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## RULE-MAKING IN MARYLAND

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More than most other lawyers, litigators, as part of their near-daily routine, must deal with the Maryland Rules of Procedure – those “precise rubrics” adopted by the Court of Appeals that govern practice and procedure in the Maryland courts. Article IV, § 18 of the Maryland Constitution gives the Court the authority to adopt such Rules, on its own and without the need of legislative approval or sign-off, and declares them to have the force of law. It is an extraordinary power, rare among State courts and which even the U.S. Supreme Court does not have.

Although the Court always had the inherent authority to adopt Rules of appellate practice and procedure and long ago assumed the authority to adopt Rules of equity procedure, it was only in 1944 that it received the Constitutional authority to adopt general Rules governing practice and procedure in the trial courts. Contemporaneously with that grant of authority, the General Assembly authorized the Court to create a standing committee to assist the Court in its rule-making function. See Md. Code, Cts. & Jud. Proc. Article, § 13-301.

Most lawyers are aware that such a committee – the Standing Committee on Rules of Practice and Procedure – exists, and some have at least a general understanding of what it does. Relatively few, however, have any contact with it or know how it, or the Court itself, goes about the rule-making process. That is the subject of this article.

As a preface, the Rules Committee currently consists of 24 regular members. Twenty-one are lawyers or judges appointed by the Court for a 3-year term, subject to reappointment for one additional term. Two, who also are lawyers, are members of the General Assembly, appointed from nominations by the President of the Senate and the Speaker of the House of Delegates, and one is a Circuit Court Clerk.

Most Rules are presented to the Court by the Rules Committee. Indeed, Md. Rule 16-801 b. provides that, unless otherwise determined by the Court, “every suggestion for the adoption, amendment, or rescission of a rule shall be

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referred to the Rules Committee for consideration.” That Rule also permits the Committee to consider Rules changes on its own initiative.

Rules proposals come from several sources. Increasingly, they come from legislation enacted by the General Assembly. Each year the Chair and the Reporter review the 800+ bills enacted by the Legislature to make a preliminary determination of those which may possibly require some Rule change. Those bills are then further reviewed by a legislative subcommittee for possible referral to one of the Committee’s standing subcommittees. Some proposals emanate from Federal action, either by Congress or by an Executive Agency. Others come from judicial decisions, mostly by the Court of Appeals or Court of Special Appeals, but occasionally by the U.S. Supreme Court or by one of the State trial courts, and occasionally the Court of Appeals will specifically ask the Committee to submit Rules on a particular subject. Some proposals come from the State Bar Association or one of its sections or committees, or from individual lawyers based on cases or experiences they have had. Some are proposed by prosecutors, the Public Defender, or the Attorney General.

Within the past few years, the Committee has proposed Rules changes on a wide variety of subjects. It has rewritten the mortgage foreclosure Rules as the result of legislation enacted by Congress and by the General Assembly, and, due to legislation enacted in 2010 and a new Federal directive, is in the process of revising some of those Rules again. In order to implement bills enacted by the General Assembly, it has drafted a new set of Rules governing post conviction proceedings based on DNA evidence and presented to the Court substantial revisions to the death penalty Rule to accommodate legislative changes.

The Rules dealing with confessed judgments were rewritten following recommendations by the Attorney General and the Chief Judge of the District Court. A Rule allowing the taking of testimony by telephone in certain cases, suggested by the Judicial Administration Section of the State Bar Association, was drafted and presented to the Court. In addition to responding to proposals from the outside, the Committee is

in the process of a comprehensive rewriting of the Rules governing juvenile court proceedings as well as those governing judicial administration, and it is exploring Rules that would permit non-evidentiary hearings – judicial review actions, motions hearings, etc. – to be conducted remotely through electronic means.

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### ON POLICY-LADEN ISSUES,

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Most proposals presented to the Committee are referred to one of its standing subcommittees for initial review. The subcommittee often designates consultants or solicits the views of affected persons or groups. Some projects, because of their breadth, are referred to special subcommittees, which work even more closely with consultants and interested groups. That was done recently with the development

of Rules governing the operation of “problem-solving” court programs – drug courts, mental health courts, and truancy courts for example.

The Rules Committee meets nine times a year – monthly except in July, August, and December. Meetings are open to the public; notice is posted on the Judiciary’s website and provided in the Maryland Register. Extensive minutes, which often run over 100 pages, are kept of Committee meetings. Those minutes provide much of the legislative history of the Rules. The Committee has a file on each Rule, and in that file are all of the drafts and minutes pertaining to that Rule. The subcommittees meet as needed; some may be relatively dormant, others are very active. Although formal minutes are not kept of subcommittee meetings, whenever a proposed Rule is sent to the full Committee, it is accompanied by a Reporter’s Note which describes the proposal, indicates its origin, and sets forth the rationale for the proposal.

Some matters are dealt with fairly quickly. Others may require extensive and time-consuming subcommittee work and may end up being referred back to the subcommittee, sometimes more than once, for additional consideration. That was the case recently with respect to a new Rule on parenting coordinators in high-conflict child custody and visitation cases and with Rules governing the procedure for resolving motions for attorneys’ fees in cases allowing the shifting of such fees.

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On policy-laden issues, the Committee takes its time and tries to explore all aspects of the issue. The ultimate goal is to give the Court of Appeals a complete and objective analysis of the issues and the Committee's thinking, so the Court can make an informed decision. Occasionally, as was the case with proposed Rules on discovery in criminal cases and changes to the death penalty Rule, the Committee may transmit alternative proposals to the Court.

Proposals approved by the Rules Committee are transmitted to the Court through a formal report. Reports are sequentially numbered – the last one was the Committee's 163rd Report – and, unless they are sent as emergency items, they are published in the Maryland Register and posted on the Judiciary's website for comment. There usually is a 30-day comment period. All comments are to be sent to the Com-

mittee, which collects and transmits them to the Court. The Court then holds an open hearing, of which public notice is given, at which it considers comments received and oral presentations. The hearing is recorded, as is the Court's discussion and decision. Together with the Committee's minutes, the record of the Court's hearing constitutes the legislative history of the Rule.

In part because of its two legislative members, the Committee has long had a good working relationship with the General Assembly. It is not uncommon for the Committee, in dealing with an issue, to suggest legislative changes, or for the Legislature to defer areas of statutory implementation to the rule-making process. On the whole, the process is a transparent one in which constructive comment is not just tolerated, but welcome.

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