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 January 8, 2016.

Members present:

Hon. Alan M. Wilner, Chair

Robert R. Bowie, Jr. Esq.
Hon. Yvette M. Bryant
James E. Carbine, Esq.
Hon. John P. Davey
Mary Anne Day, Esq.
Christopher R. Dunn, Esq.
Hon. JoAnn M. Ellinghaus-Jones
Alvin I. Frederick, Esq.
Ms. Pamela Q. Harris
Bruce L. Marcus, Esq.
Donna Ellen McBride, Esq.
Hon. Danielle M. Mosley
Hon. Douglas R. M. Nazarian
Hon. Paula A. Price
Scott D. Shellenberger, Esq.
Steven M. Sullivan, Esq.
Dennis J. Weaver, Clerk
Robert Zarbin, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
David R. Durfee, Jr., Esq., Assistant Reporter
Sherie B. Libber, Esq., Assistant Reporter
Brian L. Zavin, Esq., Office of the Public Defender
Leslie Ridgway, Esq., Office of Attorney General, Appellate Division
Valerie Smalkin, Esq.,
Hon. Frederic N. Smalkin
P. Gregory Hilton, Esq., Clerk, Court of Special Appeals
Karen M. Thomas, Esq.
Russell P. Butler, Esq., Executive Director, Maryland Crime Victims' Resource Center
Hon. John P. Morrissey, Chief Judge District Court of Maryland
Richard Montgomery, Maryland State Bar Association, Inc.

The Chair convened the meeting. He welcomed everyone back after the winter break. He announced that the Honorable Michele

D. Hotten, a former member of the Rules Committee, had been appointed to the Court of Appeals. She had been sworn in about a week ago, and she has already been sitting on the Court. On November 19, 2016, the Court of Appeals adopted the Rules pertaining to structured settlements that had been included in the 189th Report to the Court of Appeals. The Court made several relatively minor changes. Those Rules took effect January 1, 2016. On January 14, 2016, the Chair will attend a briefing before the House Judiciary and Senate Judicial Proceedings Committees to explain the new Rules and why they had been adopted.

The Chair said that in December, the Court of Appeals adopted the new Professionalism Rules. The work group that had produced the draft of the Rules discussed by the Rules Committee required the Multi-state Professionalism examination. The Committee had voted not to require this exam. Donald B. Tobin, Dean of the University of Maryland School of Law, had spoken to the Committee and was passionate and persuasive in his views on that exam. The Committee had sent the Rules to the Court of Appeals in alternative forms, one including the exam, one not including it.

Dean Tobin and Ronald Weich, Dean of the University of Baltimore School of Law, appeared at the Court hearing on the Professionalism Rules, and were as equally persuasive as Dean

Tobin had been before the Committee. The Court rejected the examination but approved the rest of the Rules. The orientation program, which is three hours long online, is scheduled to take effect with the June, 2016 admissions. It is not clear whether the program will be ready to be offered by then, but that is the target date, and it is in the Rule at the moment.

The Chair commented that he wanted to give the Committee a heads-up, which may allow the topic to be placed on the agenda for the February 12, 2016 meeting. The 178th Report is about 1,000 pages long. Those who were on the Committee two years ago may recall the presentation of Parts I and II of the Report, which the Committee had approved with changes. Part I is a complete reorganization and revision of the Rules pertaining to court administration. Part II is a complete reorganization, but not as much of a revision, of the Rules pertaining to judges. Both of them had been sent to the Court of Appeals. The Court held an open hearing on both, and with a number of amendments, tentatively approved both. The Reporter noted that most of Part III had been reviewed by the Committee. The Chair said that it had never been sent to the Court. In the two years since they were done, revisions had to be made to all three Parts, some of which are in the current Rules already and have to be put into the reorganized Rules.

The Chair told the Committee that the minutes of the

October, 2015 Rules Committee meeting had been sent out to them for their review. Mr. Frederick moved that the minutes be approved, the motion was seconded, and it passed unanimously. The Reporter pointed out that the Committee had been sent some more sets of minutes for them to review for the next Committee meeting.

The Chair explained that the process pertaining to the minutes is that all of the discussion at the meetings is recorded on tape. From those recordings, Ms. Libber, an Assistant Reporter, prepares a draft of the minutes. The Chair, the Reporter, and Ms. Cox, the Committee's Administrative Assistant, go over them, and Ms. Libber goes over them again. It is a lengthy process, because the minutes are the legislative history of the Rules, and they are publicly available. For every Rule, there is a file with the minutes of every meeting in which that Rule had been discussed. A complete legislative history exists for all of the Rules.

Agenda Item 1. Consideration of proposed amendments to Rule 5-803 (Hearsay Exceptions: Unavailability of Declarant not Required)

The Chair presented Rule 5-803, Hearsay Exceptions: Unavailability of Declarant Not Required, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 800 - HEARSAY

AMEND Rule 5-803 to permit the admissibility of certain electronic recordings made by a body camera or other device under certain circumstances, as follows:

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

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(a) Statement by Party-Opponent

A statement that is offered against a party and is:

(1) The party's own statement, in either an individual or representative capacity;

(2) A statement of which the party has manifested an adoption or belief in its truth;

(3) A statement by a person authorized by the party to make a statement concerning the subject;

(4) A statement by the party's agent or employee made during the agency or employment relationship concerning a matter within the scope of the agency or employment; or

(5) A statement by a coconspirator of the party during the course and in furtherance of the conspiracy.

Committee note: Where there is a disputed issue as to scope of employment, representative capacity, authorization to make a statement, the existence of a conspiracy, or any other foundational requirement, the court must make a finding on that issue before the statement may be admitted. These rules do not address whether the court may consider the statement itself in making that determination. Compare *Daugherty v. Kessler*, 264 Md. 281, 291-92 (1972) (civil conspiracy); and *Hlista v. Altevogt*, 239 Md. 43, 51 (1965) (employment relationship) with *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 775 (1987) (trial court may consider the out-of-court statement in deciding whether foundational requirements for coconspirator exception have been met.)

(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 (b).

Committee note: Public records specifically excluded from the public records exceptions in subsection (b)(8) of this Rule may not be admitted pursuant to this exception.

(7) Absence of Entry in Records Kept in Accordance With Subsection (b)(6)

Unless the circumstances indicate a lack of trustworthiness, evidence that a diligent search disclosed that a matter is not included in the memoranda, reports, records, or data compilations kept in accordance with subsection (b)(6), when offered to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind about which a memorandum, report, record, or data compilation was regularly made and preserved.

(8) Public Records and Reports

(A) Except as otherwise provided in this paragraph, a memorandum, report, record, statement, or data compilation made by a public agency setting forth

(i) the activities of the agency;

(ii) matters observed pursuant to a duty imposed by law, as to which matters there was a duty to report;

(iii) in civil actions and when offered against the State in criminal actions, factual findings resulting from an investigation made pursuant to authority granted by law; or

(iv) in a final protective order hearing conducted pursuant to Code, Family Law Article, §4–506, factual findings reported to a court pursuant to Code, Family Law Article, §4–505, provided that the

parties have had a fair opportunity to review the report.

Committee note: If necessary, a continuance of a final protective order hearing may be granted in order to provide the parties a fair opportunity to review the report and to prepare for the hearing.

(B) A record offered pursuant to paragraph (A) may be excluded if the source of information or the method or circumstance of the preparation of the record indicate that the record or the information in the record lacks trustworthiness.

(C) Except as provided in subsection (b)(8)(D) of this Rule, a record of matters observed by a law enforcement person is not admissible under this paragraph when offered against an accused in a criminal action.

(D) Subject to Rule 5-805, an electronic recording of a matter made by a body camera worn by a law enforcement person, or by another type of recording device employed by a law enforcement agency, may be admitted provided that (i) it is properly authenticated, (ii) it was made contemporaneously with the matter recorded, and (iii) circumstances do not indicate a lack of trustworthiness.

Committee note: This section does not mandate following the interpretation of the term "factual findings" set forth in *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988). See *Ellsworth v. Sherne Lingerie, Inc.*, 303 Md. 581 (1985).

(9) Records of Vital Statistics

Except as otherwise provided by statute, records or data compilations of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

Cross reference: See Code, Health General Article, §4-223 (inadmissibility of certain information when paternity is contested) and §5-311 (admissibility of medical examiner's reports).

(10) Absence of Public Record or Entry

Unless the circumstances indicate a lack of trustworthiness, evidence in the form of testimony or a certification in accordance with Rule 5-902 that a diligent search has failed to disclose a record, report, statement, or data compilation made by a public agency, or an entry therein, when offered to prove the absence of such a record or entry or the nonoccurrence or nonexistence of a matter about which a record was regularly made and preserved by the public agency.

(11) Records of Religious Organizations

Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, Baptismal, and Similar Certificates

Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records

Statements of fact concerning

personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones or the like.

(14) Records of Documents Affecting an Interest in Property

The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and a statute authorizes the recording of documents of that kind in that office.

(15) Statements in Documents Affecting an Interest in Property

A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document or the circumstances otherwise indicate lack of trustworthiness.

(16) Statements in Ancient Documents

Statements in a document in existence twenty years or more, the authenticity of which is established, unless the circumstances indicate lack of trustworthiness.

(17) Market Reports and Published Compilations

Market quotations, tabulations, lists, directories, and other published compilations, generally used and reasonably

relied upon by the public or by persons in particular occupations.

(18) Learned Treatises

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in a published treatise, periodical, or pamphlet on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation Concerning Personal or Family History

Reputation, prior to the controversy before the court, among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, or other similar fact of personal or family history.

(20) Reputation Concerning Boundaries or General History

(A) Reputation in a community, prior to the controversy before the court, as to boundaries of, interests in, or customs affecting lands in the community.

(B) Reputation as to events of general history important to the community, state, or nation where the historical events occurred.

(21) Reputation as to Character

Reputation of a person's character among associates or in the community.

(22) [Vacant]

There is no subsection 22.

(23) Judgment as to Personal, Family, or General History, or Boundaries

Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the matter would be provable by evidence of reputation under subsections (19) or (20).

(24) Other Exceptions

Under exceptional circumstances, the following are not excluded by the hearsay rule: A statement not specifically covered by any of the hearsay exceptions listed in this Rule or in Rule 5-804, but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

Committee note: The residual exception provided by Rule 5-803 (b)(24) does not contemplate an unfettered exercise of

judicial discretion, but it does provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 5-102.

It is intended that the residual hearsay exception will be used very rarely, and only in exceptional circumstances. The Committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rules 5-803 and 5-804 (b). The residual exception is not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by amendments to the Rule itself. It is intended that in any case in which evidence is sought to be admitted under this subsection, the trial judge will exercise no less care, reflection, and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

Source: This Rule is derived as follows:
Section (a) is derived from F.R.Ev. 801(d)(2).
Section (b) is derived from F.R.Ev. 803.

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

Rule 5-803 (b)(8) is proposed for amendment to permit an electronic recording of a matter made by a body camera worn by a law enforcement person, or by another type of recording device employed by a law

enforcement agency, to be offered into evidence as a hearsay exception against an accused in a criminal action.

Chapters 128 and 129, Laws of 2015 (SB 402 and HB 583) established the Commission Regarding the Implementation and Use of Body Cameras by Law Enforcement Officers and charged the Commission with studying and making findings and recommendations regarding the use of body cameras by law enforcement officers, and to report its findings and recommendations to the General Assembly. The Commission issued its final report to the General Assembly on September 16, 2015.

The Report did not address the issue of admissibility. Rule 5-803 (b)(8)(C) currently prohibits the admission into evidence of "a record of matters observed by a law enforcement officer ... when offered against an accused in a criminal action." The rationale for the prohibition was to place police narrative reports outside of the common law business records exception.

The Evidence Subcommittee believes that video and audio recordings made by body worn cameras and other recording devices employed by law enforcement agencies will soon become ubiquitous. Accordingly, Rule 5-803 (b)(8) is being proposed for amendment to permit body camera recordings and recordings made by other recording devices employed by law enforcement agencies to be admitted into evidence, subject to four conditions: (1) the recording is subject to the limitations of Rule 5-805, the Rule governing the admissibility of a hearsay statement within another hearsay statement, (2) the recording was made contemporaneously with the matter recorded,(3) the recording is be properly authenticated, and (4) circumstances do not indicate that the recording is untrustworthy.

The Chair explained that Mr. Armstrong was not able to attend the meeting, so he could not present the proposed amendments to Rule 5-803, which are designed to accommodate the use of body cameras. They are in the nature of an exception to the exception to the Hearsay Rule on public documents. The Honorable Frederic Smalkin, former judge of the U.S. District Court for the District of Maryland, who chaired the commission that had been created by the Maryland legislature to look at this issue, was present at the meeting. The Chair invited Judge Smalkin to sit at the table with the members of the Rules Committee.

Judge Smalkin thanked the Chair for asking him to speak. Judge Smalkin commented that it was nice for him to see many old friends and former students at the meeting. He explained that the Governor had asked him to chair the commission to draft the best practices to be used for body cameras worn by law enforcement officers. Twenty-three members were on the commission representing the American Civil Liberties Union, the Chiefs of Police, and many others. One of the members was Russell P. Butler, Esq., Executive Director of the Maryland Crime Victims' Resource Center, with whom Judge Smalkin had worked on this issue.

Judge Smalkin remarked that much research had been done on body cameras, which have been used in the United Kingdom for

many years. Police officers there have found them to be very useful, because clearly under British law, the recordings are admissible in evidence in the case-in-chief. The attitude of the police in the United Kingdom toward body cameras is that they are more of a help than a hindrance. This is the mindset to work towards.

Judge Smalkin said that he teaches Evidence, and he had given some thought to the Hearsay Rule. He said that the relevant section of the Rule in Maryland is Rule 5-803 (b)(8)(C). It is similar to the parallel federal rule, Fed. R. Evid. 803, Exceptions to the Rule Against Hearsay -- Regardless of Whether the Declarant is Available as a Witness, but it is broader. It provides that a record of matters observed by a law enforcement person is not admissible when offered against an accused in a criminal action.

The body camera is making a record of something that has been observed by a law enforcement person. If that image is inadmissible, it would defeat the purpose of trying to record an excited utterance or some other statement or picture of a location or anything that might have relevance to the situation. A broad reading of subsection (b)(8)(C) of Rule 5-803 would prevent the prosecution from offering this into evidence. Under Fed. R. Evid. 803 (8), the prosecution can get this type of

evidence admitted. The value of the recordings in terms of proof of guilt under the Maryland Rule is questionable.

Judge Smalkin noted that the reason for subsection (b)(8)(C) of Rule 5-803 is to prevent after-the-fact reports from being admitted. There is some question about the reliability of those kinds of reports, and it was felt that, in fairness, they should not be introduced against a defendant. The difference is that one of the major categories of exceptions to the Hearsay Rule centers around contemporaneity. The idea of excited utterances, present sense impressions, and similar types of declarations has to do with the timing of when the statement was made. Was it made at the time of the relevant incident, or was it made after? The longer after the incident that the statement was made, the less reliable it becomes. The body cameras make recordings contemporaneously with what is being observed by the police officer. It is virtually impossible for an officer to tamper with the recording.

Judge Smalkin commented that the current technology is that, when the officer goes off duty, the recording is then downloaded and put into a secure server, which can be the "cloud" or something similar, and is available only to a very limited range of people. It is protected from editing. There are many safeguards available. The Maryland Police Training Commission ("MPTC") is finalizing regulations on this. The

circumstantial guarantees of trustworthiness that Judge Smalkin thinks are necessary to support a hearsay exception are there, and they will only get better. The forecast is that, as the technology improves, the recordings will be instantaneously, contemporaneously, put into the "cloud" and stored there in a way that they cannot be accessed by anyone unless the person has the right to access it.

Judge Smalkin pointed out that the language of new subsection (b)(8)(D) of Rule 5-803 contains three requirements for the admission of these recordings. The first requirement is that it has to be properly authenticated. The second is that it has to be made contemporaneously with the matter recorded. The final one is that the circumstances do not indicate a lack of trustworthiness. If there is a claim of some kind of finagling, the court can look at this and decide as a matter of judicial discretion whether the recording ought to be admitted.

Judge Smalkin said that the MPTC made a formal recommendation to the legislature, and Judge Smalkin remarked that he did not know what the outcome would be. Mr. Butler was one of the prime movers of proposing an amendment to the Maryland Public Information Act ("MPIA") with regard to the ultimate availability of the recordings, especially where there is depiction of a victim, such as a child, in a sensitive situation.

Mr. Carbine pointed out that subsections (b)(8)(C) and (D) of Rule 5-803 seem to indicate that the body camera recording can only be used against a defendant. He assumed that as a substantive matter, the intent is to make it admissible against a police officer as well. Judge Smalkin responded that subsection (b)(8)(C) already allows this. It provides that, without the exception, a record of matters observed by a law enforcement person is not admissible under this paragraph when offered against an accused in a criminal action. This allows any record to be admitted by the defense, and subsection (b)(8)(D) does not change this.

Judge Smalkin commented that one possibility to clarify this is to add language between the words "admitted" and "provided" in subsection (b)(8)(D) that would read: "when offered against an accused." This would make it clear that an accused person can always bring this evidence in. Judge Smalkin said that he was not sure that subsection (b)(8)(D) would change the current situation, because it is an exception to subsection (b)(8)(C). If the recording is not being offered pursuant to subsection (b)(8)(D), subsection (b)(8)(C) would still apply. Judge Smalkin noted that he would be comfortable with a change in the language to clarify this. Mr. Carbine expressed his concern about reading the exception in subsection (b)(8)(C) with

the language of subsection (b)(8)(D). The Chair noted that subsection (b)(8)(D) is an exception to the exception.

Judge Smalkin suggested that a Committee note could be added that would provide that the addition of subsection (b)(8)(D) to Rule 5-803 does not change the fact that subsection (b)(8)(C) allows the defendant to use a recording in his or her case.

The Chair remarked that he had a question that he had discussed with Judge Smalkin on the telephone. He referred to the language in subsection (b)(8)(D) that read: "an electronic recording made by a body camera worn by a law enforcement person...". The word "person" was probably used, because it is the same word in subsection (b)(8)(C). The statute that was passed in 2015, Chapters 128 and 129, (SB 402 and HB 583) amending Code, Courts Article, §10-402 uses the language "law enforcement officer" rather than "law enforcement person," because the word "person" is a broader term, and it was intended to be in subsection (b)(8)(C). The question the Chair had was in two parts. The first was whether the word "person" was too broad in subsection (b)(8)(D). Are only police officers going to be wearing these cameras?

Mr. Shellenberger answered that his office is studying whether or not crime scene technicians should wear body cameras when they head to the crime scene after it has been cleared. In

most large jurisdictions, crime scene technicians are civilian witnesses. They are not sworn law enforcement officers. Theoretically, when a crime scene technician comes to a homicide scene not only to take photographs, but to collect evidence, the technician could be wearing a body camera to record everything. Would this recording be admissible under this exception? Mr. Shellenberger expressed the view that the word "person" needs to have a broader meaning. The Chair pointed out that the statute provides that it is lawful for a law enforcement officer in the course of the officer's regular duty to intercept an oral communication through a body camera.

Judge Smalkin commented that the crime scene technicians that Mr. Shellenberger had referred to would not be intercepting oral communications. Mr. Shellenberger agreed that the communications intercepted by the technicians would only be visual. The Chair inquired whether Rule 5-803 should conform to the statute. Mr. Shellenberger responded that the protection is not only against oral communication. Theoretically, the visual footage should have been able to come in anyhow. The Chair noted that it is not hearsay. The audio portion is hearsay. Judge Smalkin pointed out that the statute amends Code, Courts Article, §10-402, which is the wiretap statute. He thought that the situation where a police person violates the wiretap statute would not come up very often. Mr. Shellenberger remarked that

he did not feel strongly about this, because of the reference to "oral communication."

The Chair explained that his concern was that two bills had been passed that were basically identical. The Governor signed both bills. Throughout both bills, the term "law enforcement officer" was used. Should the Rule conform to this, because this is how the legislature preferred it? The Chair asked whether the regulations or protocols adopted by the MPTC address individuals other than police officers. Judge Smalkin responded that although the regulations had been scheduled for promulgation on January 1, 2016, he did not think that they had come out yet. The last date Judge Smalkin had seen was January 6, 2016. Mr. Durfee, an Assistant Reporter, had been speaking with people from the MPTC, and the regulations that had been scheduled to be adopted on January 6, 2016 were tabled until that morning. As the Rules Committee meeting was going on, the MPTC was considering its regulations.

Judge Smalkin explained that the reason for the way the Rule was drafted was to keep subsections (b)(8)(C) and (D) of Rule 5-803 *in pari materia*. If there is a violation of the wiretap statute by someone who is not authorized under Code, Courts Article, §10-402 to make a recording, then the recording would be excluded anyway. Mr. Shellenberger commented that in his office, there is a civilian who works with white-collar

crime and who is employed by the Baltimore County Police Department. She is a law enforcement person who takes reports from people about white-collar crime and writes police reports about white-collar crime. The Chair inquired whether she would be wearing a camera. Mr. Shellenberger replied that she would not be wearing a camera, but her findings would come under subsection (b)(8)(C). The Chair added that this would not fall under subsection (b)(8)(D).

The Chair noted that it is the Committee's choice and ultimately the choice of the Court of Appeals, as to the language. Judge Smalkin said that the person could be using a computer with a camera and could ask someone to make a statement that could be recorded on the computer. Subsection (b)(8)(D) would allow this if the person is a policeman or policewoman. Subsection (b)(8)(C) would not allow it under the current Rule.

The Chair reiterated that there are two questions. One is whether to use the term "law enforcement officer," which is more limited than the term "law enforcement person." The other is whether the recording should be limited to one made by the officer in the performance of the officer's official duties rather than made by a police officer who was "moonlighting." Judge Smalkin had previously told the Chair that under the regulations, the "moonlighting" officer would not be permitted to wear the body camera. Judge Smalkin confirmed this, pointing

out that under the best practices, the recordings are not to be used in court unless they were made in the course of the person's official duties. The cameras are to be turned off when the person is at lunch, etc. The cameras will not leave the precinct after the officer's shift. When the shift is over, the camera comes off the officer, the recordings are downloaded, and the camera is cleared and ready for its next use.

Judge Smalkin remarked that furthermore, the two drafts of the regulations from the MPTC that he had seen clearly indicate that the cameras are not to be used for any purpose other than recording in the line of duty. If there is a regulatory violation of Code, Courts Article, §10-402, and the officer does not comply with MPTC regulations, then that officer is subject to prosecution under the Wiretap Act. This would also fit in with the regularity requirement of the last part of subsection (b)(8)(D) of Rule 5-803 as proposed, which is that there is no indication of untrustworthiness. If it is used in violation of a regulation, obviously it is not trustworthy, or a judge could take that into account. Something could be added to the Committee note providing that one of the factors that could be considered is compliance with the MPTC regulations. The Chair responded that it would be preferable to add this to the Rule itself, not to a Committee note if it is going to be a limit on its admissibility.

Mr. Butler expressed his agreement with Judge Smalkin. Body cameras are not the only main issue. There are other kinds of cameras, such as dashcam, and there could be drones. The Chair pointed out that the new subsection (b)(8)(D) only applies to body cameras. Mr. Butler responded that it applies to all recordings. The language is "or by another type of recording device employed by a law enforcement agency." Regarding the MPIA, the Rules have implications, because the court does not allow these in under the MPIA. Discovery would be another issue. There may be several issues that the Commission studying body cameras will have to address. These are the repercussions of technology and criminal justice.

The Chair asked Mr. Butler his view of keeping the term "law enforcement person" in Rule 5-803 as opposed to the term "law enforcement officer." Mr. Butler responded that the language of subsection (b)(8)(D) should be consistent with the language of subsection (b)(8)(C).

Mr. Zavin told the Committee that he is from the Office of the Public Defender. He was not sure exactly what the Rule was allowing to be admitted. Oral communications have different exceptions. As an example, if an officer is wearing a body camera and records a witness giving a statement about something, that statement does not come in under Rule 5-803. The actual visual footage is not hearsay at all. What does the Rule cover?

He expressed the concern that the implication of the Rule is that footage from the camera is automatically admissible under the Rule and does not need an exception. The Chair noted that some footage would be, such as an excited utterance or something that falls into some other exception to the Hearsay Rule. Mr. Zavin remarked that it would not require this Rule to get these admitted. The Chair responded that it would not for those exceptions.

Judge Smalkin pointed out that it might come in as an excited utterance or present sense impression or another contemporaneous statement, but then any record of the occurrence would be barred under Rule 5-803 (b)(8)(C) as it reads now. There is a double hearsay problem. Two different gates need to be open. The gates are between the evidence and getting it to the jury. All of the gates have to be open to attain the goal. What Mr. Zavin was referring to were the provisions in 5-803 that allow contemporaneous statements to come in. There may be another Hearsay Rule that blocks it. This one at least opens that second gate. The person would still have to get past the first gate. There would still be a hearsay exception to it. This says that if there is a hearsay exception that applies, Rule 5-803 (b)(8)(C) will not keep it out. An excited utterance could be recorded, and, unless Rule 5-803 is amended, the video and audio of it would not be admissible under Rule 5-803

(b)(8)(C). Judge Smalkin thanked the Chair and the Committee for inviting him to explain the changes to the Rule.

The Chair told the Committee that they had the proposed changes to Rule 5-803 before them. Mr. Carbine moved that a Committee note be added to the Rule explaining that the defendant can use the Rule to admit recordings. The motion was seconded, and it passed on a majority vote.

By consensus, the Committee approved Rule 5-803 as amended.

The Chair thanked Judge Smalkin for his assistance.

Agenda Item 2. Consideration of proposed amendments to Rule 1-203 (Time)

Mr. Marcus presented Rule 1-203, Time, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 200 - CONSTRUCTION, INTERPRETATION, AND DEFINITIONS

AMEND Rule 1-203 to provide additional time for a self-represented party under involuntary confinement in an institution or facility pursuant to governmental authority to file a pleading or paper when the party is permitted or required to file the pleading or paper within a prescribed period, as follows:

Rule 1-203. TIME

(a) Computation of Time After an Act, Event, or Default

In computing any period of time prescribed by these rules, by rule or order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. If the period of time allowed is more than seven days, intermediate Saturdays, Sundays, and holidays are counted; but if the period of time allowed is seven days or less, intermediate Saturdays, Sundays, and holidays are not counted. The last day of the period so computed is included unless:

(1) it is a Saturday, Sunday, or holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or holiday; or

(2) the act to be done is the filing of a paper in court and the office of the clerk of that court on the last day of the period is not open, or is closed for a part of the day, in which event the period runs until the end of the next day that is not a Saturday, Sunday, holiday, or a day on which the office is not open during its regular hours.

Committee note: This section supersedes Code, General Provisions Article, §1-302 to the extent of any inconsistency.

Cross reference: For the definition of "holiday," see Rule 1-202.

(b) Computation of Time Before a Day, Act, or Event

In determining the latest day for performance of an act which is required by these rules, by rule or order of court, or by any applicable statute, to be performed a

prescribed number of days before a certain day, act, or event, all days prior thereto, including intervening Saturdays, Sundays, and holidays, are counted in the number of days so prescribed. The latest day is included in the determination unless it is a Saturday, Sunday, or holiday, in which event the latest day is the first preceding day which is not a Saturday, Sunday, or holiday.

(c) Additional Time After Service by Mail

Whenever a party has the right or is required to do some act or take some proceeding within a prescribed period after service upon the party of a notice or other paper and service is made by mail, three days shall be added to the prescribed period.

(d) Additional Time for Self-represented Party While Confined

Whenever a self-represented party has the right or is required under these Rules to file a pleading or paper within a prescribed period, and is under involuntary confinement in an institution or facility pursuant to governmental authority, five days shall be added to the prescribed period. An individual who seeks to receive the benefit of this section shall attach to the pleading or paper an affidavit of involuntary confinement substantially in the following form:

AFFIDAVIT OF INVOLUNTARY CONFINEMENT

I, _____, hereby swear or
(Name)

affirm, under penalty of perjury, that (1) I am involuntarily

confined in _____, (2) I am not
(Name of facility)

represented by an attorney in this matter, (3) I have no direct access to any outside postal or other mail delivery system, and (4) on _____, 20___ [ ] I deposited the attached pleading or paper in the receptacle designated by the facility for outgoing mail or [ ] delivered the attached pleading or paper to an authorized employee of the facility for purposes of delivery to the Court.

_____
(Signature)

_____
(Date)

Committee note: The phrase "institution or facility" is not limited to penal institutions. It includes mental hospitals and similar institutions.

~~(d)~~ (e) Extension of Time Requirements Upon the Death of a Party

Upon the death of a party, all time requirements under these rules applicable to that party shall be extended automatically from the date of death to the earlier of (1) 60 days after the date of death or (2) 15 days from the issuance of letters of administration by a court of competent jurisdiction. Before or after the expiration of an extension period under this section and upon a showing of good cause why a proper substitution was not made or could not have been made prior to the expiration of the extension and that a further extension will not unfairly prejudice the rights of any other party, the court may extend the time requirements applicable to the deceased party for an additional period

commencing upon the expiration of the extension.

Cross reference: Rule 1-321.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 8 a.
Section (b) is derived from former Rule 8 b.
Section (c) is new and is derived from the 1971 version of Fed. R. Civ. P. 6 (e).
Section (d) is new.
Section ~~(d)~~ (e) is new.

Mr. Marcus explained that the amendment to Rule 1-203 related to persons who are involuntarily confined, because they may have a shorter time frame to respond to pleadings or other matters that have to be filed with the courts. The concept is that normally there is a 15-day period to respond, depending on the particular situation. Added to that there is a three-day period of time if the pleading is mailed, so if it is a 15-day response for a submission, the person has 18 days to file. For those persons who may not have easy access to mail or to some other way to transmit pleadings or papers, the Criminal Subcommittee has suggested adding a five-day time period to whatever the normal response time is.

Mr. Marcus said that an issue for further discussion, although not necessarily for today, is that this matter covers two major situations. One is for persons who are being held in a place of confinement pending trial or sentencing or while

serving a sentence. The second is for those persons who may be hospitalized involuntarily. Mr. Marcus asked that the proposed amendments to Rule 1-203 be approved today. However, for future consideration, to the extent that one of the problems that confronts people who are involuntarily confined is being addressed, is those persons who are under some psychological or psychiatric disability, whether it is temporary or permanent. It had occurred to Mr. Marcus that if someone is involuntarily confined for a psychiatric or psychological problem, the five-day time period may not necessarily be the solution. The problem may be more fundamental as to whether the person is actually in a position to participate and respond in any timely matter, let alone being cognitively aware of what the obligations would be in the circumstances that he or she may find themselves in at the time the response is required.

Mr. Marcus remarked that for today, the Committee should approve the revision to Rule 1-203. However, for further consideration, it may be necessary to review issues that relate to persons who may not have been formally found to be incapacitated or incompetent. There is a gray area for people who may be temporarily incapacitated to a point where their ability to respond could well impact very significant legal matters in which they are involved. It is an enlightenment on mental health issues. The public's attention is being drawn to

the fact that there are those people who for whatever reason do not simply ignore an obligation but may well be impaired to the point where their participation is not always going to be in compliance with the Rule. A long-term study on Rules that may be affected by persons who are incapacitated should be left to people who are very knowledgeable on this subject. Mr. Marcus expressed the opinion that the current proposal to revise Rule 1-203 does a good job extending the period of time to take into account lack of access to mail for people who are involuntarily confined.

The Chair explained that the U.S. Supreme Court has addressed this problem of prisoners who not have direct access to the mail for responding to motions or filing their own documents in *Houston v. Lack*, 487 U.S. 266 (1988). In the legal literature (mostly in the criminal field), there has been a great deal written on this subject. A number of federal courts and a number of states have tried to address this problem by limiting it only to prisoners who are self-represented and who are in jail or prison where they do not have access to the mail. In most of the country, it is limited to unrepresented prisoners in their own criminal cases either pending or post conviction where there are time limits to filing documents.

The Chair said that the device that is commonly used is not an extension of time. It is a consideration as to whether the

facility has an internal policy where the prisoner can have something mailed or whether there is a receptacle in the facility for mail to be deposited, and the prison has an internal stamping mechanism in which the outgoing mail is stamped by the prison so that the court has a date as to when the document went out. This is the way that the Criminal Subcommittee started when discussing this issue.

The Chair commented that the Subcommittee had made contact with the Maryland Division of Correction ("DOC"), some of the local jails, and the hospital part of the Department of Health and Mental Hygiene. The Subcommittee had found no uniformity as to the mail procedure. Even within the DOC, the prisons have different systems. Some of them stamp the prisoners' outgoing mail, and some of them do not. The jails have no consistency at all with this. The representative from the Baltimore City Detention Center said that they could not stamp the mail. It would be cost-prohibitive for them to try to create a stamping system for outgoing mail.

The Chair stated that if no date exists because there is no ability to put a date on a mailed document, at least in some of the institutions, this creates an equal protection problem, which is that if someone is in a certain institution, he or she gets the benefit of whatever the date is that the item was mailed, but in another institution, the person does not get that

benefit because the institution does not have a mechanism to stamp the date on the item being mailed.

The Chair noted that this took the Subcommittee in a different direction when they were considering what should be done about this issue. By Rule, the Court of Appeals cannot tell Executive Branch jails and prisons how to operate. The Subcommittee came up with the approach of amending Rule 1-203, giving anyone who has been involuntarily committed and is self-represented a certain amount of extra days for mailing. This is similar to the extra three days allowed when a document is mailed. However, this is different than what most of the rest of the country is doing.

Mr. Frederick asked whether the change to the Rule would mean that a prisoner who would like to institute an action *pro se* for original process, for example a defamation suit, would have a year and five days to institute the action. Or is this intended to apply only where the prisoner is responding to something, so instead of three days for mailing a response, the person gets five days? Under the amendment to Rule 1-203, the latest day for performance of an act required by the Rules could apply to an action on original process.

The Chair pointed out that this is the same issue in section (a) of Rule 1-203. The amendment to section (d) was intended to latch onto section (a). Mr. Frederick noted that

section (a) could refer to a time period of 366 days or 367 days. The Chair added that it could be more. The amendment is not intended to modify the statute of limitations. Mr. Frederick suggested that it should be made clear that section (d) is not intended to apply to original filings.

Mr. Durfee observed that the same language that was used in section (d) was also used in section (c), which has not been construed to extend the statute of limitations. Original filings are not covered under section (c). Mr. Frederick responded that if someone files a defamation action 369 days after the statement was recorded on a body camera and published in The Baltimore Sun, and the person files an affidavit stating that he or she was in Sheppard Pratt, section (d) indicates that the suit can be filed, because the person was involuntarily confined. The Reporter commented that when Mr. Durfee had drafted the language of section (d), he used section (c) as a model. The pertinent language was "... has the right or is required ... under these Rules to file a pleading or paper within a prescribed period." Section (b) refers to "any applicable statute," and this would be the statute of limitations. Mr. Durfee was trying to narrow it. It may be that the language could be revised to be clearer.

Judge Nazarian noted that both the title and the language of section (c) relate to time computed after service, which is

different than time to initiate something. He recalled that at the Subcommittee, the purpose of the amendment to section (d) was to mirror that solution. It may be as simple as clarifying the language in section (d) to track the parts that narrow this to the computation of time after service as opposed to the time after initiating. Judge Nazarian's view was that it was a recognition that the three days for mailing relates to the time after someone has been served with a paper by someone else. It does not bear on meeting the time of the statute of limitations.

The Chair said that Judge Nazarian's solution may be going too far. The amendment to Rule 1-203 was not intended to cover statutes of limitations in civil proceedings. This is another issue that is implicit with this Rule. Most of the rest of the states apply this only to criminal actions in the inmate's own criminal case or a habeas corpus matter, which is civil. It does go as far as applying to habeas corpus. Judge Ellinghaus-Jones asked if adding the language "in a pending matter" would clarify this. This means that section (d) would read: "Whenever a self-represented party has the right or is required under these Rules to file a pleading or paper within a prescribed period in a pending matter...". This would make it clear that this does not apply to a new cause of action.

The Chair inquired whether there are time limits on filing a post conviction. Mr. Sullivan answered that there is a 10-

year time limit. Mr. Zavin commented that his recollection of the discussion at the Subcommittee meeting was that the amendment to Rule 1-203 was intended to apply to notices of appeal and petitions for certiorari, not only to responses. The Chair said the amendment clearly is intended to apply to notices of appeal. Ms. Day asked whether adding the language "in an existing action" to section (d) of Rule 1-203 would be better. Mr. Zarbin remarked that this problem would be solved when the Maryland Electronic Courts initiative (MDEC) is in effect in the State.

Judge Nazarian withdrew his suggestion. The discussion had reminded him that the Subcommittee meant to include notices of appeal. Mr. Frederick suggested that language could be added to the Committee note after section (d), explaining what the new language is intended to apply to. The Chair responded that language could either be added to the Committee note or to section (d) stating that section (d) does not apply statutes of limitations in civil actions. Mr. Marcus expressed his agreement with this. Mr. Sullivan pointed out that some time periods are not technically statutes of limitations but could apply to this. A waiver of sovereign immunity is not a statute of limitations, but it has a similar effect. The Chair suggested the language "...does not apply to times specified for the filing of a civil action."

Mr. Frederick moved that this language be added to Rule 1-203. The motion was seconded. Judge Ellinghaus-Jones asked for an explanation of the motion. The Reporter answered that the motion was to have a Committee note that would provide that section (d) does not apply to times specified for the filing of a civil action. The Chair inquired whether this should be in a Committee note or in the Rule itself. Mr. Frederick noted that the motion is to amend the Rule. The Chair called for a vote on the motion, and it carried with a majority vote.

Ms. McBride referred to Mr. Marcus' comment about a person who may be in a psychiatric institution or have other psychiatric disabilities. Ms. McBride expressed the concern that by imposing the five-day limitation, it is being set in stone. A judge who is considering this may need to modify this time period if the confined person was under some kind of disability and did not have the wherewithal to make decisions. This is limiting the judge's ability to be flexible. The Chair said that Ms. McBride was suggesting that the reference to hospitals should be deleted from section (d).

Ms. McBride remarked that she was concerned about the mental disability aspect of this. Is there some reason why the five-day period has to be in the Rule? Ms. Day pointed out that there has to be some kind of boundary. The Chair asked whether this would be for people in the hospital or in general. Ms.

McBride suggested that it may be that the people in the hospital should be dealt with separately. She could understand the time frame applied to people who are in prison or jail. They would need some time frame for mailing; otherwise the mail could be received years later.

The Chair explained that this issue stemmed from the dilemma that prisoners have when they are under certain time requirements to file a document on their own or to respond to something, and they have no access to the mail. There have been many cases where this has happened, and they missed a deadline. Their filing was dismissed because it was untimely. Ms. McBride asked whether the court could be given some discretion, but this could create more problems. One judge could allow something to be filed much later, and another may not. Ms. McBride reiterated that she had a problem with someone who mentally cannot make a decision.

The Chair inquired whether Ms. McBride's concern pertained only to patients in hospitals. Ms. McBride replied affirmatively. She added that her concern with the amendment to Rule 1-203 was that it included a very strict deadline for these people. The deadline could not be modified, or a judge would not have any discretion to change this. Judge Price noted that currently, the time frame is the same for everyone. The amendment would simply add another five days for certain people.

Judge Mosley agreed with Ms. McBride. Someone can be involuntarily committed for years. This could result in the person missing many deadlines because of statutes of limitations. This issue is much broader than simply giving an extension of time. If the Committee would like to address this, it would have to figure out a system. Usually in criminal cases, the confined person is represented. However, if the person is sued because of a car accident, the person would not necessarily be represented. This subject has many more issues than Rule 1-203 can address.

The Chair asked Ms. McBride if she wanted to make a motion to exclude the application of Rule 1-203 to people other than those in a correctional institution, such as a jail or prison. Ms McBride answered that she would like the viewpoint of the rest of the Committee before she would make a motion. The Chair commented that the proposed change to Rule 1-203 is an extension beyond what most of the rest of the country has done. Mr. Carbine noted that the trigger is not having access to the mail. This limits the scope of the Rule to not having mail access. The idea of being mentally ill and unable to meet deadlines is beyond the scope of the Committee. It should be addressed by the legislature. Mr. Carbine expressed the opinion that the amendment to Rule 1-203 is appropriate, and it is self-limiting by only applying to not having access to the mail.

Mr. Marcus referred to Ms. McBride's comments, and he agreed that introducing the mental health component complicates this issue. If the Committee note after section (d) of Rule 1-203 relating to mental health facilities were deleted, then the status quo would be maintained. The only difference is that an additional amount of time has been added for those people who have been committed to a mental health facility.

Mr. Marcus commented that currently, the Rule is silent as to issues relating to mental health. It is a valid point that some judge might decide that under the circumstances, the Rules Committee went so far as to determine that Rule 1-203 applies to persons confined in a mental hospital or institution. The judge would then have to make a determination as to whether service was effected on a person who at the time the pleading was served on him or her was incompetent and unable to know or understand that the pleading had been served on that person. The court could exercise some authority to hold that the service had not been effected, because the person was not in a position to understand. If there were a guardian, guardian *ad litem*, or some representative that the court had appointed for receipt of process, it would be a different situation.

Mr. Marcus agreed that this is a more far-reaching issue. To address what is a laudable goal, the period of time could be extended for persons incarcerated either under sentence or

pending trial and deleting the mental health issue. This will not create the problem of an inference that the Court of Appeals had concluded that it was important to include mental facilities, so it could be construed as signaling that the Court had ruled on the fact that someone who is in a mental institution or is incapacitated would be within the scope of the Rule. Mr. Marcus was not sure that this is a reasonable construction, but it obviously will be on a case-by-case determination.

The Chair commented that there may be two ways to approach this. One is to delete the reference to hospitals. The down side of this is that the people in hospitals are in the same position as the prisoners and would not get the benefit of the proposed change to Rule 1-203. The other way is to possibly add a Committee note providing that this Rule is not intended to preclude the court from providing any other relief with respect to a person who is under a disability.

The Reporter said that Mr. Durfee had suggested that a cross reference to section (a) of Rule 1-204, Motion to Shorten or Extend Time Requirements, be added to Rule 1-203. Even after the expiration of the time period with certain exceptions, the person could request a shortening or a lengthening of the time to permit the act to be done if the failure to act was the result of excusable neglect. If someone is in a mental

hospital, that could qualify as excusable neglect. Mr. Hilton pointed out that the reference to Rule 1-204 (a) might imply that the court would excuse a failure to meet a jurisdictional deadline, such as a notice of appeal. The Reporter responded that the next sentence of section (a) provides that the time cannot be shortened or lengthened for a long list of items, including a notice of appeal.

The Chair suggested that the Committee note after section (d) of Rule 1-203 could reference Rule 1-204. It could state that Rule 1-203 does not preclude the court from providing relief under Rule 1-204 (a). By consensus, the Committee approved the change to the Committee note.

Mr. Weaver said that he assumed that the five days provided for in section (d) of Rule 1-203 to file a pleading or paper or to respond is in addition to the three days provided for in section (c) of that Rule. Should this be clarified in the Rule? From the clerks' standpoint, they deal with this issue of time more than the judges do. Judges only deal with it when it becomes a point of argument. The clerks use the time limit to know when to send a motion to the court. In Mr. Weaver's county, the clerks give everyone 18 days to file a response to a motion. The Chair asked whether this is when the service is by mail. Mr. Weaver answered affirmatively. With the additional five days proposed to be added by section (d), if the party is

pro se, the system would have to be programmed to know that anyone who is represented by counsel would get 18 days to file, and if not, they would get 23 days. The clerk would not know that the person is institutionalized until he or she files the paper.

The Chair noted that section (c) provides for an extra three days when the pleading or paper to which someone is responding had been served by mail. Mr. Weaver explained that after the time to respond to a motion or other paper has expired, the paper is transmitted to the judge. The Chair said that if a motion is filed by Party A and is served on Party B by mail, Party B has three additional days to respond. The clerk does not know whether Party B is confined or in prison. If there is no response, would the clerk wait five additional days after the deadline for filing a response to take it to a judge? Mr. Weaver replied affirmatively. Under section (c) of Rule 1-203, the clerks give everyone three extra days to file or respond.

Mr. Zarbin observed that the only way to know that someone has been incarcerated is by reading the certificate of service. Mr. Weaver added that this cannot be relied on if both sides are *pro se*. Mr. Zarbin remarked that the bar knows that they have 18 days to file or respond. Even though the extra three days are supposed to be added when service is made by mail, generally

the clerk accepts the filing of papers even though they are walked into the clerk's office on the 18th day. The Chair noted that when MDEC is effective all over the State, it will be different.

The Chair explained that the problem with the prisoners that has been litigated is that it is not always clear when the prisoner is actually getting what was sent by the other party. The three days for mailing does not mean that the U.S. Postal Service delivers it directly to the prisoner. It has to go through a process, and particularly, there may be a delay in getting the incoming mail, because the documents that were mailed are searched. This delays the delivery beyond the three days. Then there is a delay in responding to the mailed document, because the prisoners have to drop the mail in a receptacle or give it to an employee of the jail or prison. If the institution delivers outgoing mail to the post office at 10:00 a.m., and a prisoner mails his or her item at 10:05 a.m., it will not go out until the next day. If the next day is a Saturday, Sunday, or holiday, the mail will not go out then either. This is why the time period of five days was chosen for section (d) of Rule 1-203.

Mr. Weaver commented that where he saw the proposed amendment as helpful to inmates is the waiver of costs pursuant to Rule 1-325, Waiver of Costs Due to Indigence – Generally. If

the request for waiver is denied, the person has 10 days to pay. So not only do the prisoners have a delay in getting their incoming mail, they have to get a check issued to the clerk. When Rule 1-325 became effective, Mr. Weaver had thought that 10 days may not be enough time for an inmate to get the money. The Chair pointed out that most of this has to do with the filing of initial actions in civil cases. Mr. Weaver added that it also relates to filing a notice of appeal.

Mr. Weaver asked how this can be implemented in the case management system. Will the case be on hold for 23 days instead of 18 days, or will the clerk have to look at whether the particular party has enough time to file something and whether the party is *pro se*, and if so, give the party 23 days to file? The Chair replied that if the person is responding to something that has been served, the extra time is applied, rather than when the person is initiating the case. The clerk will know from the certificate of service about the person. Mr. Weaver said that clerks usually do not read the certificate of service; they simply look for it.

Mr. Zarbin commented that there is a military docket. Could a prisoners' docket be created? The prisoner first would have to alert the clerk's office that the prisoner would like to be on the prisoners' docket. This would give the prisoner the five-day period to file or respond. If the prisoner does not

elect to be on the prisoners' docket, he or she would not get to take advantage of the extra five days. The Reporter noted that some people go in and out of institutions. Mr. Zarbin said that a prisoners' docket would alert the clerk's office about the extra five days, and it also puts everyone in the same place. The Chair countered that this was not necessarily true, because people can be moved from institution to institution.

Ms. Harris observed that this could be coded on the affidavit of involuntary confinement in the computer system. There are many different computer systems. Mr. Weaver noted that this affidavit is not available until the person files his or her response. Ms. Harris said that the prisoner could make this known up front. Mr. Zarbin remarked that the prisoner would have to elect this to take advantage of the extra five days. Mr. Weaver pointed out that this pertains to the prisoner's initial answer to the complaint. This would give the prisoner an additional five days to respond.

Mr. Zarbin said that pursuant to Rule 2-321, Time for Filing Answer, a person has 30 days to respond to an initial complaint unless the person is out of state. Then the person would get 60 days to respond. Most people, including insurance carriers, never bother to answer within 30 days. If something is filed after 30 days, someone would likely ask for a default

judgment. The judge has the discretion to allow a late answer if the person is in prison.

Mr. Shellenberger noted that the amendment fixes a problem that has existed for a long time. Obviously, this is extremely complicated and has raised other issues. He expressed the view that the other issues should be explored by the Subcommittee. The proposed amendment helps prisoners and people who are institutionalized. The amendment may not be perfect, but it improves the situation of these people. The Committee should approve the proposed amendment, with the other issues being referred back to the Subcommittee.

The Chair commented that the Subcommittee had discussed the fact that some of the basic problems cannot be addressed by Rule. If there were legislation to require the prisons, jails, and hospitals to have a system of stamping outgoing mail with a date-stamp, then the additional five days would not be necessary, and the procedure would be similar to what other states do which is to use the date stamped as the date of filing. This is where the Subcommittee started until they found out that some of the prisons do not have a date-stamp, and none of the jails have it. The hospitals also do not have it. This approach could not be used, because it is not available, and the Court of Appeals cannot make it available by Rule. The legislature could. This is why the Subcommittee chose Plan B.

Judge Price asked how many incarcerated people will be *pro se* and at risk for missing filing deadlines, since there is a procedure for representation by the Office of the Public Defender. Mr. Shellenberger answered that for someone's second and third post conviction proceedings, habeas corpus proceeding where there has already been a post conviction, or coram nobis proceeding, the prisoner would not have counsel. Judge Price observed that there would not be a deadline for these.

Mr. Shellenberger responded that there may be a deadline to answer. The State's Attorney may file a motion to dismiss the case. Judge Price inquired whether the judge could not determine on his or her own that the prisoner had a mailing issue. She added that she never denies acceptance of something that a prisoner filed too late. The only document affected is a notice of appeal.

The Reporter told the Committee that this issue had been raised by Mr. Hilton. She asked Mr. Hilton about the extent of the problem. Mr. Hilton replied that it is not a huge problem, but it is significant for filing a notice of appeal. In the Court of Special Appeals, if an appeal is dismissed by order, under Rule 8-602, Dismissal by Court, the person has 10 days to file a motion for reconsideration of that dismissal. This assumes the person has access to the notice of dismissal. If the prison is on lockdown, the prisoner will not receive the notice.

The prisoner cannot go to the courthouse to file the document in person. Judge Price asked whether the time limits of the Rule could be extended, but Mr. Hilton answered that it could not be extended for notices of appeal. Occasionally, the prisoner makes a good faith effort to comply and cannot do it.

The Chair reiterated that most of the states limit this to cases in which it is the prisoner's own criminal case. The Subcommittee felt that there are also civil cases, such as divorce or child access, that are important to the prisoners, and these cases can affect the prisoners' well-being and mental attitude. Those rights are almost as important as pursuing a post conviction, coram nobis, or habeas corpus proceeding. This is why the Subcommittee decided to extend the amendment to Rule 1-203 to civil cases. In cases such as those involving termination of parental rights, a father may be in prison, and there are deadlines for responding. If the father does not respond to the deadline, he has irrevocably waived his right to contest the termination. The Subcommittee felt that this was important to include. However, this makes it more complicated.

The Chair asked what the judicial policy should be. Mr. Marcus referred to Mr. Shellenberger's suggestion to take the proposal back to the Subcommittee. Mr. Marcus said that there is no dispute that more work needs to be done on this issue, but part of the Rule confers a benefit. With respect to the issues

that pertain to potential harm to those persons who may be under an infirmity or disability, he was not sure that there was a consensus. He suggested that the Committee proceed to approve the Rule with the understanding that it goes back to the Subcommittee for further study, as opposed to tabling the entire Rule.

The Chair said that the Rule would not be tabled. If there is a consensus, the Rule could be recommitted to the Subcommittee for further discussion. The Committee may not be ready to finalize it. The Reporter noted that when there is disagreement about a Rule, it is difficult to take it to the Court of Appeals and explain that the Committee did the best that it could for now but it is going to try to do better.

The Chair noted that some of the amendments to Rule 1-203 have already been approved with respect to the hospital aspect of it and the addition of a reference to Rule 1-204. If the Committee is not ready to vote on that and would like some further study, then a motion to recommit the Rule to the Subcommittee would be necessary. Mr. Shellenberger moved to recommit the Rule. The motion was seconded. The Chair inquired if the Committee wishes to give any guidance to the Subcommittee. Mr. Zarbin suggested that Mr. Weaver or another clerk be a part of the Subcommittee discussion. The Chair called for a vote on the motion, and it carried with a majority

vote. The Chair stated that Rule 1-203 would be recommitted to the Subcommittee.

Agenda Item 3. Consideration of a proposed amendment to Rule 4-601 (Search Warrants)

Mr. Marcus presented Rule 4-601, Search Warrants, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 600 - CRIMINAL INVESTIGATIONS AND MISCELLANEOUS PROVISIONS

AMEND Rule 4-601 (g) to change the location for filing an executed search warrant and the other papers associated with it, as follows:

Rule 4-601. SEARCH WARRANTS

. . .

(g) Executed Warrant - Filing with Clerk

The judge to whom an executed search warrant is returned shall attach to the warrant the return, the verified inventory, and all other papers in connection with the issuance, execution, and return, including the copies retained by the issuing judge, and shall file them with the clerk of the court for the county ~~in which the property was seized~~ where the warrant was issued. The papers filed with the clerk shall be sealed and shall be opened for inspection

> only upon order of the court. The clerk shall maintain a confidential index of the search warrants.
>
> . . .

Rule 4-601 was accompanied by the following Reporter's note.

> Although Rule 4-601 provides that an executed search warrant shall be filed with the clerk of the court in the county in which the property was seized, the Criminal Subcommittee is advised that the practice in most counties is to file the executed search warrant in the county where the warrant was signed by the judge.
>
> The Subcommittee's view is that the executed warrant should be filed in the county where the warrant was issued, and it recommends amending Rule 4-601 accordingly.

Mr. Marcus told the Committee that the proposed change to Rule 4-601 is more of a clarification that takes into account existing case law and the difference between the circuit court and the District Court. Historically, the circuit court is a non-unified common law court of general jurisdiction. The Court of Appeals found that all 24 of the circuit courts, in 23 counties and Baltimore City, were limited to issuing search warrants for persons, places, or things that were in the territorial confines of the particular circuit court where that circuit judge sat.

Mr. Marcus noted that in 1970, the District Court was

created. It is a unified court, and it has statewide jurisdiction. The conflict that arose related to the fact that a circuit court judge would issue a search warrant within the county in which that circuit court judge sat. Then, under Rule 4-601, after issuing the warrant, the judge would retain a copy of it. It was then to be executed by the law enforcement officer, a return was to be made from the execution of the warrant, and a file was to be maintained. The proposed amendment to section (g) of Rule 4-601 recognizes that in the District Court, a judge in one part of the State could issue a search warrant permitting a law enforcement officer to conduct a search in a jurisdiction outside of the county in which the judge issued the warrant.

Mr. Marcus noted that Rule 4-601 addresses the logistics of where the file is to be maintained. The Rule now provides that where the warrant was issued is where the file is to be maintained. If there is a contest about the warrant, a motion to suppress, or some other issue that arises, or if the government were to attempt to introduce evidence from the fruits of the warrant, and the warrant became an issue, it would be clear where to find the warrant. The warrant is in three parts -- the application for the warrant, the warrant itself, and the return by law enforcement. The amendment to Rule 4-601 (g) clarifies that wherever the warrant was issued is where the

documents relating to that warrant should be kept and maintained. The change is that previously the documents were to be filed with the clerk of the court for the county in which the property had been seized.

Mr. Shellenberger said that he had requested the change to Rule 4-601. The practice for the last 15 or 20 years has been that the clerks create the file for the warrant in the jurisdiction where the judge signed the warrant. Recently, a new clerk had been appointed, and she followed the Rule. The situation is that a criminal case is filed in Baltimore County, a warrant is issued from Baltimore County, and it is executed in a neighboring county. The original warrant then sits in the county where it was executed. Baltimore County needs to litigate the warrant, and that requires Mr. Shellenberger to have the original warrant in Baltimore County. It seemed to make sense that everything should come back to the originating county. The practice has been that the warrants are being returned to the jurisdiction from where they issued. Apparently, this is not happening all over the State. Mr. Shellenberger expressed the opinion that the Rule should reflect the practice, which makes good, practical sense.

Mr. Weaver agreed that the change to Rule 4-601 (g) was a good one, but he pointed out a problem with the word “where” in the new language. It is conceivable that a Washington County

District Court judge could issue a warrant while he or she was in Frederick County. The former language was "in the county in which the property was seized." It could read "in the court from which the warrant was issued."

The Chair commented that this issue had come up in the past few months when some other issues with warrants were being discussed. Someone had raised the question about a circuit court judge in Baltimore County who is in Atlantic City on vacation. The police officer is able to locate the judge there, and the judge then issues the warrant. Is this permissible? Mr. Shellenberger responded that this is more practical now, because electronic warrants are allowed. The Chair said that the new language in section (g) of Rule 4-601 should refer to the county in which the judge sits. Mr. Weaver remarked that the word "where" suggests the physical location rather than the jurisdiction of the judge.

Judge Ellinghaus-Jones remarked that District Court judges sit in multiple counties, and they file the warrants in the county where they signed them. Mr. Weaver responded that he was thinking of the situation where the judge signs a warrant when the judge is not at work. It could happen at night, for example. Judge Price suggested that the language of section (g) of Rule 4-601 could be: "the county from which the warrant was issued." The Chair inquired how this is different from the

proposed current language "the county where the warrant was issued." Judge Price answered that use of the word "where" means that the judge could not be in the county at all. Mr. Weaver noted that the language he had suggested, which was "the court from which the warrant was issued," would not be appropriate for the District Court, because that is one unified court. Judge Price remarked that the language could be "the county from which the warrant was issued." If she is at home in Somerset County, and someone from Wicomico County brings her a warrant, she does not issue it out of Somerset County, she issues it out of Wicomico County even though she sits in Somerset County.

The Chair commented that Baltimore County and Harford County are in the same circuit. Can a judge in Baltimore County issue a search warrant for property in Harford County? Is it done by circuit or by county? Mr. Shellenberger responded that he thought it was done by county. The Reporter commented that this may be jurisdictional.

Mr. Marcus observed that there are some cases on this. The issue is whether the warrant is valid if the judge is in Harford County directing that a search warrant be served in another county. Mr. Marcus had looked at *State v. Inter-continental, Ltd.,* 302 Md. 132 (1985) and *Birchead v. State*, 317 Md. 691 (1989). The distinction that the court has drawn is the

unique nature of the non-unified state of the circuit courts and the territorial boundaries of the court in which the judge is assigned, as opposed to the circuits and the fact that the District Court is a statewide court. Mr. Marcus had litigated issues arising out of District Court search warrants in other jurisdictions. He had not had a case where a judge who was sitting in another county, which is in the same circuit, signed a search warrant. When the judge acts, it is theoretically where the judge is sitting.

Judge Nazarian commented that at the Subcommittee meeting, the members had discussed the fact that there are some circumstances where the Circuit Administrative Judge could designate a circuit court judge to be sitting in one county or another. Are there circuit court judges who are shared among counties? The Chair responded affirmatively. He said that this is common on the Eastern Shore of Maryland. In the First Circuit, the judges are all designated for the entire circuit. However, they are sitting in a particular court.

Ms. Harris inquired whether it is legal for a circuit judge who is on duty to sign a warrant that is for another jurisdiction. Often, a circuit court judge is on duty, because in many jurisdictions, someone is on duty 24/7, and the judges rotate this duty, including both District Court and circuit court judges. It is clearly legal for a District Court judge to

do so, because it is a unified court. Judge Morrissey remarked that some circuit court judges in some jurisdictions are cross-designated.

The Chair asked Judge Price whether this is the way it is in her county. Judge Price replied that the judges are all cross-designated, and although she is a District Court judge, she can sit in circuit court. The Chair remarked that the Honorable Daniel M. Long, judge of the Circuit Court for Somerset County, is cross-designated as a District Court judge as well as a circuit court judge for the other counties in the circuit. Judge Price said that her order states that she is cross-designated to the circuit court. She was not sure whether the circuit court judges are cross-designated to the District Court.

Mr. Shellenberger commented that there are circuit court judges in Baltimore County who are cross-designated to the District Court for the purpose of weekend warrant duty. Judge Morrissey said that most of the police officers know the distinction. If they seek an out-of-county search warrant, they will seek out a District Court judge. Judge Morrissey expressed the opinion that the new language of section (g) of Rule 4-601 should be "from which the warrant was issued." The Chair asked the Committee if this change should be made. By consensus, the Committee approved the change.

By consensus, the Committee approved Rule 4-601 as amended.

Agenda Item 4. Consideration of a proposed amendment to Rule 1-325 (Waiver of Costs Due to Indigence - Generally)

Mr. Marcus presented Rule 1-325, Waiver of Costs Due to Indigence - Generally, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

AMEND Rule 1-325 (a) to add language referring to petitions for expungement and requests to shield, as follows:

Rule 1-325. WAIVER OF COSTS DUE TO INDIGENCE - GENERALLY

(a) Scope

This Rule applies only to original civil actions in a circuit court or the District Court, including petitions for expungement and requests to shield all or part of a record.

Committee note: Original civil actions in a circuit court include actions governed by the Rules in Title 7, Chapter 200, 300, and 400.

(b) Definition

In this Rule, "prepaid costs" means costs that, unless prepayment is waived pursuant to this Rule, must be paid prior to

the clerk's docketing or accepting for docketing a pleading or paper or taking other requested action.

Committee note: "Prepaid costs" may include a fee to file an initial complaint or a motion to reopen a case, a fee for entry of the appearance of an attorney, and any prepaid compensation, fee, or expense of a master, examiner, or family magistrate. See Rules 1-501, 2-541, 2-542, 2-603, and 9-208.

(c) No Fee for Filing Request

No filing fee shall be charged for the filing of the request for waiver of prepaid costs pursuant to section (d) or (e) of this Rule.

(d) Waiver of Prepaid Costs by Clerk

On written request, the clerk shall waive the prepayment of prepaid costs, without the need for a court order, if:

(1) the party is an individual who is represented (A) by an attorney retained through a pro bono or legal services program on a list of programs serving low income individuals that is submitted by the Maryland Legal Services Corporation to the State Court Administrator and posted on the Judiciary website, provided that an authorized agent of the program provides the clerk with a statement that (i) names the program, attorney, and party; (ii) states that the attorney is associated with the program and the party meets the financial eligibility criteria of the Corporation; and (iii) attests that the payment of filing fees is not subject to Code, Courts Article, §5-1002 (the Prisoner Litigation Act), or (B) by an attorney provided by the Maryland Legal Aid Bureau, Inc. or the Office of the Public Defender, and

(2) except for an attorney employed or appointed by the Office of the Public Defender in a civil action in which that Office is required by statute to represent the party, the attorney certifies that, to the best of the attorney's knowledge, information, and belief, there is good ground to support the claim, application, or request for process and it is not interposed for any improper purpose or delay.

Committee note: The Public Defender represents indigent individuals in a number of civil actions. See Code, Criminal Procedure Article, §16-204 (b).

Cross reference: See Rule 1-311 (b) and Rule 3.1 of the Maryland Lawyers' Rules of Professional Conduct.

(e) Waiver of Prepaid Costs by Court

(1) Request for Waiver

An individual unable by reason of poverty to pay a prepaid cost and not subject to a waiver under section (d) of this Rule may file a request for an order waiving the prepayment of the prepaid cost. The request shall be accompanied by (A) the pleading or paper sought to be filed; (B) an affidavit substantially in the form approved by the State Court Administrator, posted on the Judiciary website, and available in the Clerks' offices; and (C) if the individual is represented by an attorney, the attorney's certification that, to the best of the attorney's knowledge, information, and belief, there is good ground to support the claim, application, or request for process and it is not interposed for any improper purpose or delay.

Cross reference: See Rule 1-311 (b) and Rule 3.1 of the Maryland Lawyers' Rules of Professional Conduct.

(2) Review by Court; Factors to be Considered

The court shall review the papers presented and may require the individual to supplement or explain any of the matters set forth in the papers. In determining whether to grant a prepayment waiver, the court shall consider:

(A) whether the individual has a family household income that qualifies under the client income guidelines for the Maryland Legal Services Corporation for the current year, which shall be posted on the Judiciary website; and

(B) any other factor that may be relevant to the individual's ability to pay the prepaid cost.

(3) Order; Payment of Unwaived Prepaid Costs

If the court finds that the party is unable by reason of poverty to pay the prepaid cost and that the pleading or paper sought to be filed does not appear, on its face, to be frivolous, it shall enter an order waiving prepayment of the prepaid cost. In its order, the court shall state the basis for granting or denying the request for waiver. If the court denies, in whole or in part, a request for the waiver of its prepaid costs, it shall permit the party, within 10 days, to pay the unwaived prepaid cost. If, within that time, the party pays the full amount of the unwaived prepaid costs, the pleading or paper shall be deemed to have been filed on the date the request for waiver was filed. If the unwaived prepaid costs are not paid in full within the time allowed, the pleading or paper shall be deemed to have been withdrawn.

(f) Award of Costs at Conclusion of Action

(1) Generally

At the conclusion of an action, the court and the clerk shall allocate and award costs as required or permitted by law.

Cross reference: See Rules 2-603, 3-603, 7-116, and *Mattison v. Gelber*, 202 Md. App. 44 (2011).

(2) Waiver

(A) Request

At the conclusion of an action, a party may seek a final waiver of open costs, including any unpaid appearance fee, by filing a request for the waiver, together with (i) an affidavit substantially in the form prescribed by subsection (e)(1)(A) of this Rule, or (ii) if the party was granted a waiver of prepayment of prepaid costs by court order pursuant to section (e) of this Rule and remains unable to pay the costs, an affidavit that recites the existence of the prior waiver and the party's continued inability to pay by reason of poverty.

(B) Determination by Court

In an action under Title 9, Chapter 200 of these Rules or Title 10 of these Rules, the court shall grant a final waiver of open costs if the requirements of Rules 2-603 (e) or 10-107 (b), as applicable, are met. In all other civil matters, the court may grant a final waiver of open costs if the party against whom the costs are assessed is unable to pay them by reason of poverty.

Source: This Rule is new.

Rule 1-325 was accompanied by the following Reporter's note.

> Unless waived a fee is required to be paid when a petition for expungement is filed. Ordinarily, no fee is required unless shielding is requested; however, requests to shield filed under the recently enacted Second Chance Act (Code, Criminal Procedure Article, §§10-301 through 10-306) do carry a charge.
>
> The Director of the Access to Justice Department of the Administrative Office of the Courts pointed out that Rule 1-325 is applicable only to civil matters. She noted that expungements are treated in some courts as civil matters, but this may not be true in all courts. Since there will be a greater demand for expungements as well as more shielding requests due to recent changes in the law, the Director asked that language be added to Rule 1-325 to make it clear that Rule 1-325 applies to costs for petitions to expunge and for requests to shield all or part of records.
>
> The Criminal Subcommittee considered this matter and recommends amending Rule 1-325 accordingly.

Mr. Marcus explained that Rule 1-325 expands the scope of waivers of costs to include petitions for expungement, requests to shield all or part of a record, and anything else where a waiver of costs might be appropriate. Mr. Marcus took a brief look at the fee schedule for the courts. According to the published fee schedule, there is no cost to file a petition to

shield. With respect to the petitions for expungement, currently the cost is $30. The amendment to the Rule extends the idea that a waiver should be available to those persons who seek to have their records expunged whether by Rule 1-325 or by statute. There is a charge of $115 to appeal the denial of a petition for expungement in District Court.

The Reporter said that Ms. Libber, an Assistant Reporter, had written in the Reporter's note that under the new Second Chance Act, Code, Criminal Procedure Article, §§10-301 through 10-306, there is a charge for a request to shield. Mr. Weaver asked whether petitions for post conviction and coram nobis relief should be added to the new language in section (a) of Rule 1-325. The Chair noted that a petition for a post conviction review is filed in a criminal case. Mr. Weaver remarked that it is civil in nature, and the Rule could refer to the fact that it is filed in the criminal case. The Reporter asked what the charge would be for that. Mr. Weaver responded that it would be a civil filing fee, which is $55.

The Chair asked Mr. Weaver whether he would like to include a reference to petitions for post conviction review. Mr. Weaver said that he thought it should be added. The Chair asked about petitions for coram nobis and habeas corpus relief. The Reporter commented that the additional language in section (a) of Rule 1-325 was intended to be a clarification and not an

expansion, even though the expungement is filed in the criminal case. A long "laundry list" could be added. One possibility is to add language to the Committee note after section (a) to clarify.

The Chair observed that since expungement is filed in a criminal case, then it is incorrect to use the word "including" in the new language. Mr. Weaver noted that expungements and petitions to shield are considered civil actions. He added that petitions for post conviction and coram nobis relief are similar in that they are civil actions normally found in a criminal case.

Ms. Libber drew the Committee's attention to Rule 4-101, Applicability, which reads as follows: "The rules in this Title govern procedure in all criminal matters, post conviction procedures, and expungement of records in both the circuit courts and the District Court, except as otherwise specifically provided." Judge Mosley asked why the Rule has to be amended. The Reporter answered that the Access to Justice Department of the Administrative Office of the Courts had requested it. Ms. Libber explained that she drafted the new language of section (a) of Rule 1-325 based on the language of Rule 4-101, which distinguishes post conviction procedures and expungement of records from criminal matters. The Reporter agreed that Rule 4-

101 separates post conviction procedures and expungement of records from criminal matters.

The Chair remarked that the language of Rule 1-325 (a) could be similar to the language of Rule 4-101. The Reporter said that this would indicate that the petitions for expungement and requests to shield are different from a civil action, but they actually are civil actions filed in a criminal case. She asked Ms. Libber what her research had shown. Ms. Libber replied that she had not been able to find a statement that clarified whether petitions for expungement and requests to shield are civil or criminal, although she believes the language in Rule 4-101 sheds some light on this.

Mr. Sullivan suggested that the language could be: "requests for civil relief filed in a criminal case." This would be general enough, so that it would not be necessary to list the various kinds of proceedings. The Chair pointed out that not many proceedings would be required to be listed in section (a) of Rule 1-325. Mr. Weaver had suggested adding post conviction petitions. The only other two petitions that the Chair was aware of were petitions for habeas corpus and for coram nobis review.

Mr. Shellenberger added that motions for a writ of actual innocence and motions for post conviction DNA testing could be included. Judge Nazarian asked whether the purpose of the

proposed change was to make sure that proceedings that were covered by the Second Chance Act did not get excluded from the scope of the Rule.

The Reporter observed that if an action is clearly a civil one, it is already included in the Rule. The problem is that people are confused as to whether petitions for expungement are included. Ms. Libber added that Pamela Ortiz, Esq., Director of the Access to Justice Department, had pointed this out. Mr. Durfee noted that section (a) of Rule 4-504, Petition for Expungement When Charges Filed, provides that the petition shall be filed in the original action. The Reporter responded that this does not make it a criminal action. It is a civil action filed in the criminal case file. Judge Ellinghaus-Jones asked whether Ms. Ortiz had said that there are jurisdictions that will not accept requests for a waiver of prepaid costs under Rule 1-325 that pertain to petitions for expungement. The Reporter answered affirmatively.

Mr. Weaver remarked that the clerks know that post conviction proceedings are civil in nature even if the parties do not know this. The language that is being added to section (a) of Rule 1-325 is to inform people that expungements and shielding are civil in nature. Judge Nazarian commented that it might be less confusing if the word “including” is changed to the word “and.” The Reporter said that this could make it more

confusing, by creating an inference that expungement petitions and requests to shield are not civil.

Mr. Zarbin suggested that some clarification could be added to the Committee note after section (a). The Chair commented that if this is done by a Committee note, section (a) would not be changed. Language could be added to the Committee note to provide that the intent is that the scope of the Rule includes petitions that are civil, even if filed in a criminal case. Judge Ellinghaus-Jones inquired whether the petitions being referred to can be specified. The Chair answered that part of the new language would be "petitions, such as....". The Chair had some question as to whether a petition for post conviction DNA testing is civil. Mr. Shellenberger replied that it is filed in the original criminal case if the case still exists. The Chair asked whether the State's Attorney files an answer to the petition, and Mr. Shellenberger responded affirmatively. He added that he also answers petitions for expungement and requests for shielding.

Mr. Weaver remarked that in post conviction proceedings, petitions ordinarily are filed in the criminal case, but they are civil in nature. The Reporter asked whether a separate file is opened for petitions for a writ of habeas corpus. Mr. Weaver replied affirmatively. The Reporter commented that a petition for a writ of habeas corpus is never filed in the criminal case,

and Mr. Weaver confirmed this. The Chair asked about petitions for coram nobis. Mr. Weaver replied that they are treated like the petitions for post conviction relief.

The Chair remarked that it is interesting that the habeas cases are treated differently. Mr. Weaver reiterated that Rule 4-504 (a) provides that post conviction petitions shall be filed in the original criminal action that related to it. The Reporter noted that petitions for habeas corpus could also be filed on behalf of someone who is in a mental institution. Mr. Weaver commented that the difference is that post conviction proceedings attack the conviction, while habeas corpus proceedings attack the confinement.

The Chair asked the Committee for its approval of adding language to the Committee note after section (a) of Rule 1-325 clarifying that section (a) applies to petitions that are civil even though they are filed in a criminal case with examples included. By consensus, the Committee approved this.

Mr. Weaver pointed out that the Committee note after section (b) of Rule 1-325 refers to “a master,” even though that term has been eliminated from the other Rules. Mr. Marcus said the reference could be to a “discovery master.” The Reporter commented that there should not be any references to “master” in the Rules. The Chair noted that the statute, Code, Courts Article, §2-501, changed all of the references, except for the

redistricting master. The Reporter suggested deleting the word "family" from the Committee note. This language was appropriate before the statute was passed. The wording of the Committee note would be "...of an examiner or magistrate." By consensus, the Committee agreed to this change.

By consensus, the Committee approved Rule 1-325 as amended.

Agenda Item 5. Consideration of a proposed amendment to Rule 1-325.1 (Waiver of Prepaid Appellate Costs in Civil Actions)

Judge Nazarian presented Rule 1-325.1, Waiver of Prepaid Appellate Costs in Civil Actions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

AMEND Rule 1-325.1 to remove language that provides that if unwaived prepaid costs are not paid in full within the time allowed the "appeal shall be deemed to have been withdrawn," and to add language to require the court to "enter an order striking the appeal" if unwaived prepaid costs are not paid in full within the time allowed, as follows:

Rule 1-325.1. WAIVER OF PREPAID APPELLATE COSTS IN CIVIL ACTIONS

(a) Scope

This Rule applies (1) to an appeal from an order or judgment of the District Court or an orphans' court to a circuit court in a civil action, and (2) to an appeal as defined in subsection (b)(1) of this Rule seeking review in the Court of Special Appeals or the Court of Appeals of an order or judgment of a lower court in a civil action.

(b) Definitions

In this Rule, the following definitions apply:

(1) Appeal

"Appeal" means an appeal, an application for leave to appeal to the Court of Special Appeals, and a petition for certiorari or other extraordinary relief filed in the Court of Appeals.

(2) Clerk

"Clerk" includes a Register of Wills.

(3) Prepaid Costs

"Prepaid costs" means (A) the fee charged by the clerk of the lower court for assembling the record, (B) the cost of preparation of a transcript in the District Court, if a transcript is necessary to the appeal, and (C) the filing fee charged by the clerk of the appellate court.

Cross reference: See the schedule of appellate court fees following Code, Courts Article, §7-102 and the schedule of circuit court fees following Code, Courts Article, §7-202.

(c) Waiver

(1) Generally

Waiver of prepaid costs under this Rule shall be governed generally by section (d) or (e) of Rule 1-325, as applicable, except that:

(A) the request for waiver of both the lower and appellate court costs shall be filed in the lower court with the notice of appeal;

(B) a request to waive prepayment of the fee for filing a petition for certiorari or other extraordinary relief in the Court of Appeals shall be filed in, and determined by, that Court;

(C) waiver of the fee charged for assembling the record shall be determined in the lower court;

(D) waiver of the appellate court filing fee shall be determined by the appellate court, but the appellate court may rely on a waiver of the fee for assembling the record ordered by the lower court;

(E) both fees shall be waived if (i) the appellant received a waiver of prepaid costs under section (d) of Rule 1-325 and will be represented in the appeal by an eligible attorney under that section, (ii) the attorney certifies that the appellant remains eligible for representation in accordance with Rule 1-325 (d), and (iii) except for an attorney employed or appointed by the Office of the Public Defender in a civil action in which that Office is required by statute to represent the party, the attorney further certifies that to the best of the attorney's knowledge, information, and belief there is good ground to support the appeal and it is not interposed for any improper purpose or delay; and

(F) if the appellant received a waiver of prepaid costs under section (e) of Rule 1-325, the lower court and appellate court may rely on a supplemental affidavit of the appellant attesting that the information supplied in the affidavit provided under Rule 1-325 (e) remains accurate and that there has been no material change in the appellant's financial condition or circumstances.

(2) Procedure

(A) If an appellant requests the waiver of the prepaid costs in both the lower and appellate courts, the lower court, within five days after the filing of the request, shall act on the request for waiver of its prepaid cost and transmit to the appellate court the request for waiver of the appellate court prepaid cost, together with a copy of the request and order regarding the waiver of the lower court prepaid cost.

(B) The appellate court shall act on the request for the waiver of its prepaid cost within five business days after receipt of the request from the lower court.

(C) If either court denies, in whole or in part, a request for the waiver of its prepaid cost, it shall permit the appellant, within 10 days, to pay the unwaived prepaid cost. If, within that time, the appellant pays the full amount of the unwaived prepaid cost, the appeal shall be deemed to have been filed on the day the request for waiver was filed in the lower court or, as to a petition for certiorari or other extraordinary relief, in the Court of Appeals. If the unwaived prepaid costs are not paid in full within the time allowed, the ~~appeal shall be deemed to have been withdrawn~~ court shall enter an order striking the appeal.

Source: This Rule is new.

Rule 1-325.1 was accompanied by the following Reporter's note.

> The last sentence of current Rule 1-325.1 (c)(2)(C) provides that if unwaived prepaid appellate costs are not paid in full within the time allowed, "the appeal shall be deemed to have been withdrawn." It is proposed that the sentence be revised to provide that if the unwaived prepaid costs are not paid, "the court shall enter an order striking the appeal." Thus, the consequences of non-payment would be the judicial act of striking the appeal, instead of a "deemed" withdrawal.

Judge Nazarian explained that in the course of implementing Rule 1-325.1, a problem was found that flows from the way that the circuit court and the Court of Special Appeals interact. If a person files a notice of appeal and a request for a fee waiver at the same time, and the fee waiver is denied, the person has 10 days to pay the unwaived prepaid cost. If the fee waiver denial occurs after day 20, there would not be enough time to cure by paying the fee before the 30-day jurisdictional period expires. The current language of Rule 1-325.1 provides that the appeal shall be deemed to have been withdrawn. This creates a situation where the process of assessing and denying the fee waivers in the circuit court could result in the expiration of the appeal period, and the appeal would be dismissed. The proposed change deletes the last phrase of Rule 1-325.1, which

is “the appeal shall be deemed to have been withdrawn,” and adds the language, “the court shall enter an order striking the appeal.” Notices of appeal were being filed and docketed in circuit court, and when they got to the Court of Special Appeals, they should have been deemed to have been withdrawn, but there was no docket entry of that. The new language means that the fee situation will have been resolved. If a fee waiver request is denied and the unwaived prepaid costs are not paid within the time allowed, an order docketing the appeal as stricken shall be entered in the circuit court, so that there is no confusion about the case. Mr. Weaver and some other circuit court clerks had been present at the Subcommittee meeting at which Rule 1-325.1 had been discussed. This situation had been creating some additional work for the circuit courts, so the proposed change is the cleanest way to address the problem.

Mr. Hilton commented that the current language of subsection (c)(2)(C) sounds as though the consequence of non-payment is an act of the appellant, rather than an act of the court. An order striking an appeal is actually appealable. The proposed change provides some due process for the appellant. Mr. Weaver inquired whether the language should be that the “lower court shall enter an order.” The Chair pointed out that it could be either the circuit court or the Court of Special Appeals, depending on which fee is not paid. He said that he

had had a discussion with Judge Nazarian as to whether the Court of Special Appeals has the right to strike a paper filed in the circuit court before the record had come up to the Court of Special Appeals. The better answer is that the circuit court should strike the appeal, not the Court of Special Appeals. By consensus, the Committee agreed with Mr. Weaver's suggestion to add the word "lower" before the word "court" in the new language at the end of Rule 1-325.1.

Mr. Weaver noted that in subsection (b)(3) of Rule 1-325.1, the term "prepaid costs" is defined. In subsection (c)(1)(A), the term "court costs" is used, instead of the term "prepaid costs." Judge Nazarian said that prepaid costs are all that is meant to be encompassed by the Rule. The Chair asked whether section (c) applies only to prepaid costs. There are also final costs at the appellate stage. Mr. Hilton responded that there is a separate waiver for those. Section (c) of Rule 1-325.1 applies only to prepaid costs. By consensus, the Committee agreed to change the term "court costs" to the term "prepaid costs" in subsection (c)(1)(A) of Rule 1-325.1.

By consensus, the Committee approved Rule 1-325.1 as amended.

Agenda Item 6. Consideration of proposed amendments to Rule 2-551 (In Banc Review)

Judge Nazarian presented Rule 2-551, In Banc Review, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-551 to provide that if a post-judgment motion is filed after a notice of in banc review is filed, the notice for in banc review shall be treated as filed on the same day as, but after, the entry of a notice withdrawing the motion or an order disposing it; to provide that a notice for in banc review filed after announcement or signing by the trial court of a judgment but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket; to provide that a notice for in banc review filed before a timely post-judgment motion shall be treated as filed on the same day as, but after, entry of a notice withdrawing the motion or an order disposing of it; and making certain conforming and stylistic changes, as follows:

Rule 2-551. IN BANC REVIEW

(a) Generally

When review by a court in banc is permitted by the Maryland Constitution, a party may have a judgment or determination of any point or question reviewed by a court in banc by filing a notice for in banc review. Issues are reserved for in banc review by making an objection in the manner set forth in Rules 2-517 and 2-520. Upon the filing of the notice, the Circuit Administrative Judge shall designate three

judges of the circuit, other than the judge who tried the action, to sit in banc.

(b) Time for Filing

Except as otherwise provided in this ~~section~~ Rule, the notice for in banc review shall be filed within ten days after entry of judgment. When a timely motion is filed pursuant to Rule 2-532, 2-533, or 2-534, the notice for in banc review shall be filed within ten days after (1) entry of an order denying a motion pursuant to Rule 2-533 or disposing of a motion pursuant to Rule 2-532 or 2-534 or (2) withdrawal of the motion. A notice for in banc review filed before the withdrawal or disposition of any of these motions ~~that was timely filed shall have no effect, and a new notice for in banc review must be filed within the time specified in this section~~ does not deprive the trial court of jurisdiction to dispose of the motion. If a notice for in banc review is filed and thereafter a party files a timely motion pursuant to Rule 2-532, 2-533, or 2-534, the notice for in banc review shall be treated as filed on the same day as, but after, the entry of a notice withdrawing the motion or an order disposing of it.

(c) Memoranda

Within 30 days after the filing of the notice for in banc review, the party seeking review shall file four copies of a memorandum stating concisely the questions presented, any facts necessary to decide them, and supporting argument. Within 15 days thereafter, an opposing party who wishes to dispute the statement of questions or facts shall file four copies of a memorandum stating the alternative questions presented, any additional or different facts, and supporting argument. In the absence of such dispute, an opposing party may file a memorandum of argument.

(d) Transcript

Promptly after the filing of memoranda, a judge of the panel shall determine, by reviewing the memoranda and, if necessary, by conferring with counsel, whether a transcript of all or part of the proceeding is reasonably required for decision of the questions presented. If a transcript is required, the judge shall order one of the parties to provide the transcript and shall fix a time for its filing. The expenses of the transcript shall be assessed as costs against the losing party, unless otherwise ordered by the panel.

(e) Hearing and Decision

A hearing shall be scheduled as soon as practicable but need not be held if all parties notify the clerk in writing at least 15 days before the scheduled hearing date that the hearing has been waived. In rendering its decision, the panel shall prepare and file or dictate into the record a brief statement of the reasons for the decision.

(f) Motion to Shorten or Extend Time Requirements

Upon motion of any party filed pursuant to Rule 1-204, any judge of the panel may shorten or extend the time requirements of this Rule, except the time for filing a notice for in banc review.

(g) Dismissal

(1) Generally

The panel, on its own initiative or on motion of any party, shall dismiss an in banc review if ~~(1)~~ (A) in banc review is not permitted by the Maryland Constitution, ~~(2)~~ (B) the notice for in banc review was

prematurely filed or not timely filed except as provided in subsection (g)(2) of this Rule, or ~~(3)~~ (C) the case has become moot, and the panel may dismiss if the memorandum of the party seeking review was not timely filed.

(2) Judgment Entered After Notice Filed

A notice for in banc review filed after the announcement or signing by the trial court of a judgment but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.

(h) Further Review

Any party who seeks and obtains review under this Rule has no further right of appeal. The decision of the panel does not preclude an appeal to the Court of Special Appeals by an opposing party who is otherwise entitled to appeal.

Source: This Rule is new, is consistent with Md. Const., Art. IV, §22, and replaces former Rule 510.

Rule 2-551 was accompanied by the following Reporter's note.

Proposed amendments to Rule 2-551 add to the Rule savings provisions for certain prematurely filed notices for in banc review. Under the amended Rule, treatment of prematurely filed notices would be comparable to the treatment of prematurely filed notices of appeal under the Rules in Title 8.

The savings provisions added to sections (b) and (d) are patterned after Rules 8-202 (c) and 8-602 (d), respectively.

Additionally, for completeness and consistency with Rule 8-202 (c), language pertaining to withdrawal of a motion filed pursuant to Rule 2-532, 2-533, or 2-534 is added to Rule 2-551 (b).

Judge Nazarian told the Committee that the proposed changes to Rule 2-551 are designed to avoid a potential trap involving motions filed pursuant to Rule 2-532, Motion for Judgment Notwithstanding the Verdict; Rule 2-533, Motion for a New Trial; and Rule 2-534, Motion to Alter or Amend a Judgment – Court Decision. A party could file a notice for in banc review and then still have a post-decisional motion pending that could bear on whether in banc review was still appropriate and whether jurisdiction had been lost or taken. The proposed amendments are designed to work the same way as comparable provisions in Rules in Title 8. If a notice for in banc review is filed before resolution of a post-verdict or post-judgment motion, it is treated as if it had been filed on the same day as, but after, the entry of a notice withdrawing the motion or an order disposing of it. The amendments are meant to clear up the potential jurisdictional trap.

By consensus, the Committee approved Rule 2-551 as presented.

Agenda Item 7. Consideration of proposed amendments to Rule 7-202 (Method of Securing Review)

Judge Nazarian presented Rule 7-202, Method of Securing Review, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW

IN CIRCUIT COURT

CHAPTER 200 - JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY DECISIONS

AMEND Rule 7-202 to permit an administrative agency to provide a certain notice by electronic means to a party to the agency proceeding if the party has consented to receive notices from the agency electronically and to make stylistic changes, as follows:

Rule 7-202. METHOD OF SECURING REVIEW

. . .

(d) Copies; Filing; ~~Mailing~~ Notices

(1) Notice to Agency

Upon filing the petition, the petitioner shall deliver to the clerk a copy of the petition for the agency whose decision is sought to be reviewed. The clerk shall promptly mail a copy of the petition to the agency, informing the agency of the date the petition was filed and the civil action number assigned to the action for judicial review.

(2) Service by Petitioner in Workers' Compensation Cases

Upon filing a petition for judicial review of a decision of the Workers' Compensation Commission, the petitioner shall serve a copy of the petition, together with all attachments, by first-class mail on the Commission and each other party of record in the proceeding before the Commission. If the petitioner is requesting judicial review of the Commission's decision regarding attorneys' fees, the petitioner also shall serve a copy of the petition and attachments by first-class mail on the Attorney General.

Committee note: The first sentence of this subsection is required by Code, Labor and Employment Article, §9-737. It does not relieve the clerk from the obligation under subsection (d)(1) of this Rule to mail a copy of the petition to the agency or the agency from the obligation under subsection (d)(3) of this Rule to give written notice to all parties to the agency proceeding.

(3) ~~By~~ Notice by Agency to Parties

(A) ~~Generally~~ Duty

Unless otherwise ordered by the court, the agency, upon receiving the copy of the petition from the clerk, shall give written notice promptly ~~by first-class mail or, if permitted by subsection (d)(3)(B) of this Rule, electronically~~ to all parties to the agency proceeding that:

(i) a petition for judicial review has been filed, the date of the filing, the name of the court, and the civil action number; and

(ii) a party ~~wishing~~ who wishes to oppose the petition must file a response within 30 days after the date the agency's notice was ~~mailed~~ sent unless the court shortens or extends the time.

(B) ~~Electronic Notification in Workers' Compensation Cases~~ Method

The ~~Commission~~ agency may give the ~~written~~ notice ~~required under subsection (d)(3)(A) of this Rule electronically to a party to the Commission proceeding if the party has subscribed to receive electronic notices from the Commission~~ by first class mail or, if the party has consented to receive notices from the agency electronically, by electronic means.

(e) Certificate of Compliance

Within five days after mailing or electronic transmission, the agency shall file with the clerk a certificate of compliance with section (d) of this Rule, showing the date the agency's notice was mailed or electronically transmitted and the names and addresses of the persons to whom it was ~~mailed~~ sent. Failure to file the certificate of compliance does not affect the validity of the agency's notice.

. . .

Rule 7-202 was accompanied by the following Reporter's note.

The Maryland Department of the Environment suggested to the Rules Committee that it be permitted to notify parties electronically in its administrative proceedings, which are often multi-party permitting decisions. It pointed to Rule 7-202 (d)(3)(B), which was added by a Rules Order on March 3, 2015, effective July 1, 2015, permits the Workers' Compensation Commission to provide written notice to a party if the party has subscribed to receive electronic notices from the Commission.

> Rule 7-202 is proposed to be modified to expand the ability of other administrative agencies to provide notice electronically, "to the extent that a party has consented to receive notices from the agency electronically." It is increasingly the case that administrative agencies communicate with parties electronically throughout the administrative proceeding, using email addresses instead of post office addresses, and the proposed change would eliminate the requirement that if a petition for judicial review is filed, the agency would have to notify a party through mailing to a post office address. That may be burdensome requirement if the agency had not been communicating by regular mail during the administrative process.

Judge Nazarian explained that the proposed change to Rule 7-202 came from a request of the Maryland Department of the Environment. When a petition for judicial review of an agency action is filed, Rule 7-202 requires that notice is to be mailed to all parties. The Secretary of the Maryland Department of the Environment had pointed out that this could include a tremendous number of people. In their cases, the decision is to issue or not issue a permit, and there could be hundreds of interested parties, who potentially could receive notice. The Department was having problems getting the correct addresses for the parties. It was also receiving electronic comments from people who were not necessarily giving them mailing addresses. Rule 7-202 was creating some challenges for them. Representatives of the Department had made a presentation to the Subcommittee.

Judge Nazarian said that by consulting other agencies, the Subcommittee learned that the definition of a “party” varies tremendously from agency to agency, depending on the nature of the proceeding. From Judge Nazarian’s personal experience with the Public Service Commission, people entered their appearance as parties, and interested parties could file comments. A lack of uniformity led to the proposed amendments being phrased in a way to allow service electronically of a petition for judicial review if the party has consented to receive notice electronically in the course of the agency proceedings. The default is that the agency would still send first-class mail notice to a party, but the agency has the opportunity to create a mechanism by which a party consents to receive electronic notice instead of first-class mail notice.

Judge Nazarian commented that the Department of the Environment had suggested that if someone comes into their system electronically to make comments about a permit, the Department could have a mechanism where the person can opt into receiving notices electronically from them. There would be the opportunity for people to participate electronically and get notices electronically, and it would save the agency the time-consuming task of attempting to track down mailing addresses for people who never gave them in the first place. The Subcommittee discussed ways that electronic notice could be authorized more

generally, but the inconsistency of both who is a party to different kinds of agency proceedings and the different kinds of systems used by various agencies would mean that defining electronic notice in some uniform way would create many more problems in itself. The proposed amendment keeps the status quo but allows the agency to create a waiver.

Mr. Zarbin commented that this procedure works very well for Workers' Compensation Commission cases. The Chair noted that the Department of the Environment had made a request for Rule 7-202 to be changed. Rather than do this agency by agency, the Subcommittee's recommendation is to allow electronic notice if there is consent to receive it.

By consensus, the Committee approved the change to Rule 7-202 as presented.

Agenda Items 8 and 10. Consideration of proposed amendments to Rules 8-121 (Appeals from Courts Exercising Juvenile Jurisdiction - Confidentiality) and 8-122 (Appeals from Proceedings for Adoption of Guardianship - Confidentiality) and Consideration of a proposed amendment to Rule 8-504 (Contents of Brief)

Judge Nazarian presented Rule 8-121, Appeals from Courts Exercising Juvenile Jurisdiction - Confidentiality, Rule 8-122, Appeals from Proceedings for Adoption or Guardianship - Confidentiality, and Rule 8-504, Contents of Brief, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 100 - GENERAL PROVISIONS

AMEND Rule 8-121 to remove the requirement in appeals from courts exercising juvenile jurisdiction that the proceeding be styled using the child's first name and the initial of the child's last name; to substitute the requirement that the proceedings be styled using the initials of the child's first and last names; and to add a requirement that only the initials of the name of a child, parent, or guardian be used in any document pertaining to the appeal; as follows:

Rule 8-121. APPEALS FROM COURTS EXERCISING JUVENILE JURISDICTION - CONFIDENTIALITY

(a) Scope

This Rule applies to an appeal from an order relating to a child entered by a court exercising juvenile jurisdiction.

(b) Caption

Unless the court orders otherwise, the proceedings shall be styled ~~"In re ..... (first name and initial of last name of child)"~~ "In re A. B. (initial of the child's first name and initial of child's last name).

(c) Confidentiality

The ~~last~~ name of the child, and any parent or guardian of the child, other than their initials, shall not be used in any opinion, oral argument, brief, record

extract, petition, or other document pertaining to the appeal that is generally available to the public.

(d) Transmittal of Record

The record shall be transmitted to the appellate court in a manner that ensures the secrecy of its contents.

(e) Access to Record

Except by order of the Court, the record shall be open to inspection only by the Court, authorized court personnel, parties, and their attorneys.

Source: This Rule is derived from former Rules 1097 and 897.

Rule 8-121 was accompanied by the following Reporter's note.

The Appellate Subcommittee of the Rules Committee received a joint request from the Office of the Attorney General, the Office of the Public Defender, and the Maryland Legal Aid Bureau to improve confidentiality protections for children in CINA, TPR, and delinquency cases by requiring that both the first and last initial of the child's name be used in case captions. They referred to a 2004 reported appellate opinion where a child was properly referred to by her first name and the initial of her surname, but she nevertheless was teased and harassed. The child's identity was easily discovered because her first name was relatively uncommon, which together with specific facts described in the opinion, made it relatively easy for her to be identified.

Rule 8-121 is proposed to be amended to require that the initials of both the first

and last names be used in case captions, rather than just the last name. Through that change, the identities of children would be better protected.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 100 - GENERAL PROVISIONS

AMEND Rule 8-122 to remove the requirement in an appeal from certain an orders relating to a child in a proceeding for adoption or for guardianship that the proceeding be styled using the child's first name and the initial of the child's last name; to substitute the requirement that the proceedings be styled using the initials of the child's first and last names; to require that only the first and last initials of a child, the parents of the child, and the adopting parents be used in any document pertaining to the appeal; as follows:

Rule 8-122. APPEALS FROM PROCEEDINGS FOR ADOPTION OF GUARDIANSHIP - CONFIDENTIALITY

(a) Scope

This Rule applies to an appeal from an order relating to a child in a proceeding for adoption or for guardianship with right to consent to adoption or long-term care short of adoption.

(b) Caption

The proceeding shall be styled ~~"In re Adoption/ Guardianship of ..... (first name and initial of last name of adoptee or ward)"~~ “In re Adoption/ Guardianship of A. B. (initial of the adoptee or ward’s first name and initial of adoptee or ward’s last name)”.

(c) Confidentiality

The ~~last~~ name of the child, the natural parents of the child, and the adopting parents, other than their initials, shall not be used in any opinion, oral argument, brief, record extract, petition, or other document pertaining to the appeal that is generally available to the public. The parties, with the approval of the appellate court, may waive the requirements of this section.

(d) Transmittal of Record

The record shall be transmitted to the appellate court in a manner that ensures the secrecy of its contents.

(e) Access to the Record

(1) Adoption Proceeding

Except by order of the Court and subject to reasonable conditions and restrictions imposed by the Court, the record in an appeal from an adoption proceeding shall be open to inspection only by the Court and authorized court personnel.

(2) Guardianship Proceeding

Except by order of the Court, the record in an appeal from a guardianship proceeding shall be open to inspection only by the Court, authorized court personnel, parties, and their attorneys.

Source: This Rule is new.

Rule 8-122 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 8-121. Rule 8-122 (c) is proposed to be amended for similar reasons to require that the natural parents and the adoptive parents be referred to only by the initials of their names, because of the concern that identities can be readily discovered when there are uncommon first names in the context of a given case.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 500 - RECORD EXTRACT, BRIEFS, AND ARGUMENT

AMEND Rule 8-504 to require that an appendix to a brief in certain appellate proceedings be separate from the brief and filed under seal, as follows:

Rule 8-504. CONTENTS OF BRIEF

(a) Contents

A brief shall comply with the requirements of Rule 8-112 and include the following items in the order listed:

(1) A table of contents and a table of citations of cases, constitutional

provisions, statutes, ordinances, rules, and regulations, with cases alphabetically arranged. When a reported Maryland case is cited, the citation shall include a reference to the official Report.

Cross reference: Citation of unreported opinions is governed by Rule 1-104.

(2) A brief statement of the case, indicating the nature of the case, the course of the proceedings, and the disposition in the lower court, except that the appellee's brief shall not contain a statement of the case unless the appellee disagrees with the statement in the appellant's brief.

(3) A statement of the questions presented, separately numbered, indicating the legal propositions involved and the questions of fact at issue expressed in the terms and circumstances of the case without unnecessary detail.

(4) A clear concise statement of the facts material to a determination of the questions presented, except that the appellee's brief shall contain a statement of only those additional facts necessary to correct or amplify the statement in the appellant's brief. Reference shall be made to the pages of the record extract supporting the assertions. If pursuant to these rules or by leave of court a record extract is not filed, reference shall be made to the pages of the record or to the transcript of testimony as contained in the record.

Cross reference: Rule 8-111 (b).

(5) A concise statement of the applicable standard of review for each issue, which may appear in the discussion of the issue or under a separate heading placed before the argument.

(6) Argument in support of the party's position on each issue.

(7) A short conclusion stating the precise relief sought.

(8) The citation and verbatim text of all pertinent constitutional provisions, statutes, ordinances, rules, and regulations except that the appellee's brief shall contain only those not included in the appellant's brief.

(9) If the brief is prepared with proportionally spaced type, the font used and the type size in points shall be stated on the last page.

Cross reference: For requirements concerning the form of a brief, see Rule 8-112.

(b) Appendix

(1) Generally

Unless the material is included in the record extract pursuant to Rule 8-501, the appellant shall reproduce, as an appendix to the brief, the pertinent part of every ruling, opinion, or jury instruction of each lower court that deals with points raised by the appellant on appeal. If the appellee believes that the part reproduced by the appellant is inadequate, the appellee shall reproduce, as an appendix to the appellee's brief, any additional part of the instructions or opinion believed necessary by the appellee.

(2) Appeals from Courts Exercising Juvenile Jurisdiction or from Proceedings Involving Termination of Parental Rights

Any appendix filed by any party shall be filed as a separate volume and,

unless otherwise ordered by the Court, shall be filed under seal.

Committee note: Rule 8-501 (j) allows a party to include in an appendix to a brief any material that inadvertently was omitted from the record extract.

(c) Effect of Noncompliance

For noncompliance with this Rule, the appellate court may dismiss the appeal or make any other appropriate order with respect to the case, including an order that an improperly prepared brief be reproduced at the expense of the attorney for the party for whom the brief was filed.

Source: This Rule is derived as follows:

Section (a) is derived from former Rules 831 c and d and 1031 c 1 through 5 and d 1 through 5, with the exception of subsection (a) (6) which is derived from FRAP 28 (a)(5). Section (b) is derived from former Rule 1031 c 6 and d 6.
Section (c) is derived from former Rules 831 g and 1031 f.

Rule 8-504 was accompanied by the following Reporter's note.

Rule 8-504 is proposed to be amended to require appendices in CINA, TPR, and delinquency cases to be separate from the briefs and filed under seal in the appellate courts. The proposed change would reflect the treatment of materials in those types of actions in the circuit courts. The change also would eliminate the need for counsel to redact information in source documents, which creates the possibility that information might be inadvertently revealed through redaction mistakes.

Judge Nazarian explained that he would give an overview of Agenda Items 8 and 10 together, because they are related. A letter was received from a group of advocates in cases involving children originating from the Office of the Attorney General, but the letter was co-signed by attorneys from the Office of the Public Defender and the Legal Aid Bureau. In the time since unreported Court of Special Appeals opinions have been made available on the Internet, there are now many more opinions online in juvenile cases and in cases pertaining to divorce and family matters. The potential for revelation of personal details has grown. The Court of Special Appeals judges have a heightened sensitivity to this, and the advocates came to the same conclusion that, even starting with the case caption, in smaller counties, or where people have unique names, a child can be readily identified from the first name and the last initial. The changes to Rules 8-121 and 8-122 would identify a child by initials of the child's first and last names. There is still the possibility that a child could have unique enough initials to be identifiable. The court retains the ability to make a further change to the caption if that is a problem, but the default under the proposed amendments to the Rules would be in Rule 8-121 - the caption of "in re A.B." in a juvenile case and, in Rule 8-122, the caption of "in re adoption of or guardianship of A.B.," in an adoption or guardianship case. Rather than the

first name and last initial of the child, two initials would be used.

Judge Nazarian said that the proposed change to Rule 8-504, Contents of Brief, which is Agenda Item 10, is related to the change to Rules 8-121 and 8-122. The records in the circuit court for all of the cases encompassed by Rules 8-121 and 8-122 are sealed. The briefs and record extracts filed in the Court of Special Appeals are not sealed. The briefs refer to the protected individual by first name and first initial of the last name, or if the proposed change is adopted, it will be by initials only. The record extracts can be separate or often are attached as an appendix to the brief. They will have a variety of documents relating to the case that were sealed in the circuit court and are now redacted to the best of the filer's ability. The excerpts are usually not very lengthy, but sometimes they can be, and the process of redacting requires some precision in the middle of documents that can be very dense. For a non-trivial number of them, eventually the last name appears somewhere in the document.

Judge Nazarian remarked that the thought was that because these records are sealed in the circuit court, the appendices could be filed separately in all of the cases and sealed by default. This would preserve the same level of confidentiality. The overarching result would be that the case is captioned only

by initials unless there is a need to make it even more truncated. The appendix or record extract would be sealed in the same manner, and the files will not have to be redacted. The result would be the same or slightly less work for those who file briefs and would expand the confidentiality.

By consensus, the Committee approved amendments to Rules 8-121, 8-122, and 8-504, as presented.

Agenda Item 9. Consideration of proposed amendments to Rule 8-402 (Appearance)

Judge Nazarian presented Rule 8-402, Appearance, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 400 - PRELIMINARY PROCEDURES

AMEND Rule 8-402 to change the title of the Rule, to state that an individual may appear by an attorney or in proper person, to require that the appearance of a person other than an individual be by an attorney except as otherwise provided by rule or statute, and to make stylistic changes, as follows:

Rule 8-402. APPEARANCE ~~OF COUNSEL~~

(a) By Attorney or in Proper Person

Except as otherwise provided by rule or statute:

(1) an individual may appear by an attorney or in proper person, and

(2) a person other than an individual may enter an appearance only by an attorney.

~~(a)~~ (b) Continuance of Appearance from Lower Court

The appearance of an attorney entered in a lower court shall continue in the Court of Special Appeals and the Court of Appeals unless (1) the attorney's appearance has been stricken in the lower court pursuant to Rule 2-132 or 4-214, (2) the attorney notifies the Clerk of the appellate court in writing not to enter the attorney's appearance in the appellate court and sends a copy of the notice to the clerk of the lower court and the client, or (3) the attorney's appearance has automatically terminated pursuant to section (g) of this Rule.

~~(b)~~ (c) New Appearance

An attorney newly appearing on appeal may enter an appearance by filing a written request (1) in the Court of Special Appeals if the record on appeal has already been filed in that Court, (2) in the Court of Appeals if a petition for a writ of certiorari has been filed or the Court has issued a writ on its own initiative, or (3) in the lower court in all other cases.

~~(c)~~ (d) In Certification Cases

In a proceeding pursuant to Rule 8-305, the appearance of an attorney entered in the certifying court shall continue in the Court of Appeals if the attorney has been admitted to practice law in this State. An attorney newly appearing in the case may

enter an appearance by filing a written request in the Court of Appeals at any time after the certification order is filed.

Cross reference: For special admission of an out-of-state attorney, see Bar Admission Rule 14.

~~(d) Corporation~~

~~A corporation may enter an appearance only by an attorney, except as otherwise provided by rule or statute.~~

(e) When Entered by Clerk

The Clerk of the appellate court shall formally enter the appearance of the attorney (1) in the Court of Special Appeals when the record on appeal is filed, (2) in the Court of Appeals when a petition for a writ of certiorari is filed or, if the Court issues the writ on its own initiative, when the writ is issued, or (3) when properly requested pursuant to section (b) or (c).

(f) Striking Appearance

The appearance of an attorney may be stricken pursuant to Rule 2-132, except that a motion to withdraw an appearance must be in writing and may not be made in open court.

(g) Automatic Termination of Appearance

The appearance of an attorney entered in the lower court is automatically terminated upon the entry of an appearance by the Public Defender or an attorney designated by the Public Defender.

Source: This Rule is in part derived from former Rules 1005 a and 805 a and in part new.

Rule 8-402 was accompanied by the following Reporter's note.

> Rules 2-131 (a) and 3-131 (a), governing appearances in the circuit courts and District Court, respectively, provide that "Except as provided by rule or statute: (1) an individual may enter an appearance or in proper person and (2) a person other than an individual may enter an appearance only by an attorney." Under Rule 1-202 (l), an "individual" "means a human being" and under Rule 1-202 (t), a "person includes any individual, general or limited partnership, joint stock company, unincorporated association or society, municipal or other corporation, limited liability partnership, limited liability company, the State, its agencies or political subdivisions, any court, or other governmental entity."
>
> Rule 8-402 (d) currently provides that "A corporation may enter an appearance only by an attorney." The Rule is silent with respect whether an attorney is required to enter an appearance for other "persons" who are neither individuals nor corporations.
>
> Amendments are proposed to make Rule 8-402 *in pari materia* with Rule 2-131 and Rule 3-131, by requiring the appearance of an attorney for every person other than an individual, except as otherwise provided by rule or statute. The requirement for appearance of counsel has been moved from current section (d) to section (a) of Rule 8-402, and the other subsections have changed accordingly.

Judge Nazarian told the Committee that the proposed change to Rule 8-402 is meant to recognize the reality that the term "persons" refers to more than simply corporations. This brings

Rule 8-402 in line with the circuit court Rules. It requires that persons other than individuals may appear only by attorney. There have been instances where a limited liability company ("LLC"), had claimed that it was not a corporation, and officials of the LLC thought that they should have been able to file a brief without being represented by counsel. This clarifies the Rule and tracks the circuit court procedure.

By consensus, the Committee approved the change to Rule 8-402 as presented.

Agenda Item 11. Consideration of proposed amendments to Rule 16-731 (Complaint; Investigation by Bar Counsel) [proposed revised Rule 19-711 (Complaint; Investigation by Bar Counsel)]

Mr. Frederick presented Rule 16-731, Complaint; Investigation by Bar Counsel, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

AMEND Rule 16-731 to add a reference in subsection (b)(2) to a certain subsection, to add a new subsection (b)(3), and to add a certain limitation to section (d), as follows:

Rule 16-731. COMPLAINT; INVESTIGATION BY BAR COUNSEL

(a) Complaints

A complaint alleging that an attorney has engaged in professional misconduct or 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, subject to subsection (b)(3) of this Rule, 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.

(3) If Bar Counsel concludes that a civil or criminal action involving material

allegations against the attorney substantially similar to those alleged in the complaint is pending in any court of record in the United States, Bar Counsel [with the approval of the Commission] may defer action on the complaint pending a determination of those allegations in that action. Bar Counsel shall notify the complainant of that decision and, during the period of the deferral, shall report to the Commission, at least every six months, the status of the other action. The Commission, at any time, may direct Bar Counsel to proceed in accordance with subsection (b)(2) of this Rule.

(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 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~~ Subject to subsection (b)(3) of this Rule or 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 in the following Reporter's note.

The Chief Judge of the Court of Appeals sent a letter to the Chair of the Rules Committee asking the Committee to consider amending Rule 16-731 to give Bar Counsel or the Attorney Grievance Commission discretion to defer action on a complaint filed against an attorney if Bar Counsel finds out that a criminal, civil, post conviction, or administrative proceeding involving material allegations similar to those alleged in the complaint is also pending against the attorney. The deferral would be until the parallel action has been completed.

The Attorneys and Judges Subcommittee discussed this issue, and they recommended

amending Rule 16-731 (and Rule 19-711, the successor to Rule 16-731) as the Chief Judge had suggested. The Subcommittee has included language providing for notice of the deferral to the complainant and for a report to the Commission, every six months, of the status of the pending proceeding.

Mr. Frederick explained that the amendments to Rule 16-731 related to attorney grievance matters that had been brought to the attention of the Rules Committee by the Honorable Mary Ellen Barbera, Chief Judge of the Court of Appeals. If a claim is filed against an attorney for ineffective assistance of counsel, or a civil lawsuit is filed against the attorney, this will not infrequently come to the attention of Bar Counsel. At present, Bar Counsel is required to act timely with regard to these complaints. There are time elements in Rule 16-731.

Mr. Frederick said that these complaints tend to create problems for attorneys for a variety of reasons. For example, the usual and customary practice of Bar Counsel in a disciplinary case is to take an attorney's initial response and send it to the person complaining. If the attorney is a party defendant in a civil lawsuit, the adverse party files a complaint with Bar Counsel essentially predicated on the same allegations that have given rise to a civil cause of action. The attorney who is encouraged and indeed required by the Rules to fully cooperate with Bar Counsel lays out the entire set of

circumstances, including some things that might otherwise be work product, proposed trial tactics, etc. The person filing the complaint is put into an unfair position of advantage, because the disclosures are not necessarily discoverable other than by the disciplinary process.

Mr. Frederick said that if someone raises the issue of ineffective assistance of counsel, it is usual and customary for there also to be a complaint filed with the disciplinary authorities. Bar Counsel may not want to prosecute the attorney at that time, although he or she might want to later. If there is a pending action where the facts that are the premise of the alleged violation of the disciplinary rules are before a tribunal, Bar Counsel may wish to "stet" the case against the attorney and wait to see what the trial court does before Bar Counsel makes a determination as to whether the public needs to be protected. This would only be done with the recommendation of Bar Counsel and the approval of the Attorney Grievance Commission. This determination would not be made by one person. The Commission would make the determination at its regular monthly meeting. It would allow Bar Counsel to wait to prosecute the attorney. The case can be reviewed periodically, so that it does not get lost in the system.

Mr. Sullivan pointed out that in subsection (b)(3) of Rule 19-731, there are brackets around the language "with the

approval of the Commission." Is Commission approval intended to be part of this procedure? The Chair replied affirmatively, adding that the brackets should be taken out. When it was initially drafted, a question arose as to whether Bar Counsel should have to keep reporting to the Attorney Grievance Commission. The Subcommittee's view was that Bar Counsel should have to report to the Commission. Mr. Frederick commented that each Bar Counsel handles this in his or her own way. It is always good to have a checks and balances system. The Chair said that the time standards in Rule 19-731 were deliberately added by the Court of Appeals. The Court was getting cases of serious violations five or six years after the violation occurred. Meanwhile, the attorneys were continuing to practice.

By consensus, the Committee approved Rule 19-731 as presented.

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