at the end of Rule 15-401.

The proposed change to Rule 15-401 is the addition of a cross reference to Code, Courts Article, §5-118, relating to revival of a claim against a health care provider. Mr. Brault stated that in response to *Walzer v. Osborne*, 395 Md. 563 (2006), the legislature passed a statute that provides that if a party is dismissed for failure to file a certificate of merit, he or she has until August 2007 to file it. He noted that the statute expires in August. The Reporter commented that the cross reference probably is unnecessary, and the Committee agreed.

Mr. Karceski presented Rule 4-341, Sentencing - Presentence Investigation and Report, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-341 to include statutes

that require presentence investigation and report, as follows:

Rule 4-341. SENTENCING - PRESENTENCE INVESTIGATION AND REPORT

Before imposing a sentence, ~~if required by law~~ the court in accordance with Code, Correctional Services Article, §6-112 (c) and Code, Criminal Procedure Article, §11-727 shall, and in other cases may, order a presentence investigation and report. A copy of the report, including any recommendation to the court, shall be mailed or otherwise delivered to the defendant or counsel and to the State's Attorney in sufficient time before sentencing to afford a reasonable opportunity for the parties to investigate the information in the report. Except for any portion of a presentence report that is admitted into evidence, the report, including any recommendation to the court, is not a public record and shall be kept confidential as provided in Code, Correctional Services Article, §6-112.

Cross reference: ~~See, e.g.,~~ As to mandatory presentence investigations, see *Sucik v. State*, 344 Md. 611 (1997). As to ~~the handling of a presentence report~~ victim impact statements in presentence reports, see *Ware v. State*, 348 Md. 19 (1997)~~, and~~. As to the confidentiality and availability of presentence reports, see *Haynes v. State*, 19 Md. App. 428 (1973).

Source: This Rule is derived from former Rule 771 and M.D.R. 771.

Rule 4-341 was accompanied by the following Reporter's Note.

The 2007 General Assembly enacted Chapter 601, Acts of 2007 (HB 390), which requires a court to order a presentence investigation for a defendant who violated Code, Criminal Law Article, §3-602, Sexual Abuse of a Minor, and is obligated to register as a child sexual offender. Code,

> Correctional Services Article, §6-112 (c) requires presentence investigation reports for first degree murder convictions resulting in the death penalty or imprisonment for life without possibility of parole. The Criminal Subcommittee recommends including a reference to these statutes in Rule 4-341.
>
> In response to a request of the Rules Committee, the Subcommittee also recommends expanding the existing cross reference to cases to explain the reason for citing the cases.

Mr. Karceski explained that House Bill 390, enacted by the 2007 legislature, requires a court to order a presentence investigation and a mental health assessment for a defendant who violated Code, Criminal Law Article, §3-602, Sexual Abuse of a Minor, and who has to register as a child sexual offender unless waived by the State's Attorney and defense counsel. The only other categories of cases that require a presentence investigation are death penalty and life without parole cases. Otherwise, it is a discretionary matter with the court. By consensus, the Committee approved the Rule as presented.

The Chair thanked the Committee and adjourned the meeting.