COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 of the Judicial Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland on October 12, 2007.

Members present:

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

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Hon. Michele D. Hotten
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Frank M. Kratovil, Jr., Esq.
Zakia Mahasa, Esq.
Hon. Albert J. Matricciani
Robert R. Michael, Esq.
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Kathy P. Smith, Clerk
Melvin J. Sykes, Esq.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Cheryl Lyons-Schmidt, Rules Committee Intern
Brian L. Zavin, Esq., Office of the Public Defender
Kathleen Dumais, Esq., Maryland House of Delegates, District 15
Richard Montgomery, Director, Legislative Relations, Maryland State Bar Association
Leslie Gradet, Esq., Clerk, Court of Special Appeals
Stuart Grozbean, Esq.
Pamela Cardullo-Ortiz, Esq., Executive Director, Family Administration, Administrative Office of the Courts

The Chair convened the meeting. He said that the Committee had received the minutes of the meetings of February 9, 2007, March 9, 2007, and May 11, 2007. He asked if anyone had any additions or corrections. There being none, Mr. Klein moved that

the minutes be approved, the motion was seconded, and it passed unanimously.

The Chair said that the 158th Report will be considered by the Court of Appeals on December 3, 2007.

Agenda Item 1. Consideration of proposed amendments to: Rule 4-322 (Exhibits), Rule 8-411 (Transcript), and Rule 16-404 (Administration of Court Reporters)

Mr. Karceski presented Rules 4-322, Exhibits; 8-411, Transcript; and 16-404, Administration of Court Reporters, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-322 by adding section (c) pertaining to audio, audiovisual, and visual recordings, as follows:

Rule 4-322. EXHIBITS

(a) Generally

All exhibits marked for identification, whether or not offered in evidence and, if offered, whether or not admitted, shall form part of the record and, unless the court orders otherwise, shall remain in the custody of the clerk. With leave of court, a party may substitute a photograph or copy for any exhibit.

Cross reference: Rule 16-306.

(b) Preservation of Computer-generated Evidence

The party offering computer-generated evidence at any proceeding shall preserve the computer-generated evidence, furnish it to the clerk in a manner suitable for transmittal as a part of the record on appeal, and present the computer-generated evidence to an appellate court if the court so requests.

Cross reference: For the definition of "computer-generated evidence," see Rule 2-504.3.

Committee note: This section requires the proponent of computer-generated evidence to reduce the computer-generated evidence to a medium that allows review on appeal. The medium used will depend upon the nature of the computer-generated evidence and the technology available for preservation of that computer-generated evidence. No special arrangements are needed for preservation of computer-generated evidence that is presented on paper or through spoken words. Ordinarily, the use of standard VHS videotape or equivalent technology that is in common use by the general public at the time of the hearing or trial will suffice for preservation of other computer generated evidence. However, when the computer-generated evidence involves the creation of a three-dimensional image or is perceived through a sense other than sight or hearing, the proponent of the computer-generated evidence must make other arrangements for preservation of the computer-generated evidence and any subsequent presentation of it that may be required by an appellate court.

(c) Audio, Audiovisual, or Visual Recordings

A copy or a transcript of any audio, audiovisual, or visual recording offered at a hearing or trial shall be made part of the record. If a portion of the recording is offered, a description identifying the portion shall be made part of the record, and only the offered portion of an audio or

audiovisual recording needs to be transcribed.

Source: This Rule is new.

Rule 4-322 was accompanied by the following Reporter's Note.

The Office of the Public Defender has requested that the Rules be amended to require that sound recordings that are played at hearings or trials be transcribed and made part of the record. Nancy Forster, Esq., Public Defender, pointed out that frequently neither written transcriptions of recordings nor the recordings themselves are part of the record on appeal. Transcriptions prepared by an agent of a party may be of questionable reliability, because they were not prepared by a neutral person, such as a court reporter. Also, in many cases, only a portion of a recording is played in court, and what is played is not decided until the time of trial, so even if the recording and a written transcription are included in the record, it may not be clear what was heard at the trial.

A representative from the Office of the Public Defender appeared before the Conference of Circuit Judges to request that court reporters be required to transcribe sound recordings, but the Conference declined to do so. The Conference has suggested that judges be reminded that parties seeking to admit audiotapes into evidence should include a written transcript.

The Public Defender feels that the solution proposed by the Conference of Circuit Judges does not go far enough. The Criminal Subcommittee recommends adopting the suggestions of the Public Defender, with some modifications. The Subcommittee reworked the language suggested by the Public Defender to include visual recordings and transcripts of audio or audiovisual recordings and to require that a description identifying any portion of a recording that is offered at a hearing or trial be part of the record.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 400 - PRELIMINARY PROCEDURES

AMEND Rule 8-411 by adding subsection (a)(3) pertaining to audio and audiovisual recordings, as follows:

Rule 8-411. TRANSCRIPT

(a) Ordering of Transcript

Unless a copy of the transcript is already on file, the appellant shall order in writing from the court stenographer a transcript containing:

(1) a transcription of (A) all the testimony or (B) that part of the testimony that the parties agree, by written stipulation filed with the clerk of the lower court, is necessary for the appeal or (C) that part of the testimony ordered by the Court pursuant to Rule 8-206 (d) or directed by the lower court in an order; and

(2) a transcription of any proceeding relevant to the appeal that was recorded pursuant to Rule 16-404 e~~.~~; and

(3) a transcription of any audio or audiovisual recording or portion thereof offered at a hearing or trial, including electronically recorded statements of witnesses and parties, electronically monitored or wiretapped conversations, and electronically recorded interviews of child witnesses conducted by a judge in the absence of any party.

(b) Time for Ordering

The appellant shall order the transcript within ten days or five days in

child in need of assistance cases after:

(1) the date of an order entered pursuant to Rule 8-206 (a)(1) that the appeal proceed without a prehearing conference, or an order entered pursuant to Rule 8-206 (d) following a prehearing conference, unless a different time is fixed by that order, in all civil actions specified in Rule 8-205 (a), or

(2) the date the first notice of appeal is filed in all other actions.

Cross reference: Rule 8-207 (a).

(c) Filing and Service

The appellant shall (1) file a copy of the written order to the stenographer with the clerk of the lower court for inclusion in the record, (2) cause the original transcript to be filed promptly by the court reporter with the clerk of the lower court for inclusion in the record, and (3) promptly serve a copy on the appellee.

Source: This Rule is derived from former Rule 1026 a 2 and Rule 826 a 2 (b).

Rule 8-411 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 4-322.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 400 - ATTORNEYS, OFFICERS OF COURT AND OTHER PERSONS

AMEND Rule 16-404 (e) by adding language pertaining to audio or audiovisual

recordings, as follows:

Rule 16-404. ADMINISTRATION OF COURT REPORTERS

a. Applicability.

Section b of this Rule applies to court reporters in the circuit courts and the District Court. Sections c, d, and e apply in the circuit courts only.

b. Establishment of Regulations and Standards.

The Chief Judge of the Court of Appeals shall prescribe regulations and standards regarding court reporters and the system of reporting in the courts of the State. The regulations and standards may include:

(1) the selection, qualifications, and responsibilities of court reporters;

(2) procedures and regulations;

(3) preparation, typing, and format of transcripts;

(4) charges for transcripts and copies;

(5) preservation and maintenance of reporting notes and records, however recorded;

(6) equipment and supplies utilized in reporting; and

(7) procedures for filing and maintaining administrative records and reports.

Cross reference: Rule 16-504.

c. Number of Court Reporters - Supervisory Court Reporter.

Each circuit court shall have the number of court reporters recommended by the County Administrative Judge and approved by

the Chief Judge of the Court of Appeals. In a county with more than one court reporter, the County Administrative Judge shall designate one as supervisory court reporter, who shall serve at the pleasure of the County Administrative Judge. The Chief Judge of the Court of Appeals shall prescribe the duties of the supervisory court reporter.

d. Supervision of Court Reporters.

Subject to the general supervision of the Chief Judge of the Court of Appeals, the County Administrative Judge shall have the supervisory responsibility for the court reporters in that county. The County Administrative Judge may delegate supervisory responsibility to the supervisory court reporter, including the assignment of court reporters.

e. Methods of Reporting - Proceedings to be Recorded.

Each court reporter assigned to record a proceeding shall record verbatim by shorthand, stenotype, mechanical, or electronic audio recording methods, electronic word or text processing methods, or any combination of these methods, and shall maintain that record subject to regulations and standards prescribed by the Chief Judge of the Court of Appeals. Unless the court and the parties agree otherwise, all proceedings held in open court, including opening statements, closing arguments, ~~and~~ hearings on motions, and any audio or audiovisual recordings offered at a hearing or trial, shall be recorded in their entirety.

Cross reference: Rule 16-1006 (g) provides that backup audio recordings made by any means, computer disks, and notes of a court reporter that have not been filed with the clerk or are not part of the official court record are not ordinarily subject to public inspection.

Source: This Rule is derived from former Rule 1224.

Rule 16-404 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 4-322.

Mr. Karceski explained that a new section (c) is proposed to be added to Rule 4-322. Some time ago, there was a discussion at the Rules Committee either by Nancy Forster, Esq., Public Defender or Brian L. Zavin, Esq., Assistant Public Defender, who is present today, to let the Committee know that the Appellate Section of the Office of the Public Defender (OPD) has been having some difficulty preparing cases for appeal. In some jurisdictions, sound recordings are played at hearings or trials, but the recordings are not being made part of the record, or the recording is introduced and then given back to the lawyer who introduced it. When that occurs, the recording does not become part of the official court record of that case. This has happened to Mr. Karceski personally. In addition, there may be a tape or electronic recording of an interview that lasts as much as a half-hour or an hour, but only a small portion of that interview is played at the trial. Appellate lawyers are having a great deal of difficulty determining exactly what was played. Even when the recording is in the possession of the court, it is not specified as to when the portion played began and ended. The intent is that only the portion of the recording that was played should become part of the record on appeal, but it is unclear which portion that was.

Mr. Karceski commented that a representative of the OPD, Michael Braudes, Esq., attended a meeting of the Conference of Circuit Judges. Mr. Braudes requested that the Conference consider a change pertaining to what the court reporters should do to address the problem. As indicated by the supporting meeting materials, the Conference declined to act officially, preferring instead to remind circuit court judges of the provision in the court reporters' manual that requires the party who wishes to play a recording in court to submit a transcript of it. (See Appendix 1).

Mr. Karceski said that the OPD had asked the Rules Committee for some changes to rules to address this problem. Recently, various court reporters and the president of the Court Reporters' Association sent letters expressing concerns about the proposed Rules. Yesterday, Mr. Karceski spoke to the Chief Court Reporter in Baltimore County who told him that she would provide him with specific suggestions as to what the court reporters would like the Committee to consider instead of what has been presented as changes to the Rules. Unfortunately, due to the shortage of time, she was unable to provide the suggestions in time for today's meeting. The court reporters would like to have an opportunity to present their position.

Mr. Karceski told the Committee that no one representing the court reporters is present today. He understands their problem to be that some of the recordings offered are in such bad shape that they are inaudible. In a criminal trial, which is different

than a civil trial, the lawyers do not necessarily know whether a recording or a portion of a recording will be used at trial, until the lawyer hears the testimony that is presented during the trial. The lawyers may have an idea of what the testimony is going to be, but they do not have the luxury of depositions that are available in civil cases. The lawyer may not be sure how he or she wishes to cross-examine a witness until the witness testifies. Preparing a transcript of everything that is on a recording is burdensome and costly. Another issue is whether the transcript must be official -- prepared by someone who is a certified court reporter, or can it be transcribed by the attorney's secretary and used merely as an aid to understand the contents of the recording? Generally, often the latter version is used as simply an aid. It is not evidence and it is not official. To have a transcript ahead of time is not always possible, although in some cases, the lawyer knows that he or she will be using the recording and therefore has a transcript prepared before trial.

Mr. Karceski said that the court reporters would like for the lawyers to have a transcript of everything they bring into the courtroom. The reason is that many recordings have such inaudible portions that the court reporters have to go over and over the recording. This is costly and time-consuming. Mr. Karceski remarked that he understands this, but the recording is what it is. The jury or the judge hears the recording, and the trier of fact gives it the weight that the trier of fact believes

is appropriate. The transcript of the recording will be what is decipherable and what is audible. If it is not clear, then it cannot be transcribed. He added that he did not know of any other way to approach this situation.

Mr. Karceski explained that Rule 4-322 could provide that if a recording of a conversation, interview, or wiretap is to be introduced at trial, any transcript that the lawyer has of it is to be introduced, also. It is an "either/or" or "both" situation. It is important to specify what portions of that recording were played for the court or for the jury, and that this be transcribed if there is an appeal. It is also important that what is played be preserved, as part of the record, and be made an exhibit. If there is an appeal, the court reporter can prepare a transcript from the recording that is part of the court file. The court reporters were concerned as to how they could take down the testimony while the recording is being played in court. That was not the intent of the Subcommittee, only that the recording be preserved as part of the record for possible future use.

Mr. Karceski asked Mr. Zavin if he had any comments. Mr. Zavin responded that his office does not want to burden the court reporters. There is a court reporters' manual that suggests that a transcript should be included if a sound recording is part of a case. If no agreement regarding the transcript has been reached, the court reporter should record it. Sometimes the transcript states "the tape was played" as part of a motion to suppress or a

motion in limine, but there is no tape recording in the record. Several years later, when the case is on appeal or there is a post-conviction proceeding, no copy of the recording can be located. The parties do not have a copy of it and neither does the detective who may have recorded the confession. Mr. Kratovil remarked that if a recording is admitted without a transcript but is kept as part of the court record, then the recording can be reviewed later, just as the judge and jury reviewed it. Mr. Zavin added that the record must indicate what portion of the recording was actually played. Judge Matricciani noted that prosecutors do not state on the record which portion of the recording is played. Whose responsibility is it to identify what was played?

The Chair observed that Rule 4-322 states that the recording is introduced into evidence as part of the record, unless the court orders otherwise. The recording is preserved as part of the record. The Court of Special Appeals decided a case earlier this year, *Marshall v. State*, 174 Md. App. 572 (2007), in which a witness had reported that the defendant had confessed to him that the defendant committed a crime. However, much of the recording of the defendant's conversation with the witness was inaudible. The defense argument was that the prosecutor who had prepared the transcript for the jurors had failed to satisfy the necessary foundational requirements with respect to the accuracy of the transcript. The trial judge gave an excellent instruction to the jury, explaining that it is the recording that is the evidence,

not the transcript. To the extent that there is any discrepancy, the jurors would be governed by what was heard on the recording. Presenting this issue for appeal did not cause a problem for the appellant, because the transcript was in the record, and the court knew what the jurors had been given. The recording itself was in the record. The opinion referred to some federal cases, including *U.S. v. Font-Ramirez*, 944 F.2d 42 (1st Cir. 1991) and *U.S. v. Robinson*, 707 F.2d 872 (6th Cir. 1983) held that where there is a conflict as to what is on the recording, the defense can prepare a transcript and present it as the defense version of what was on the recording.

The Chair said that it is not a problem when the State knows in advance and introduces a transcript for the jury to review. Mr. Zavin commented that there could be a disagreement, and some instruction to the jury is necessary. The Chair responded that even if there is a disagreement, the judge can give an instruction similar to the one given in *Marshall*. The Chair pointed out that in *Marshall*, the investigating officer spent almost two weeks listening to the recording repeatedly. To impose this type of burden on the court reporter is extremely unfair. However, when there are problems with how much of the tape was played, the situation is different. The trial judge has to exercise some degree of discretion and control. Section (a) of Rule 8-413, Record – Contents and Form, provides that where there is a dispute over whether the record accurately discloses what occurred in the lower court, the trial judge shall resolve

the dispute. If there is a situation where, as a result of what happened on direct examination, the defense attorney wants to impeach a witness with an earlier recorded statement by the witness, the attorney can make the appropriate record. The attorney could request that the witness confirm that he or she was asked a certain question and gave a certain answer. To the extent the recording is played, the attorney can say that the record shows that on that portion of the recording, the question was as stated, and the answer was as stated. The trial judge can agree, and this will be the record. The *Marshall* opinion cited the book, Law of Electronic Surveillance by Carr and Bellia, which contains cases dealing with this issue. Most of the federal courts have said that if defense counsel contends that the government's transcript is inaccurate, defense counsel should prepare his or her own transcript. The jury can decide which is more accurate. The transcript is simply an aid to the jury's understanding and is not part of the record. The true evidence is the recording itself.

Mr. Sykes said that he had a problem with the wording of the first sentence, because it appears that a copy of the recording does not have to be a part of the record if a transcript is. If a copy of the recording is part of the record, a transcript is not necessary. Should there be a Committee note that refers to the role of the lawyer and the role of the judge if there is a dispute, or should there be a cross reference to *Marshall*? The wording of section (c) is in the passive voice, and it is not

clear whose responsibility it is to make the copy or transcript part of the record. The theory of the new provision is laudable, but the Style Subcommittee needs some guidance as to the Committee note and as to the question of whether a transcript is sufficient without a copy of the recording. A copy of the recording ought to be in the record in any case. The Chair stated that the original should be part of the record. He suggested that the beginning of the Rule read as follows: "Any audio, audiovisual, or visual recording...shall be made part of the record." Mr. Kratovil inquired whether the Rule allows for a copy. The Chair responded that whatever is admitted is considered to be the original, even if it was a copy to begin with. Judge Matricciani added that even if a recording is not admitted, it is still part of the record if offered.

Mr. Brault told the Committee that he had read the letters from the various court reporters, and one of the issues raised is that a recording could be of such poor quality that it could not be understood by the judge or the jury. In that situation, the judge should make the finding that the recording is not admissible, because it is not understandable. Judge Matricciani noted that a 911 tape, even though incomprehensible, may be offered to show the time of the call and not necessarily the substance. The Chair commented that often some portions of the recordings are incomprehensible, and some can be understood. Mr. Michael said that he is involved in a case where a 911 tape is critical to the case, and a sound engineer has enhanced the tape,

but there are still parts that are not comprehensible. There will probably be a debate with the defense as to what parts are incomprehensible. Mr. Kratovil reiterated that the tape itself is necessary, but he asked if the transcript is. Mr. Michael answered affirmatively. The Chair added that appellate counsel must have the ability to examine the record for issues. Mr. Michael noted that the transcript is for the jury's assistance. He agreed with the statement in *Marshall* that the evidence is the recording itself.

Mr. Karceski reiterated that a copy or the actual recording is something that must always be part of the record. If offered, a transcript of the recording also is part of the record, but the words "copy" and "transcript" should not be in the disjunctive. The Chair asked Mr. Zavin if he is seeing cases in which the transcript prepared by the court reporter simply provides that a portion of the recording was played but does not identify what was played. Mr. Zavin responded affirmatively, noting that the transcript often provides no indication that only a portion of the recording was played. The transcripts are important not only for lawyers; they are equally important for judges. A three-judge panel of the Court of Special Appeals should not have to share one copy of the recording.

Mr. Kratovil asked whether every recording that is admitted at trial requires a transcript, which would mean that every 911 tape would have to be transcribed. Mr. Karceski answered that the transcript referred to in section (c) of Rule 4-322 is not

the transcript sent to an appellate court. This is a transcript used by the prosecutor or the defense attorney as an aid for the jury to listen to the recording. Mr. Kratovil responded that there should be clarification that a transcript is not required in order for a recording to be admitted. The Vice Chair pointed out that the last part of section (c) of Rule 4-322 implies that there will be a transcription. She had read this language to mean that the court reporter has to do the transcription. Judge Hotten remarked that this is how the court reporters are reading this language.

Mr. Kratovil suggested that the second sentence of section (c) of Rule 4-322 be changed as follows: "If a portion of the recording is offered, a description identifying the portion shall be made part of the record. If a transcript has been made and offered at trial, that shall be part of the record as well." Mr. Sykes noted that this would impose a burden on the appellate judge to listen to all of the recordings. If the parties agree, the appellate court can use the same transcript that aided the jury. Mr. Kratovil responded that this is a different question -- at the appellate level when a transcript is made of the entire proceeding, is that different from the transcript that is used at the trial level?

Mr. Brault observed that the next Rule to be considered, Rule 8-411, Transcript, requires that if an audio or audiovisual recording was offered at a hearing or trial, a transcript has to be made if there is an appeal. At the trial level, it appears

that it is discretionary whether a transcript is needed, but if a party has one, it should be made a part of the record. The Chair commented that there is a problem with the word "offered." These types of items are marked for identification and given to the jury, but they are not offered into evidence. They are used as an aid to listening to recorded conversations, but they are not evidence.

Mr. Brault said that in civil practice, transcripts are not given to the jury. This avoids unduly highlighting the testimony of a witness. He asked what happens to the recording of a confession or a recording used to impeach in a criminal case. Is it given to the jury? The Chair answered that if the jury asks for the recording, the trial judge decides whether the jury can have it. In some cases, the judge will send the tape recording and a tape recorder to the jury. Judge Matricciani added that if a transcript of a recording is given to the jury, each copy is collected after the jury has listened to the recording, because the transcript is not evidence. The transcript never becomes part of the record. The Chair inquired whether a copy of it is placed in the record, and Judge Matricciani replied that a copy is not always so placed.

Mr. Karceski expressed the view that it should be part of the record, because if there is an objection to the prosecutor's version of the contents of the recording, the appellate court would need to see that transcript. The transcript copies should be collected from the jury and not be part of the deliberations.

As Mr. Kratovil pointed out, the Rule has to separate the issue of the recordings from the issue of the transcripts. They are being folded together, causing confusion.

Mr. Kratovil suggested that the first sentence of section (c) of Rule 4-322 should be deleted. The Vice Chair suggested that section (c) read as follows: "A party who offers an audio, audiovisual, or visual recording at a hearing or trial shall make the recording part of the record and, if only a portion of the recording is offered, include a description on the record that identifies the portion offered. Any transcript used at trial shall be made part of the record." Mr. Sykes questioned who is responsible for transcribing a portion of the recording. Mr. Brault responded that the person offering the recording is responsible for the transcription.

Mr. Sykes inquired whether, if only a portion of the recording is played, the transcript is made after the recording has been played. The Chair replied that there are situations in which, as a result of what happens at trial, a portion of a recorded statement or conversation is played, but the record is insufficient to show what really took place. In that case, the party who used the recording should be required to supplement the record with a transcript. On the other hand, if the lawyer properly impeaches the witness with his or her earlier testimony, the record will show it, because the court reporter will be capturing it. There will be a statement as to what the question was, what the answer was, and what was said on that recording, so

there would be no reason to supplement.

Judge Kaplan noted that even if the lawyer does not handle this properly in Baltimore City, everything that occurs is picked up by the circuit court's audiovisual recording system. In addition to the court reporter's transcription of what occurred, the circuit court's audiovisual recording is available to the appellate court. Mr. Karceski commented that not all jurisdictions have this type of equipment. Even with the sophisticated system in place in Baltimore City, there are times when things go wrong. There is a good reason to identify the portion of the recording that is played, but it could be cumbersome as to how it is identified. The party offering the recording should have the responsibility of properly identifying the segment of the recording being played. The Chair inquired whether this responsibility should be built expressly into the Rule, and whether the Rule also should include the duty of the trial judge to make sure that an adequate record is made.

The Chair asked Ms. Gradet, Clerk of the Court of Special Appeals, for her viewpoint. She answered that Rule 4-322 should require the person offering the recording to identify the portion played. She referred to the discussion of whose responsibility it is to ensure that the recording is made part of the record, and she remarked that it is helpful to have a specific procedure for people to follow. The Vice Chair commented that Rule 4-322 is being revised to put the burden on the party offering a recording to ensure that the court's record includes the

recording itself, a description that identifies the portion offered, and any transcript. If the Rule imposes duties on the trial judge, this could create reversible error or potentially reversible error. Mr. Kratovil added that once the offering party has moved the recording into evidence, the question becomes who is responsible for the evidence. The Chair commented that the other aspect of this is that it is difficult to provide for every contingency, or the Rule would become too long and cumbersome. A lawyer ought to be able to request that the trial judge direct the court reporter to take down portions of an obviously audible and understandable recording where it is clear enough to be able to impeach a witness. However, in a situation like the *Marshall* case, where the recording is not understandable, the reporter should not be required to capture or transcribe it.

Judge Matricianni questioned whether the judge should identify the portion of the recording being played, if, at a pretrial hearing, an issue had been raised about a recording, some of the recording is redacted, and then the redacted recording is played at the trial several days later. The Chair expressed the opinion that it is too great a burden for the trial judge to identify the exact portion. The Vice Chair commented that the lawyer would have made one recording that complies with the order to redact, so it is no longer a portion of a recording, but it is the entire recording. The Chair said that if there is an argument as to whether the portion ordered to be redacted

should have been, the lawyer can submit a transcript and circle or point out the portion the lawyer had wanted to play but the trial judge refused to allow. The appellate court can see what the argument is about. If the trial judge orders a portion to be redacted, and the defense does not agree, the redacted part can be shown to the appellate court for its determination.

The Chair stated that since some materials pertaining to this subject were submitted very recently by the court reporters, all of the materials can be provided to the court reporters, circuit court judges, and State's Attorneys to discuss the protocol for handling this issue. He asked if the Office of the Public Defender can identify the situations in which the problems with the recordings have arisen. The Criminal Subcommittee can look at this subject again after the various organizations have had a chance to review everything.

Mr. Karceski suggested that the Committee redraft the language of section (c) of Rule 4-322 today. The Chair said that the Vice Chair had redrafted this provision. The Vice Chair proposed the following language: "A party who offers an audio, audiovisual, or visual recording at a hearing or trial shall ensure that the recording is made part of the record, and, if only a portion of the recording is offered, the party shall make sure that a description that identifies the potion offered is made part of the record. A party who uses a transcript of the recording at a hearing or trial shall make the transcript part of the record." Judge Matricciani noted that once the recording is

marked for identification, it is part of the record. By consensus, the Committee approved that language suggested by the Vice Chair.

The Chair said that after the Vice Chair's changes to Rule 4-322 have been included, the Rule will be sent to circuit court judges and court reporters. Mr. Kratovil will take it to the State's Attorneys Association, and Mr. Zavin will take it to the Office of the Public Defender. Ms. Gradet will review it, and any upcoming cases can be considered to see how they would be affected. The Chair asked Ms. Lyons-Schmidt, the Rules Committee intern, to check other jurisdictions to see how they handle this issue.

The Vice Chair commented that Rule 4-322 does not affect the court reporters, but Rule 8-411 does. Mr. Zavin told the Committee that the proposed changes to Rule 4-322 would help considerably. Once a copy of the sound recording is in the record, if there is no transcript, the recording can be transcribed by a private transcription service if necessary. Part of the problem is the need for the sound recording to be included in the appellate record.

The Vice Chair inquired whether sound recordings are being played at trial but are not being marked for identification. Mr. Zavin responded that the problem is that the recordings are given back to the parties. Mr. Karceski explained that a 911 tape is played for the jury, the defendant is convicted, and the clerk returns the recording to the lawyer. The clerks refuse to keep

them. Judge Matricciani added that there are many items that the clerks do not retain, including guns and drugs. They have a tendency to get anything bulky out of their files. The Chair pointed out that the clerks are in violation of the Rule, because these items are part of the record. The Rule provides that the judge can decide what to do with the various exhibits and tangible items that are part of the record. Mr. Kratovil commented that the addition of the language in section (c) clarifying that the recording is part of the record would solve 95% of the problem.

The Chair asked Mr. Zavin if, in child abuse cases, juries have been presented with a recorded interview with the child, but no transcript. Mr. Zavin answered that he was not sure, because this is not a frequent situation. The Chair said that in a child abuse case, where there is an audible audio-recording of questions asked of the child and the child's answers, the court reporter can take down the testimony as if the child were on the witness stand. The problem is with inaudible and incomprehen-sible tapes.

Mr. Zavin commented that if a transcript is required to be prepared in advance, and there is only one copy of the recording, his office may not know that something has not been transcribed. When they find it out, the case has to be postponed, so that they can obtain a transcript. Mr. Karceski asked whether a transcript should be prepared in every case where there is an audio recording played in court. Mr. Kratovil said this would be

burdensome. As long as the recording is made part of the record and the portions that were played are specified, the appellate attorney can listen to the recording to see if there is an issue with it. If there is, the recording can be transcribed. Every time a criminal case is appealed, an audio recording need not automatically be transcribed.

Mr. Karceski inquired how a video deposition of a witness is handled by court reporters. Mr. Brault answered that in Montgomery County, there are no court reporters. The Chair noted that in Baltimore County, the court reporter does not record the contents of the video deposition that is played. The video deposition itself is made part of the record.

The Reporter observed that one of the most problematic aspects of this topic involves a recording of an event where several people are talking at the same time. An example is a recording made by an undercover police officer. How is this transcribed for the appellate court? In considering the issue, this situation is important to keep in mind. The Chair remarked that several people talking at once can happen at trial, also. Mr. Kratovil said that the recording is admitted into evidence, and it is dealt with by the appellate court.

Judge Hotten asked Mr. Zavin whether the prosecutor and the defense lawyer both have copies of a recording of an interview of a suspect, such as a confession or a statement, that the defense lawyer knows in advance will be the subject of a motion to suppress. Mr. Zavin answered affirmatively. Judge Hotten asked

why this could not be transcribed. Mr. Zavin replied that it is too expensive, especially since it is not clear that the recording will be admitted. Judge Hotten questioned whether there is any other burden to have it transcribed, other than cost. Mr. Zavin responded that it may be a time burden. Judge Hotten noted that it could be transcribed either before the suppression hearing or before the trial. The Chair commented that it would not be necessary before the suppression hearing. Once the judge rules, and it is clear that the recording will be admitted, it could be transcribed so that there will be a transcript available for the jury. If there is no transcript, and the recording is audible and comprehensible, the court reporter can record its contents.

Mr. Karceski noted that the court reporters are concerned about transcribing a tape where three or four speakers are talking at the same time. The court reporter can only do the best that he or she can. There is a point at which the reporter cannot transcribe what is being said. The court reporters also are concerned about being required to identify who is speaking when there are multiple speakers on a recording. The court reporters are asking the Committee for direction.

The Vice Chair remarked that some recordings are almost like in-court testimony. Other recordings are almost impossible to understand. The less comprehensible recordings may have to be handled like computer-generated visual evidence, which cannot be transcribed. The procedure for handling this evidence is stated

in section (b) of Rule 4-322 and the Committee note that follows that section. It may be that, in some cases, the appellate court will have to listen to the recording, because there is no other way to deal with it. The recording issue will not be an easy one to resolve. The Chair said that when the various organizations, the court reporters, the prosecutors, and the public defenders look at this, they will have to consider section (b) of the Rule, which may be helpful. Whoever is offering the recording is required to make it available for review by the appellate court.

Rules 4-322, 8-411, and 16-404 were remanded back to the Subcommittee.

Agenda Item 4. Consideration of proposed amendments to: Rule 9-206 (Child Support Guidelines) and Rule 9-210 (Attachment, Seizure, and Sequestration)

The Chair stated that Agenda Item 4 would be considered next, because several guests were present for the discussion of that item. Ms. Ogletree presented Rule 9-206, Child Support Guidelines, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 200 - DIVORCE, ANNULMENT AND ALIMONY

AMEND Rule 9-206 by revising the worksheets to conform to statutory changes and by making stylistic changes, as follows:

Rule 9-206. CHILD SUPPORT GUIDELINES

(a) Definitions

The following definitions apply in this Rule:

(1) Shared Physical Custody

"Shared physical custody" has the meaning stated in Code, Family Law Article, §12-201 (i).

(2) Worksheet

"Worksheet" means a document to compute child support under the guidelines set forth in Code, Family Law Article, Title 12, Subtitle 2.

(b) Filing of Worksheet

In an action involving the establishment or modification of child support, each party shall file a worksheet in the form set forth in section (c) or (d) of this Rule. Unless the court directs otherwise, the worksheet shall be filed not later than the date of the hearing on the issue of child support.

Cross reference: See Code, Family Law Article, §12-203 (a) and *Walsh v. Walsh*, 333 Md. 492 (1994).

(c) Primary Physical Custody

Except in cases of shared physical custody, the worksheet shall be in substantially the following form:

_____ In the

Circuit Court for _____

v.

_____ No. _____

WORKSHEET A - CHILD SUPPORT OBLIGATION: PRIMARY PHYSICAL CUSTODY

_____

~~Children~~	~~Date of Birth~~	~~Children~~	~~Date of Birth~~
Name of Child	Date of Birth	Name of Child	Date of Birth
Name of Child	Date of Birth	Name of Child	Date of Birth
Name of Child	Date of Birth	Name of Child	Date of Birth

	Mother	Father	Combined
1. MONTHLY ACTUAL INCOME (Before taxes)	$	$	/////// ///////
a. Minus preexisting child support payment actually paid	-	-	/////// ///////
~~b. Minus health insurance premium (if child included)~~	~~-~~	~~-~~	~~/////// ///////~~
~~c.~~ b. Minus alimony actually paid	-	-	///////
~~d.~~ c. Plus/minus alimony awarded in this case	+/-	+/-	/////// ///////
2. MONTHLY ADJUSTED ACTUAL INCOME	$	$	$
3. PERCENTAGE SHARE OF INCOME (~~Line 2. Each~~ Divide each parent's income on line 2 by the combined income on line 2. ~~divided by Combined Income~~)	%	%	/////// /////// /////// /////// ///////
4. BASIC CHILD SUPPORT OBLIGATION (Apply line 2 Combined Income to Child Support Schedule.)	////// ////// //////	////// ////// //////	$
a. Work-Related Child Care	~~////// //////~~		

Expenses (Code, ~~FL~~ Family Law Article, §12-204 (g))	~~//////~~ ~~//////~~ $	~~//////~~ ~~//////~~ $	+
b. Health Insurance Expenses (Code, Family Law Article, §12-204 (h)(1))	~~//////~~ ~~//////~~ ~~//////~~ $	~~//////~~ ~~//////~~ ~~//////~~ $	+
~~b.~~ c. Extraordinary Medical Expenses (Code, ~~FL~~ Family Law Article, §12-204 (h)(2))	~~//////~~ ~~//////~~ ~~//////~~ $	~~//////~~ ~~//////~~ ~~//////~~ $	+
~~c.~~ d. Additional Expenses (Code, ~~FL~~ Family Law Article, §12-204 (i))	~~//////~~ ~~//////~~ ~~//////~~ $	~~//////~~ ~~//////~~ ~~//////~~ $	+
5. TOTAL CHILD SUPPORT OBLIGATION (Add lines 4, 4 a, 4 b, ~~and~~ 4 c, and 4 d).	////// ////// //////	////// ////// //////	$
6. EACH PARENT'S CHILD SUPPORT OBLIGATION (Multiply line ~~3 times~~ 5 by line ~~5~~ 3 for each parent.)	$	$	////// ////// //////
~~7. RECOMMENDED CHILD SUPPORT ORDER (Bring down amount from line 6 for the non-custodial parent only. Leave custodial parent column blank.)~~	~~$~~	~~$~~	~~//////~~ ~~//////~~ ~~//////~~ ~~//////~~ ~~//////~~
7. TOTAL DIRECT PAY BY NON-CUSTODIAL PARENT (Add the expenses shown on lines 4 a, 4 b, 4 c, and 4 d paid by non-custodial parent. Leave custodial parent column blank.)	$	$	////// ////// ////// //////
8. RECOMMENDED CHILD SUPPORT ORDER (Subtract line 7 from line 6 for non-custodial parent. Leave			////// ////// //////

custodial parent column blank.	$	$	//////

Comments, calculations, ~~or~~ rebuttals ~~to schedule or adjustments if non-custodial parent directly pays extraordinary expenses~~ to schedule, or special adjustments, including any set off for certain third party benefits paid to or for the child of an obligor who is disabled, retired, or receiving benefits as a result of a compensable claim (see Code, Family Law Article, §12-204 (j)):

PREPARED BY: DATE:

(d) Shared Physical Custody

In cases of shared physical custody, the worksheet shall be in substantially the following form:

_____ In the
Circuit Court for _____

v.

_____ No. _____

WORKSHEET B - CHILD SUPPORT OBLIGATION: SHARED PHYSICAL CUSTODY

~~Children~~	~~Date of Birth~~	~~Children~~	~~Date of Birth~~
Name of Child	Date of Birth	Name of Child	Date of Birth
Name of Child	Date of Birth	Name of Child	Date of Birth
Name of Child	Date of Birth	Name of Child	Date of Birth

	Mother	Father	Combined

1. MONTHLY ACTUAL INCOME (Before taxes)	$	$	//////
a. Minus preexisting child support payment actually paid	-	-	//////
~~b. Minus health insurance premium (if child included)~~	~~-~~	~~-~~	~~//////~~
~~c.~~ b. Minus alimony actually paid	-	-	//////
~~d.~~ c. Plus/minus alimony awarded in this case	+/-	+/-	//////
2. MONTHLY ADJUSTED ACTUAL INCOME	$	$	$
3. PERCENTAGE SHARE OF INCOME (~~Line 2. Each~~ (Divide each parent's income ~~divided~~ on line 2 by the combined income on line 2.)	%	%	//////
4. BASIC CHILD SUPPORT OBLIGATION (Apply line 2 Combined Income to Child Support Schedule.)	//////	//////	$
5. ADJUSTED BASIC CHILD SUPPORT OBLIGATION (Multiply Line 4 ~~times~~ by 1.5)	//////	//////	$
6. OVERNIGHTS with each parent (must total 365)			365
7. PERCENTAGE WITH EACH PARENT (Line 6 divided by 365)	A %	B %	//////
STOP HERE IF Line 7 is less than 35% for either parent. Shared physical custody does not apply. (~~See~~ Use Worksheet A, instead.)	//////	//////	//////

8. EACH PARENT'S THEORETICAL CHILD SUPPORT OBLIGATION (Multiply line ~~3 times~~ 5 by line ~~5~~ 3 for each parent.)	A$	B$	//////
9. BASIC CHILD SUPPORT OBLIGATION FOR TIME WITH OTHER PARENT (Multiply line ~~7B times~~ 8A by line ~~8A~~ 7B and put answer on Line 9A.) (Multiply line ~~7A times~~ 8B by line ~~8B~~ 7A and put answer on line 9B.)	A$	B$	//////
10. NET BASIC CHILD SUPPORT OBLIGATION (Subtract lesser amount from greater amount in line 9 and place answer here under column with greater amount in Line 9.)	$	$	//////
11. EXPENSES:	//////	//////	
a. Work-Related Child Care Expenses (Code, Family Law Article, §12-204 (g))	//////	//////	+
b. Health Insurance Expenses (Code, Family Law Article §12-204 (h)(1))	//////	//////	+
~~b.~~ c. Extraordinary Medical Expenses (Code, Family Law Article, §12-204 (h)(2))	//////	//////	+
~~c.~~ d. Additional Expenses (Code, Family Law Article, §12-204 (i))	//////	//////	+
12. NET ADJUSTMENT FROM WORKSHEET C. Enter amount ~~on~~ from line h, WORKSHEET C, if applicable. If			//////

not, continue to Line 13.	$	$	//////
13. NET BASIC CHILD SUPPORT OBLIGATION (From Line 10, WORKSHEET B)	$	$	//////
14. RECOMMENDED CHILD SUPPORT ORDER (If the same parent owes money under Lines 12 and 13, add these two figures to obtain the amount owed by that parent. If one parent owes money under Line 12 and the other owes money under Line 13, subtract the lesser amount from the greater amount to obtain the difference. The parent owing the greater of the two amounts on Lines 12 and 13 will owe that difference as the child support obligation. NOTE: The amount owed in a shared custody arrangement may not exceed the amount that would be owed if the obligor parent were a non-custodial parent. See WORKSHEET A).	$	$	//////

Comments, calculations, ~~or~~ rebuttals ~~to schedule or adjustments if non-custodial parent directly pays extraordinary expenses~~ to schedule, or special adjustments, including any set off for certain third party benefits paid to or for the child of an obligor who is disabled, retired, or receiving benefits as a result of a compensable claim (see Code, Family Law Article, §12-204 (j)):

PREPARED BY: DATE:

INSTRUCTIONS FOR WORKSHEET C: Use ~~this~~ Worksheet C ONLY if any of the Expenses listed in lines 11 a, 11 b, ~~or~~ 11 c, or 11 d is directly paid out or received by the parents in a different proportion than the percentage share of income entered on line 3 of Worksheet B. Example: If the mother pays all of the day care, or parents split education/medical costs 50/50 and line 3 is other than 50/50. If there is more than one ~~11c~~ 11 d expense, the calculations on lines ~~e and f~~ g and h below must be made for each expense.

WORKSHEET C - FOR ADJUSTMENTS, LINE 12, WORKSHEET B

	Mother	Father
a. Total amount of direct payments made for Line 11 a expenses ~~times~~ multiplied by each parent's percentage of income (Line 3, WORKSHEET B) (Proportionate share)	$	$
b. The excess amount of direct payments made by the parent who pays more than the amount calculated in Line a, above. (The difference between amount paid and proportionate share)	$	$
c. Total amount of direct payments made for Line 11 b expenses ~~times~~ multiplied by each parent's percentage of income (Line 3, WORKSHEET B)	$	$
d. The excess amount of direct payments made by the parent who pays more than the amount calculated ~~on~~ in Line c, above.	$	$
e. Total amount of direct payments made for Line 11 c expenses ~~times~~ multiplied by each parent's percentage of income (Line 3, WORKSHEET B)	$	$
f. The excess amount of direct payments made by the parent who pays more than the amount calculated in Line e, above.	$	$

g. Total amount of direct payments made for Line 11 d expenses multiplied by each parent's percentage of income (Line 3, WORKSHEET B)	$	$
h. The excess amount of direct payments made by the parent who pays more than the amount calculated in line g, above.	$	$
~~g.~~ i. For each parent, add lines b, d, ~~and~~ f, and h	$	$
~~h.~~ j. Subtract lesser amount from greater amount in Line ~~g.~~ i, above. Place the answer on this line under the lesser amount in Line ~~g.~~ i Also enter this answer on Line 12 of WORKSHEET B, in the same parent's column.	$	$

Source: This Rule is new.

Rule 9-206 was accompanied by the following Reporter's Note.

> Chapter 36, Laws of 2007 (HB 265) added health insurance expenses as a category to be included when basic child support obligation amounts are calculated. This additional category requires modifications of the Worksheets in section (c) of Rule 9-206, so that health insurance expenses are taken into account when child support obligations are calculated.
>
> Stylistic changes also are made.

Ms. Ogletree explained that Code, Family Law Article, §§12-201 and 12-204 were amended by Chapter 36, Laws of 2007 (HB 265), which added the actual cost of providing health insurance to the calculation of the basic child support obligation under the Child

Support Guidelines. Previously, health insurance expenses were deducted from the gross income prior to taxes. The forms in Rule 9-206 are proposed to be changed to conform to the statute by removing the health insurance provision entry from the income sections of the forms and moving it to the child support obligation computation sections.

Judge Matricciani inquired whether the software programs have been modified to reflect the change. Stuart Grozbean, Esq., said that he had written the computer program used by most courts, and the program has been updated. He pointed out a problem with Worksheet A. In line 7., the instruction reads "Leave custodial parent column blank." The instruction "Leave custodial parent column blank" in certain scenarios is incorrect. Mr. Grozbean explained that he had tested the forms by using different dollar amounts. He distributed an example in which the mother is the custodial parent and makes $9,000.00 per month, the income of the non-custodial father is $1,000.00 per month, and the father pays the child's health insurance premium. (See Appendix 2). In this scenario, the correct computation of the Guidelines requires the custodial parent to pay the non-custodial parent $76.00.

Ms. Ogletree suggested that the phrase "Leave custodial parent column blank" be deleted from line 8, Recommended Child Support Order. The Chair asked if this solves the problem, and Ms. Ogletree replied that it works. Mr. Grozbean agreed that this is appropriate, and by consensus, the Committee agreed with

this suggestion.

Master Mahasa suggested that the form should not label the parent as "mother" or "father." She said that Ms. Ortiz had prepared and distributed a page entitled "Suggested Additional Changes to Child Support Worksheets in Md. Rule 9-206" that uses a alternative terminology. (See Appendix 3).

Mr. Grozbean pointed out a second problem in the comment section at the end of Worksheet A. He said that putting in the calculation under Code, Family Law Article, §12-204 (j) without adding income back in is very confusing to *pro se* litigants and to lawyers. The Chair asked what would be the cure for this problem. Mr. Grozbean replied that the Honorable Kathleen M. Dumais of the Maryland House of Delegates was present and would answer this question. Mr. Grozbean added that a similar change should be made to the comment section at the end of Worksheet B, which pertains to shared physical custody. The other factors applying to Schedule A do not apply to Schedule C. The Reporter asked how Code, Family Law Article, §12-204 (j) applies in the shared custody situation.

Delegate Dumais explained that she came to the meeting for two reasons. The first one was to answer any questions about House Bill 265 and the changes resulting from it. The bill was a priority of the Family Law Section Council of the Maryland State Bar Association. She drew the Committee's attention to the Appendix 2 example. The way that health insurance was handled prior to the enactment of the legislation last year, if a parent

paid for health insurance, it would be deducted from his or her gross income. When the Guidelines first went into effect in 1989, health insurance was often paid for by one's employer, and its cost was much less than the cost today. Because health insurance is so expensive currently, the bill-drafters felt that it was important to put this item below the line, which is line 4 c. on the sample worksheet, because it results in the premium being apportioned between the parties based on their respective incomes. This is the same principle that is applied to expenses for day care, orthodontia, and school, as well as for any other extraordinary expenses. Moving the health insurance expense from above the line, so that it is deducted from a party's income, to below the line, so that it is apportioned between the parties according to their income, is a fairer way to apportion the cost of providing health insurance for the child.

Delegate Dumais said that the materials that are being considered today contain the revisions that must be made as a result of the change to the law. The Appendix 2 worksheet computation is used when the child is with the custodial parent at least 128 days of the year. If the custodial situation is a generic schedule with one parent having primary physical custody of the child and the other parent having the child on alternating weekends and one overnight during the week, this is the worksheet that would be used. If the situation is a shared physical custody arrangement where each parent has the children at least 35% of the time, which is 128 overnights, the appropriate

document is Worksheet B, "Child Support Obligation: Shared Physical Custody." It is calculated the same way as the "Sole" worksheet, except that line 12 involves calculations using Worksheet C, entitled "For Adjustments, Line 12, Worksheet B." Delegate Dumais added that she and Mr. Grozbean feel that a few changes to the Worksheets are necessary, including removing the sentence that reads "Leave custodial parent column blank" from line 7. on Worksheet A. Mr. Sykes questioned whether this sentence is being deleted from both Lines 7. and 8., and Delegate Dumais replied affirmatively.

Delegate Dumais told the Committee that the second reason for her attendance at the meeting was that when she looked at the proposed changes to the Worksheets, she had a concern about the Comment section at the end of both Worksheet A and Worksheet B. In the Comment section at the end of Worksheet A, there is a reference to "Code, Family Law Article, §12-204 (j)." Delegate Dumais suggested that this reference be taken out, because it is misleading. Senate Bill 928 in the 2004 legislative session was entitled "Family Law -- Child Support Guidelines, Third Party Payments." In cases where either parent's income is based on Social Security payments, and the child also receives a separate payment, there has always been a question as to how this is handled. The 2004 legislation pertains to cases where a payment is being made to a child as a result of the disability or retirement of a parent. The comment only tells half of the story. It talks about making a setoff for certain benefits.

This is part of what Senate Bill 928 provided. The other part provided that the amount of the benefit has to be added to the income of the obligor. That is in the definition of "income" in Code, Family Law Article, §12-201 (c). Delegate Dumais noted that the comment is misleading, because the worksheet does not refer to adding the child support amount into the obligor's income.

The Chair suggested that the language of the Comment section be changed to read as follows: "Comments, calculations, rebuttals, required setoffs, required additions...". If this language is more general, then the Comment section will not have to be changed each time the legislature acts. Delegate Dumais said that Mr. Grozbean, Ms. Ortiz, and she had been discussing this, and their recommendation is that the language should be "Comments, calculations, or rebuttals to schedule, or adjustments if non-custodial parent directly pays any expenses included on line 7." The word "setoff" could be added in someplace, but the problem with the word "setoff" is that it is applicable only to disability payments.

The Chair suggested that the language of the Comment section be: "Comments, calculations, rebuttals, or special adjustments as set forth by statute." The Reporter pointed out that except for §12-204 (j) of the Family Law Article, all of the other statutory items are built into the computations in lines 7. and 8. of Worksheet A by the direction to subtract line 7. from line 6. for each parent. The only statutory item that needs to be separately

accounted for is §12-204 (j) of the Family Law Article. The Chair's language would be appropriate with the required setoffs and additions. There could be a cross reference to the Code or language that would provide "For example, see Code, Family Law Article, §12-204 (j)." It is a trap if someone does not know that this statute exists when doing the worksheet. This Code provision is very specific and unusual, because it is not often that a child will get a payment based on the disability of a parent, and it should be flagged for practitioners who do not do this type of work very often. Delegate Dumais added that Code, Family Law Article, §12-201 (c) also should be flagged, so practitioners understand that the amount of the disability payment has to be added to the income of the parent. The Reporter said that both could be flagged by adding language that would read "See, for example...".

Delegate Dumais clarified that the specific Code provision is Code, Family Law Article, §12-201 (c)(3)(xiv). The Chair remarked that the legislature may change this next year, and the Code reference would have to be modified. Delegate Dumais responded that this will not be changed next year. The Child Support Guidelines Advisory Committee has been established by the Child Support Enforcement Administration, and the Committee is working on revising the statute. The chart has not been changed since 1989. Attorneys, Child Support Enforcement Administration representatives, and members of the Judicial Conference are on the Advisory Committee. Legislation will not be ready until at

least 2009.

The Reporter asked whether properly filling out line 1. of the worksheet would mean that the amount would already be included in the parent's income. Delegate Dumais replied that the person filling out the form would have to know to put it in as income. If from the wording of the comment section, the parent did not know to put the amount as part of the income, it is detrimental to the child because there is a setoff, but the amount of child support may not have been computed properly. The parent receiving the disability income may not have to make a payment, but if it not added to the income and is only deducted from the bottom, it causes a real problem. Master Mahasa suggested that the comment could also state: "the actual income includes..." and list what it includes. Delegate Dumais responded that the actual income is composed of 16 different components, and there are additional circumstances that include another four components. Master Mahasa asked about including a cross reference to that statute. Delegate Dumais said that if the specific setoff is to be referenced, the statute defining the word "income" would have to be referenced. She expressed the view that if the Committee feels there needs to be a reference to the rare circumstance of the setoff for disability payments, then the form should refer to the statute.

The Reporter expressed the view that a cross reference to Code, Family Law Article, §12-201 (c)(3)(xiv) should be added. Everything else in the statute is covered in the computations.

However, one hole got through, so this needs to be addressed, particularly for practitioners who only practice this kind of law occasionally. The Chair noted that it could be referred to by the term "special adjustments." Mr. Grozbean suggested that the following language could be added: "See section_____ for special exceptions." The reference to the setoff for disability payments had been deleted when the software for the form was prepared, but a judge from one county requested that it be put back in. Other judges disagreed, so the reference was deleted. If new language is inserted that draws attention to the special exception, this would solve the problem. The Chair commented that ordinarily he would agree, but "special exceptions" is a term of art for zoning law. However, he added that if the term "special exceptions" is the best choice, he would agree to it. Mr. Grozbean said that the cross reference should read: "See also..." because there may be other references, including a reference to the statute. The Chair remarked that it is very helpful. Ms. Ogletree pointed out that there are many *pro se* litigants who need direction in these cases.

Delegate Dumais noted that the comment that appears on page 8 of the Rule is the comment that was referenced in the worksheet for shared physical custody, and the same adjustment would have to made there. The Chair added that the same language can be used for both comment sections. Ms. Ortiz told the Committee that each time she looks at the worksheet changes, new issues arise. She had consulted with Diane McCullough of the Child

Support Enforcement Administration, and they had discussed a few more modifications. Ms. Ortiz had distributed to the Committee a sheet entitled "Suggested Additional Changes to Child Support Worksheets in Md. Rule 9-206." (See Appendix 3). Item 2. of that sheet suggests a modification to line 7. of Worksheet A and line 14 of Worksheet B that would change the current language "recommended child support order" to "recommended amount of child support to be paid to other parent."

The Reporter pointed out that the change would be to line 8., not line 7., of Worksheet A. Ms. Ortiz agreed. She explained that there is some confusion as to what a "child support order" is. Many *pro se* litigants think that a worksheet is an order or that it is has the strength or authority of a judge's decision. Using the term "recommended amount" will help to clarify that this is not an order and that the court may or may not adopt the recommended amount. Ms Ogletree asked whether the phrase "to other parent" could be deleted. Master Mahasa added that this phrase is confusing. Ms. Ortiz agreed that it could be deleted. By consensus, the Committee agreed to Ms. Ortiz's change with the last phrase taken out.

Ms. Ortiz noted that item 4. on the sheet she handed out suggests a change to line 4. d of Worksheet A and line 11. b of Worksheet B. This would change the wording from "Additional Expenses" to "School and Transportation Expenses (Code, Family Law Article, §12-204 (i))." This section of the statute only refers to school and transportation expenses, and it would be

better to use that as a caption. The Reporter remarked that the statute is very limited as to the type of expenses; it would not cover school supplies, for example. Ms. Ortiz observed that those using the forms may think that the language "additional expenses" is a catchall phrase. Delegate Dumais said that she sometimes uses that section to refer to other expenses that are not related to school or transportation, usually in a case where the parents agree to share the cost of the child's expenses. Even though that is not what the statute refers to, the language "additional expenses" covers it. Ms. Ortiz suggested that item 4. d could read "permitted school and transportation expenses pursuant to Code, Family Law Article, §12-204 (i)." Ms. Ogletree expressed the opinion that this language would be confusing. The Subcommittee recommends no change. The Chair said that this item should remain as it is. The reference to the statute will be helpful. As Delegate Dumais noted, where the parties agree upon adjustments, it can be worked out using this item. Ms. Ortiz remarked that she did not feel strongly about making this change.

Judge Matricciani moved to approve Rule 9-206 as amended, the motion was seconded, and it passed unanimously. The Chair thanked the guests for attending.

Agenda Item 2. Consideration of proposed new Rule 2-507.1 (Stay)

Mr. Johnson presented Rule 2-507.1, Stay, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 500 - TRIAL

ADD new Rule 2-507.1, as follows:

Rule 2-507.1. STAY

If, by joint motion, all parties request that an action be stayed, the court shall grant the motion. On written request of any party, the court shall lift the stay. If no request to lift the stay is made within the time set forth in section (c) of Rule 2-507, the action shall be subject to dismissal for lack of prosecution under the provisions of that Rule.

Committee note: Administrative timeliness standards do not apply to actions that are stayed pursuant to this Rule.

Source: This Rule is new.

Rule 2-507.1 was accompanied by the following Reporter's Note.

The Trial Subcommittee recommends the addition of a rule that would provide for the stay of a civil action in a circuit court. This would help alleviate the problem circuit courts have in meeting administrative timeliness standards in actions in which the parties do not move a case forward and do not wish to dismiss the action. There are many reasons for this, including (1) a case in which the defendant becomes difficult to serve, so the plaintiff files suit, serves the defendant, and then works toward settlement of the case, (2) there is already a settlement agreement, performance of which will require a period of time; the plaintiff does not wish to dismiss the case until performance is complete, (3) limitations are

> about to run, but the parties need additional time to resolve all details of a settlement, and (4) the parties are attempting to resolve the matter by participating in ADR proceedings.

Mr. Johnson explained that the Trial Subcommittee was asked to consider a rule suggested by the Chair that would allow a civil action to be stayed upon the joint request of all parties. As the memorandum from the Reporter dated July 26, 2007 that was included in the meeting materials indicates, there are a number of circumstances in which a civil stay might be appropriate. (See Appendix 4). Rule 2-507.1 as proposed would allow a stay only when all parties agree, and any party could ask that the stay be lifted at any point during the period of time when the stay is in place. This is subject to Rule 2-507 (c), which puts a one-year limit on the stay. The Subcommittee took this under advisement and decided that this is a good rule. It would relieve the court of having to choose between moving a case through even though the parties have a legitimate reason for not wanting the case to proceed or being criticized for failing to move cases promptly enough.

The Chair said that he wanted to commend the Subcommittee for working on this so quickly. The real problem is the time standards that have been imposed on the courts. The time standards are valuable, and they help move cases along, but judges are concerned about not being able to grant postponements when lawyers legitimately ask for one. The Chair expressed the

view that a civil stay would work well, because it puts a temporary stop on the time standards, and the judge does not have to worry about being scolded for failure to follow them.

The Chair suggested that Rule 2-507.1 could be improved by adding the word "not" after the word "shall" and before the word "be" in the third sentence of the proposed Rule. If there is a stay, Rule 2-507 should not be a potential problem. Mr. Johnson replied that the Subcommittee did not consider what the Chair has suggested. One reason that the proposed Rule is so attractive is that the stay would not be indefinite. There would still continue to be a one-year limit on inactivity. There is some concern about cases hanging around. Lawyers may want the case to continue longer than the one-year limit. The vehicle could be that a lawyer could apply for the stay and then reapply for the stay. What happens now is that those who want to avoid Rule 2-507 file something, so that there is activity on the docket, and this stops the application of the Rule. It is better for the parties to ask for further time, so that the parties and the court know what is going on, than for the case to continue on indefinitely.

The Reporter suggested that the third sentence begin as follows: "[i]f no request to lift or extend the stay...," so that there must be a mutual, affirmative request for an extension. The Chair said that the first motion for a stay would have to be within the time set forth. Mr. Johnson observed that the first motion would have to be within the one-year period. The

Reporter's suggestion would mean that within the next 365 days, a motion to extend the stay could be filed. The Reporter noted that the extension could be year-by-year, upon request each year. Otherwise, the cases could go on forever, and the clerks' offices would not be able to close the cases out. The Chair commented that the Judiciary should not be dismissing the cases of busy lawyers or forcing them to file something to avoid having their case dismissed.

Judge Matricciani asked whether it would be helpful to change the word "shall" in the third sentence to the word "may," so that the language would be "... may be subject to dismissal...". Mr. Johnson responded that the problem with this is that the dismissal is issued by the clerk's office routinely, and the court is not involved. Judge Matricciani remarked that a notice is sent. Judge Hotten observed that the notice is not always sent.

The Chair suggested that the third sentence begin as follows: "Unless a request to extend the stay is made within the time set forth in section (c) of Rule 2-507, the action shall be subject...". Master Mahasa inquired whether this means an agreement to extend; if not, the same person could keep asking for the stay. Mr. Michael responded that with the Chair's suggested language, anyone who does not want the stay could oppose it. Judge Norton inquired whether the circuit court judges were happy with the proposed Rule. Mr. Johnson answered that the circuit judges wanted a vehicle to deal with the

problem.

Judge Norton cautioned about the situation where the jury is waiting to hear the case, and five minutes before trial, the case is postponed for the fifth time. The Vice Chair said that if both parties agree to stay the case, even though the judge refuses, the case is stayed if this Rule is in place. Judge Matricciani remarked that the Rule does not provide how long the stay is for; it could be a one-day stay. Judge Norton added that control over continuances is taken away from the court. Mr. Johnson commented that when he first looked at the Rule, he asked about the language that reads: "... the court shall grant the motion ...," because it does not allow the court any discretion. If the parties agree, the court has to allow the stay. Granting a one-day stay defeats the purpose of the Rule.

The Chair suggested the following language for the first sentence of proposed new Rule 2-507.1: "If, by joint motion filed at least 30 days prior to a scheduled trial date, all parties request that an action be stayed, the court shall grant the motion." The last sentence would read: "Unless a joint request to extend the stay is made within the time set forth in section (c) of Rule 2-507, the action shall be subject to dismissal for lack of prosecution under the provisions of that Rule." This prevents lawyers coming in on the morning of trial to ask for a stay and inconveniencing everyone. Ms. Ogletree pointed out that there may not be a scheduled trial date.

Ms. Smith said that she did not understand what Rule 2-507.1

is trying to accomplish. One of the reasons noted for the necessity of a stay is that the defendant cannot be served. The Chair responded that this is the situation that stops the trial judge from saying to the plaintiff and defense lawyer, both of whom agree that additional time is needed to try a case, that the judge is prevented by time standards from staying the case. Ms. Smith said that in order to have a time period subtracted, there must be a lift of the stay. The Chair commented that what is happening now is that judges are not granting postponements to which lawyers are entitled. This is a way for the court to give lawyers more time without the judges and the court system being accused of violating the time standards. Ms. Smith noted that if the judge grants the motion and allows the stay, and it is not lifted, then the time standards will not be met. The Chair explained that this will change the time standards. It is not available now because there is no rule in effect. Once Rule 2-507.1 is approved by the Court of Appeals, the time standards will be changed to provide that the period during which the stay is in effect does not count against the standards.

Judge Norton pointed out that there may be instances where 10 days before trial the court may want to issue a stay, and this should not be prevented. Language could be added that would provide that the court could issue a stay even if it is less than 30 days before trial. It may be appropriate even if it is one week before the trial. Mr. Johnson expressed his preference for removing the 30-day limitation and letting the judges handle

those people who often request a stay. The point of new Rule 2-507.1 is to facilitate justice as opposed to forcing people to have no control over a case. If the parties tell the judge that they need another six months after the scheduled trial date to get the case settled, the Rule would allow it. If there is a performance that is required under a settlement, and there is a time frame in which this action must take place, this allows the judge to get away from the scheduled trial date and allow the performance of the settlement to be effectuated. The Vice Chair commented that there are many examples of cases in which the judge apologized for having to go forward because of the time standards, even though there may be another proceeding three days after the scheduled trial date that would make trial of the entire case unnecessary. If two good lawyers on opposite sides of a case are in agreement, the action should be stayed. She expressed the opinion that the 30-day limitation suggested by the Chair should not be added to the Rule.

The Chair said there is another way to change Rule 2-507.1. Section (a) of Rule 2-132, Striking of Attorney's Appearance, provides: "The court may deny the motion if withdrawal of the appearance would cause undue delay, prejudice, or injustice." Similar language could be added to proposed Rule 2-507.1. The Vice Chair responded that this language could be used by some judges routinely to deny the stay. She expressed the view that the Rule is satisfactory with the changes that were suggested to include a request for an extension. Mr. Johnson commented that

some of the Rules from other jurisdictions that were included in the meeting materials are too complicated. The Rule should be kept simple as the proposed Rule is.

The Vice Chair asked that a Committee note be added to provide that there are stays for other reasons -- there is a stay for a pending case with the same subject matter. This Rule should not appear to preclude motions addressed to the court for a stay that might be discretionary. Mr. Sykes suggested that a sentence could be added to the Committee note that would provide that the Rule does not limit motions for a stay for other reasons. By consensus the Committee approved this suggestion.

The Chair commented that section (a) of Rule 2-508 states: "On motion of any party or on its own initiative, the court may continue a trial or other proceeding as justice may require." Judge Matricciani observed that there needs to be a way to distinguish Rule 2-507.1 from Rule 2-508. The Vice Chair pointed out that currently, there is no rule relating to stays. The Chair suggested that the Committee note read as follows: "See Rule 2-508 for continuances on motion of the parties or on the court's own initiative." He said that the Rule would read: "If, by joint motion, all parties request that an action be stayed, the court shall grant the motion. On written request of any party, the court shall lift the stay. Unless a joint request to extend the stay is made within the time set forth in section (c) of Rule 2-507, the action shall be subject to dismissal for lack of prosecution under the provisions of that Rule." A cross

reference to Rule 2-508 will be added. By consensus, the Committee agreed to the Chair's suggested language.

Master Mahasa asked what the difference is, practically speaking, between a continuance and a stay, because a continuance is discretionary, and a stay is not. The Chair responded that Rule 2-507.1 applies only when all of the parties agree. Judge Hotten remarked that the time standards are still in effect. The stay will suspend them. The Chair said that the Time Standards Committee has not adjusted to account for this new Rule. Once it goes into effect, and there is a case where the lawyers agree to a stay that puts the case outside the time standard guidelines, the court enters the stay, and the court is not in violation of the standards.

Judge Matricciani expressed his agreement with the proposed Rule, but he commented that someone not familiar with the Maryland Rules who is looking for a rule pertaining to stays would not find one. This is the only one on the subject, and it deals with Rule 2-507 and the suspension of administrative timeliness standards. However, there is no rule on the subject of stays *per se.* The Vice Chair added that Rule 2-508 effectuates a stay. Mr. Johnson inquired whether the Subcommittee should draft another rule dealing with other stays, such as a stay when another case is pending. The Vice Chair replied that there has never been a problem with that situation. The Chair added that this is never a problem in the Court of Special Appeals as long as all of the lawyers agree to stay the

case.

Ms. Smith reiterated that case continues to age even though it has been stayed. If the stay is never lifted, the case is never tried or dismissed. It just continues to age. The Vice Chair asked whether the time standards could provide that when a case is stayed pursuant to this Rule, the minute it is stayed, the clock is stopped. Ms. Smith remarked that the case is still aging, and there is nothing from which to subtract the time that has run. Mr. Klein said that in Baltimore City, there is an inactive docket for asbestos cases, and the time standards are not applied. Ms. Smith observed that, for example, for purposes of the Criminal Justice Information System (CJIS), the case is still aging. The Chair clarified that the case ages when the defendant has shown up at the arraignment and then flees the jurisdiction. The Chair said that the existence of the time standards is causing problems for lawyers around the State who are being denied a stay for a valid reason because of the time standards. The proposed Rule will permit a civil case to be stayed. Criminal cases are different, because the public has an interest in getting dangerous people off the street.

Judge Norton asked whether he should take proposed new Rule 2-507.1 to the District Court Administrative Judges Committee to see if it would like to have a corollary District Court rule. The Chair replied affirmatively.

By consensus, the Committee approved proposed new Rule 2-507.1 as amended.

Agenda Item 3. Reconsideration of a proposed amendment to Rule 2-508 (Continuance)

Mr. Johnson presented Rule 2-508, Continuance, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-508 by adding a cross reference to a certain Administrative Order, as follows:

Rule 2-508. CONTINUANCE

. . .

(e) Costs

When granting a continuance for a reason other than one stated in section (d), the court may assess costs and expenses occasioned by the continuance.

Cross reference: For the Revised Administrative Order for Continuances for Conflicting Case Assignments or Legislative Duties, see the Maryland Judiciary Website, www.mdcourts.gov.

. . .

Rule 2-508 was accompanied by the following Reporter's Note.

The Trial Subcommittee discussed adding a new Rule pertaining to continuances, but after learning that the Honorable Robert M. Bell, Chief Judge of the Court of Appeals, and the Conference of Circuit Judges prefers that continuances be handled by

> Administrative Order, the Subcommittee recommends adding to Rule 2-508 a cross reference to the website of the Maryland Judiciary, so that lawyers can find the Administrative Order pertaining to continuances.

Mr. Johnson explained that this issue has come up previously. The issue is trying to deal with conflicts in case assignments and which cases have priority. An Administrative Order was issued first in 1977 by the Honorable Robert C. Murphy, then Chief Judge of the Court of Appeals, addressing conflicting case assignments. The substance of this Order is still in effect. The most recent revised Order is in the meeting materials. (See Appendix 5). The Trial Subcommittee was asked to consider a rule setting priorities for competing cases. The issue was whether the Court of Appeals wants this type of rule or whether the Court prefers an Administrative Order. The Chair had spoken to the Conference of Circuit Court Judges several years ago, and their view was to leave the Order in place with no rule.

Mr. Johnson stated that after the Subcommittee received the request to reconsider this issue, he talked with Chief Judge Bell, who expressed his preference for an Administrative Order. Mr. Johnson also spoke with the Honorable William D. Missouri, Administrative Judge of the Circuit Court for Prince George's County, who was formerly a member of the Rules Committee. Judge Missouri expressed the view that the Administrative Order is appropriate, with some minor changes to it. His view also was that a rule is not necessary. The Subcommittee decided not to

recommend a rule on the subject.

Master Mahasa questioned as to the conflicts that are addressed by the Administrative Order. Mr. Michael replied that it involves conflicts between the federal and State courts and between State circuit court and District Court cases. Mr. Johnson commented that one of the interns for the Rules Committee had been asked to research whether the District of Columbia had a similar rule, and she found that it did not. The Chair said that the proposed cross reference to the Administrative Order is appropriate. A lengthy rule would be necessary to explain all of the various conflict situations. The problem with the previous version of the Administrative Order was that if the first assignment for a lawyer was a parking ticket case, and then there was a conflict with a major federal case, the lawyer could not take the federal case. The Reporter added that this is still a problem. The Chair remarked that judges are handling this better. He noted that the history of this issue goes back 30 years when the Federal Rules of Criminal Procedure or federal statutes required that there be a trial in a certain amount of time. The federal judges wanted to make sure that their cases had priority. Former Chief Judge Robert C. Murphy had worked on the various conflicts.

Judge Kaplan observed that the Administrative Order worked well for the 15 years that he was Administrative Judge for the Circuit Court for Baltimore City. A conference was held for several federal judges and some Maryland circuit court judges,

and no participant had received any complaints about the Administrative Order. If there any problems with scheduling conflicts, the judge involved was called, and all of the judges fully cooperated. Master Mahasa expressed the view that the problem is more on the State level -- circuit court vs. District Court vs. juvenile court.

The Chair said that the proposed addition to Rule 2-508 is helpful. As long as the Chief Judge of the Court of Appeals and the administrative judges are in agreement, the change is appropriate. By consensus, the Committee approved Rule 2-508 as presented.

Agenda Item 4. (continued)

Ms. Ogletree presented Rule 9-210, Attachment, Seizure, and Sequestration, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 200 - DIVORCE, ANNULMENT AND ALIMONY

AMEND Rule 9-210 by adding a cross reference after section (b), as follows:

Rule 9-210. ATTACHMENT, SEIZURE, AND SEQUESTRATION

(a) Alimony from a Nonresident Defendant

A plaintiff who seeks alimony from a nonresident defendant under Code, Family Law Article, §11-104, may request an order for the attachment or sequestration of the

defendant's property in accordance with the procedures of Rule 2-115. The court may enter any appropriate order regarding the property that is necessary to make the award effective.

(b) Enforcement of an Order Awarding Child Support, Alimony, Attorney's Fees, or a Monetary Award

When the court has ordered child support, alimony, attorney's fees, or a monetary award, the property of a noncomplying obligor may be seized or sequestered in accordance with the procedures of Rules 2-648 and 2-651.

Cross reference: For statewide Child Support Payment Incentive Program, see Code, Family Law Article, §10-112.1.

Source: This Rule is new.

Rule 9-210 was accompanied by the following Reporter's Note.

The 2007 General Assembly enacted a new statute, Code, Family Law Article, §10-112.1 in Chapter 16, Laws of 2007 (HB 263). The new provision requires the Child Support Enforcement Administration to develop a statewide Child Support Payment Incentive Program to encourage payment of child support. The Family/Domestic Subcommittee recommends adding a cross reference at the end of Rule 9-210 to draw attention to the new program.

Ms. Ogletree explained that a new law, Code, Family Law Article, §10-112.1, was added by Chapter 16, Laws of 2007 (HB 263). This created a statewide Child Support Payment Incentive Program that, in essence, allows an administrative modification of a court order. The Subcommittee believes that no Rule on this is necessary, so a cross reference to the statute is proposed in

Rule 9-210. By consensus, the Committee agreed to the addition of the cross reference in Rule 9-210.

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