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 6, 2012.

Members present:

Hon. Alan M. Wilner, Chair

Robert R. Bowie, Jr., Esq.
Albert D. Brault, Esq.
James E. Carbine, Esq.
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Hon. Thomas J. Love
Zakia Mahasa, Esq.
Timothy F. Maloney, Esq.
Robert R. Michael, Esq.
Hon. John L. Norton, III
Scott G. Patterson, Esq.
Hon. W. Michel Pierson
Debbie L. Potter, Esq.
Kathy P. Smith, Clerk
Sen. Norman R. Stone, Jr.
Steven M. Sullivan, Esq.
Melvin J. Sykes, Esq.
Hon. Julia B. Weatherly

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Kara K. Lynch, Esq., Assistant Reporter
Debra Gardner, Esq., Public Justice Center
David R. Durfee, Jr., Esq., Executive Director, Legal Affairs, Administrative Office of the Courts
Mark Bittner, Executive Director, Judicial Information Systems, Administrative Office of the Courts
D. Robert Enten, Esq.
Richard Montgomery, Director, Legislative Relations, Maryland State Bar Association
Suzanne Delaney, Esq., Deputy Director, Government Relations, Administrative Office of the Courts
David Weissert, Commissioner, District Court of Maryland
Kathleen M. Elmore, Esq., Treasurer, Maryland Legislative Action Committee
Dawn Elaine Bowie, Esq.
Katherine Hager, Chief Deputy Clerk, Queen Anne’s County
Connie Kratovil-Lavelle, Esq., Executive Director, Family Administration

Pamela Cardullo-Ortiz, Esq., Executive Director, Access to Justice Commission
Elizabeth Embry, Esq., Office of the State's Attorney
Frank Broccolina, State Court Administrator
Faye Matthews, Assistant State Court Administrator
Scott MacGlashan, Clerk, Circuit Court for Queen Anne's County
Donald Sealing, Clerk, Circuit Court for Carroll County
Barbara Gavin, Esq., Director, Character & Fitness, State Board of Law Examiners
Kathleen Wherthey, Esq., Legal Affairs, Administrative Office of the Courts
Brian L. Zavin, Esq., Office of the Public Defender

The Chair convened the meeting, wishing everyone present a happy new year. He said that he had two announcements. He announced, with genuine regret, that Linda M. Schuett, Esq., the Vice Chair of the Rules Committee had retired from the Committee. She had indicated that she would still like to receive all of the documents generated by the Committee to make sure that the Committee stays on target. She had sent a letter to the Honorable Robert M. Bell, Chief Judge of the Court of Appeals, explaining that it was time for her to move on. She had been a member of the Committee for almost 31 years and had been absolutely invaluable during her entire time of service. The Chair added that he and the Committee would certainly miss her.

The second announcement was the decision of the Court of Appeals in the case of *DeWolfe v. Richmond* (No. 34, September Term, 2011). It is a major decision that construes the Public Defender statute, Code, Criminal Procedure Article, §§16-101 through 16-403, as requiring representation by the Public Defender for indigents at the first appearance before a District

Court commissioner and also at bail review hearings in the District Court. This will require a great amount of work in a hurry. The Public Defender had made a request to delay the implementation of the decision, for a period of time of around six to nine months, to be able to ask the legislature for funding and the Court denied the request. The opinion was filed on January 4, 2012. Normally, the Court's mandate issues 30 days after that, which would be around February 3, 2012, the date of the next Rules Committee meeting. It will be necessary to review several Rules in order to implement the decision.

The Chair said that he and the Reporter had attended a meeting the previous day with other counsel on some of the issues associated with the opinion. A meeting was scheduled for the afternoon of January 10, 2012 with representatives of the Public Defender and others to sort through some of the details of how they propose to proceed, so rules changes could be structured accordingly.

Paul DeWolfe, Esq., the Public Defender, along with two members of his office, agreed to work with the Rules Committee. Also working with the Committee will be the Assistant Attorney General who represents the court system, as well as other stakeholders. It would be a relatively small drafting group to determine which Rules need to be amended and how they need to be amended, to draft the language, and to present it to the Rules Committee on February 3, 2012. The drafting group will do its

best to make sure that the Rules are amended as appropriately as possible. Some of the amended Rules probably will have to be interim Rules, because some procedures cannot be implemented immediately.

The Chair said that it is critically important to transmit these Rules to the Court of Appeals. The next Rules Committee meeting is scheduled for February 3, 2012, the date the mandate would issue. It may be necessary to ask the Court about a modest delay in issuing the mandate, so that the Court can have the opportunity to consider the rules that the Committee sends to them. The Committee would have to do its part, and while that certainly does not mean that the Committee has to rubberstamp what will be presented to it, any issues that the members of the Committee have would have to be resolved on February 3rd. Anyone who has any thoughts about this process during the next month should feel free to express them. It is important to obtain as much input as possible. The District Court will be intimately involved in this process, and the circuit court to a lesser extent, but it certainly will be involved as well.

The Chair noted that the Governor had created a task force on foreclosure, which had recently issued a report, and will be recommending legislation in the coming session on a number of issues that may require some changes to rules.

Emergency Agenda Item

The Chair said that one item had been added on to the agenda

for the meeting and would be considered first.

The Chair presented Rule 4-216, Pretrial Release, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-216 (e) to change "$100.00" to "$25.00," to delete language concerning certain advice by the judicial officer, to add a new subsection requiring the judicial officer to provide certain advice under certain circumstances, and to make stylistic changes, as follows:

Rule 4-216. PRETRIAL RELEASE

. . .

(e) Condition of Release

(1) Imposition

The conditions of release imposed by a judicial officer under this Rule may include:

~~(1)~~ (A) committing the defendant to the custody of a designated person or organization that agrees to supervise the defendant and assist in ensuring the defendant's appearance in court;

~~(2)~~ (B) placing the defendant under the supervision of a probation officer or other appropriate public official;

~~(3)~~ (C) subjecting the defendant to reasonable restrictions with respect to travel, association, or residence during the period of release;

~~(4)~~ (D) requiring the defendant to post a bail bond complying with Rule 4-217 in an amount and on conditions specified by the judicial officer, including any of the following:

~~(A)~~ (i) without collateral security;

~~(B)~~ (ii) with collateral security of the kind specified in Rule 4-217 (e) (1) (A) equal in value to the greater of ~~$100.00~~ $25.00 or 10% of the full penalty amount~~, and if the judicial officer sets bail at $2500 or less, the judicial officer shall advise the defendant that the defendant may post a bail bond secured by either a corporate surety or a cash deposit of 10% of the full penalty amount~~;

~~(C)~~ (iii) with collateral security of the kind specified in Rule 4-217 (e) (1) (A) equal in value to a percentage greater than 10% but less than the full penalty amount;

~~(D)~~ (iv) with collateral security of the kind specified in Rule 4-217 (e) (1) equal in value to the full penalty amount; or

~~(E)~~ (v) with the obligation of a corporation that is an insurer or other surety in the full penalty amount;

~~(5)~~ (E) subjecting the defendant to any other condition reasonably necessary to:

~~(A)~~ (i) ensure the appearance of the defendant as required,

~~(B)~~ (ii) protect the safety of the alleged victim, and

~~(C)~~ (iii) ensure that the defendant will not pose a danger to another person or to the community; and

~~(6)~~ (F) imposing upon the defendant, for good cause shown, one or more of the conditions authorized under Code, Criminal Law Article, §9-304 reasonably necessary to stop or prevent the intimidation of a victim

or witness or a violation of Code, Criminal Law Article, §9-302, 9-303, or 9-305.

(2) Advice to Defendant

If the judicial officer imposes a condition of release under subsection (e)(1)(D)(ii), (iii), or (iv) of this Rule, the judicial officer shall advise the defendant that the condition may be satisfied by posting a bail bond secured by a corporate surety or by the required amount of collateral security of the kind specified in Rule 4-217 (e)(1)(A) or (e)(1), as applicable.

Cross reference: See Code, Criminal Procedure Article, §5-201 (a)(2) concerning protections for victims as a condition of release. See Code, Criminal Procedure Article, §5-201 (b), and Code, Business Occupations and Professions Article, Title 20, concerning private home detention monitoring as a condition of release.

. . .

Rule 4-216 was accompanied by the following Reporter's Note.

To better harmonize Rule 4-216 with Code, Criminal Procedure Article, §§5-203 and 5-205 and Rule 4-217, proposed amendments to section (e) of the Rule change "$100.00" to "$25.00," delete from current subsection (e)(4)(B) the requirement that the judicial officer give certain advice when bail is set at $2,500.00 or less, reletter the subsections, and add a new subsection (e)(2) requiring the judicial officer to advise the defendant concerning the defendant's options for posting the required amount of collateral security.

The Chair explained that Rule 4-216 was one of the Rules that would need to be amended to implement the decision of the Court of Appeals in *Richmond*. The issue being considered at the

meeting today was a separate issue. The Chair stated that he would not suggest sending to the Court any changes to Rule 4-216 until February when the other changes to the Rule would be made. A revised draft of Rule 4-216 had been handed out at the meeting. These changes resulted from an inquiry by a legislative analyst from the Maryland Department of Legislative Services, asking whether Rule 4-216 was inconsistent with a 2004 amendment to Code, Criminal Procedure Article, §5-203.

The Chair pointed out that section (e) of current Rule 4-216 states what the commissioner can do with respect to pretrial release. Subsection (e)(4) provides that the commissioner can release a person without any collateral security. The defendant signs a bond that establishes a penalty, which is the bail. If the amount of the bail is $10,000, the defendant has to sign documents that provide that if he or she does not show up in court, he will have to pay the penalty sum of $10,000. However, no security for that obligation is required to be posted. That is one option. The second option is that the Commissioner can release the defendant on the bond but require security equal to the greater of $100 or 10% of the full penalty amount. If the bond is $10,000, some kind of collateral security amounting to $1,000 would have to be posted. The third option is the defendant being released after putting up collateral security greater than 10% but less than the full $10,000. The fourth option is that the entire $10,000 has to be secured. Neither the

Rule nor the statute addresses who can provide the security. That was the genesis of the legislative inquiry.

The Chair said that current Rule 4-216 (e)(4)(B) states that if the bail is $2,500 or less, the judicial officer must advise the defendant that the defendant may post a bail of $2,500 with either the greater of 10% thereof or $100 collateral. The statute does not refer to a bail of $2,500 or less. This is only referred to in the Rule. The intent at the time that provision was adopted was that if the commissioner set bail at $2,500 or less, the defendant should be informed that he or she may pay the 10% ($250) to a bail bondsman, as a premium on the bondsman's acting as a surety on the $2,500 bond, or post the bail himself or herself and would get it back if he or she appears in court as required. The Legislature passed the statute soon after this Rule was adopted. The Chair remarked that he had not been privy to the legislative proceedings and he was not sure exactly what the legislative intent had been. Nothing in the statute refers to advice given to a defendant as to how he or she may meet the collateral requirement, such as a corporate insurer providing the bond, or a property bondsman posting a property a property bond, or the defendant or a family member posting the bail.

Comparing current Rule 4-216 against the statute, it appears that there was at least one clear inconsistency between the Rule and the statute. The Rule provides for collateral security of the greater of $100 or 10%, and the statute provides for the

greater of $25 or 10%. The proposal was to conform the Rule to the statute, changing the $100 amount to $25. There is also an internal inconsistency in the Rule. In what has been changed to subsection (e)(1)(D)(ii), the language is "with collateral security of the kind specified in Rule 4-217 (e)(1)(A)...", which states that the defendant may post cash, certified check, or intangible property approved by the court. Looking at the language that had been proposed to be stricken, the current Rule states that the defendant may post a bail bond secured either by a corporate surety or a cash deposit of 10% of the full penalty amount. The latter option is inconsistent with Rule 4-217 (e)(1)(A), which also allows the defendant to post a certified check or intangible property approved by the court. The stricken language does not provide what the commissioner may order but only states what the commissioner must tell the defendant he or she may do. That advice probably should apply as well to the next two items, collateral security of more than 10% or collateral security total. The commissioner could advise the defendant that this is the condition, and this is how the condition may be met. The defendant may either obtain a bondsman or a corporate insurance company, or the defendant may post the bail himself or herself (or a family member can post the bail).

The Chair told the Committee that to conform Rule 4-216 to the statute, the amount of the collateral security should be changed from $100 to $25. To resolve the inconsistency between

Rules 4-216 and 4-217, regarding the advice to the defendant, the "cash deposit" referred to in Rule 4-217 (e)(1)(A) would be deleted, and Rule 4-216 (e)(2) would read: "whatever is allowed under Rule 4-217 (e)(1)(A)," which includes a certified check and intangible property. If the advice to the defendant is to be kept in the Rule, it probably should apply to the amount that is greater than 10% but less than the full penalty amount as well as to the collateral security equal in value to the full penalty amount. To do this, Rule 4-216 had been drafted to take the advice section out of subsection (e)(1)(D)(ii) and add it as a new subsection (e)(2).

Judge Weatherly commented that the District Court judges do this in a large volume, at least in Prince George's County. She tends to give this advice to defendants, but she does not cite the specific amounts referred to in the Rule. She expressed the concern that this may cause problems for the District Court judges. Judge Love responded that it would not cause any problems for them.

Mr. Karceski remarked that he was confused about a provision in the existing Rule. In proposed Rule 4-216, subsections (e)(1)(D)(iii) and (iv) refer to the kind of security specified. Under subsection (iii), it is clear that Rule 4-217 (e)(1)(A) refers to cash or a certified check. The Chair explained that subsection (e)(1) of Rule 4-217 includes real property that may be posted. Mr. Karceski inquired why subsection (e)(2) of Rule

4-216 would not refer to subsection (e)(1)(B) of Rule 4-217. Subsection (e)(1) of Rule 4-217 covers more than just the money, real property, or intangible property that may be posted. Subsection (e)(1)(D)(iv) of Rule 4-216 seems to allow the bail to be posted in a way other than cash and certified check, and this other way is to post real property. The Chair agreed, noting that it would have to be fully collateralized.

Mr. Karceski expressed the opinion that subsection (e)(2) of Rule 4-216 should refer specifically to "Rule 4-217 ...(e)(1)(B)." The Chair pointed out that this would exclude subsection (e)(1)(A). The Reporter asked if the language in Rule 4-216 (e)(2) should be: "(e)(1)(A) or (B)." Mr. Karceski replied affirmatively. Judge Norton suggested that Rule 4-216 (e)(2) could refer to: "Rule 4-217 (e)(1)" in place of "Rule 4-217 (e)(1)(A) or (e)(1)," which is duplicative. Subsection (e)(1) of Rule 4-217 includes (A). Referring to "Rule 4-217 (e)(1)" covers (A) as well as (A) and (B).

The Chair noted that if Rule 4-216 (e)(2) refers only to "Rule 4-217 (e)(1)(B)," then subsection (e)(1)(A) is being excluded. Judge Norton reiterated that if the language of the Rule is "Rule 4-217 (e)(1)," it covers both. Mr. Klein added that the language now refers to a subset of the Rule, and then it refers to the entire Rule. Mr. Karceski pointed out that he was referring to both subsections (e)(1)(D)(iii) and (e)(2) of Rule 4-216. He saw a problem in both provisions. Subsection

(e)(1)(D)(iii) addresses specifically posting cash and nothing else. It includes either a certified check or cash. The Chair added that it also refers to intangible property. Mr. Karceski remarked that the second one must be real property. The Chair disagreed, pointing out that the intent was not to exclude the ability to collateralize the bail with cash or intangible property but to provide that it may also be collateralized with real property.

The Reporter said that the intent of the revision was that under subsection (e)(1)(D)(ii), which is 10% or less, apparently the appropriate collateral is what is listed in subsection (e)(1)(A) of Rule 4-217. Looking at the next higher amount, if the commissioner sets collateral security under Rule 4-216 (e)(1)(D)(iii) that is greater than 10% but less than 100%, apparently what had been decided previously was that subsection (e)(1)(A) of Rule 4-217 lists the appropriate type of collateral security. In subsection (e)(1)(D)(iv) of Rule 4-216, apparently what had been decided previously was that the appropriate collateral security is either what is in subsection (e)(1)(A) of Rule 4-217 or what is in subsection (e)(1)(B) of Rule 4-217. It is anywhere in subsection (e)(1) of Rule 4-217, including real estate or the other categories, if the entire amount of the penalty is required to be posted. This is in the existing Rule and is being retained. The intent is to make sure that Rule 4-216 is properly harmonized with the statute.

The Reporter noted that in subsection (e)(2) of Rule 4-216, Advice to Defendant, the idea is to inform the defendant if the commissioner sets the bail under subsection (e)(1)(D)(ii) or (iii); the type of collateral security that must be posted is what is listed in subsection (e)(1)(A) of Rule 4-217. But if the commissioner or judge requires posting of the full amount as security, then either subsection (e)(1)(A) or (B) of Rule 4-217 applies. This was summarized by referring to "Rule 4-217 (e)(1)," which encompasses both (A) and (B). Judge Norton noted that this would be as applicable. The Reporter agreed, pointing out that subsection (e)(1)(D)(iii) of Rule 4-216 applies to subsection (e)(1)(A) or (B) of Rule 4-217, and subsections (e)(1)(D)(i) and (ii) of Rule 4-216 apply only to subsection (e)(1)(A) of Rule 4-217; subsection (e)(1)(D)(iv) of Rule 4-216 applies to subsection (e)(1)(A) or (B) of Rule 4-217. It is whichever is applicable.

Mr. Karceski inquired if someone could post real property in any manner other than 100% of the bail. Can a judge tell the defendant that the bail is $400,000 and that he or she can post 10% cash or post real property if it is assessed by the court as worth 10% of that amount? His view was that the judge was able to do this. This is why the Rule is causing problems. The Chair commented that there is another provision in the statute and not in the Rule which provides that the commissioner can direct that the greater part of the collateral be cash. It appears that the

commissioner can set the bail at $10,000 and ask for 10%, but require that most of this be in cash and not in real property.

Mr. Karceski said that while he did not disagree with what was being proposed in Rule 4-216, there may be a problem in the Rule as it exists. As he read the Rule, it did not allow real property to be posted at a percentage; it only allowed fully collateralized real property. The Chair agreed. Mr. Karceski said that he did not think that a judge could do this under the Rule. The Chair noted that this is the current Rule. Mr. Karceski remarked that he saw a problem with the current Rule. A court can allow a defendant to post real property and post it to the extent of whatever percentage of the bail that the judge would like. The Chair pointed out that under the current Rule, if the collateralization is less than total, subsection (e)(1)(A) of Rule 4-217 applies. Mr. Karceski said that he read the Rule that way, but he did not agree that this was the case.

The Chair commented that he did not know what the history of this was. Mr. Karceski said that it is usually this way when the collateral is cash, not when it is real property. The problem is not in the proposed change, it is in the current version of the Rule. The Chair said that he had no policy objection to what Mr. Karceski was suggesting, but he did not know why the Committee approved and the Court of Appeals adopted the Rule as it stands. Since Rule 4-216 would not be transmitted to the Court until the Rule is discussed in February on other issues, the history of the

Rule could be researched to see why the Committee and the Court limited the less-than-full collateralization to cash.

Mr. Klein referred to subsection (e)(2) of Rule 4-216. He pointed out that a reference to a subsection had been omitted. The last line referred to "Rule 4-217 (e)(l)(A)" and then referred to the entire subsection "(e)(1)" of Rule 4-217, which he felt did not make sense. The Chair responded that this was the subject of Mr. Karceski's earlier comments. Mr. Karceski expressed the opinion that the second reference in subsection (e)(2) of Rule 4-216 should be to "Rule 4-217 (e)(1)(B)." The Chair said that the intent was not to change the current Rule in this regard, because such a change had not been requested. Mr. Klein remarked that he did not have Rule 4-217 in front of him. However, it is simple mathematical subset logic as to why the Rule would specify "Rule 4-217 (e)(1)," which would cover every subpart that is under that subsection and then specify a particular subpart. The Chair replied that it was because for two of these items, only subsection (e)(1)(A) was applicable. The Reporter added that for the third item, either (e)(1)(A) or (B) applied. The intent was to give the correct advice to the defendant. The Chair noted that the defendant cannot be told that if it is a 10% collateralization, he or she is able to post someone's house, because that is not allowed under the current Rule. Mr. Karceski expressed the opinion that it is allowed.

Judge Norton remarked that his recollection was that for

several years, a battle concerning Rule 4-216 was ongoing until the Honorable Joseph F. Murphy, Jr., who was then Chair of the Committee, came up with the idea of the nominal $2,500 case. Who would object to 10% cash with those cases? This was a kind of compromise for the bail bond industry, which seemed satisfactory to everyone. Now the issue is 10% cash and a $5,000 bond. If the court's intent was to have $500 on the table, is it now a $50 premium for a $500 corporate bond, or is it a $5,000 corporate bond? The utility of the 10% bond when it is not designated as cash and then posted in a variety of ways leaves the other 90% to be somewhat amorphous. The old Rule suggested that the bail should be cash. This may have been ignored, but it seemed to be the intent of the Rule. The Chair pointed out that the reference in subsection (e)(2) of Rule 4-216 to "subsection (e)(1)(A)," which is in the current Rule, is an exception.

The Chair expressed the opinion that the Rule was clear that the bond sets the penalty. If the defendant does not appear, he or she would have to pay the penalty amount. It is the collateral that is the issue. It seems clear that if collateralization of less than the full amount of the bond is allowed, the collateral must be in cash, certified check, or intangible property. The Chair added that he was not part of the Committee when Rule 4-216 had been last modified.

Mr. Karceski agreed with Judge Norton that the previous changes to the Rule were trying to carve out an exception where

$2,500 would be the magic number. If the bail was that amount or less, there would be a way that the court could permit release in an easier manner. This concerned the bail bond industry more than anything else involving the Rule. The discussion had gone on for a long time with every bail bondsman in the State coming forward at some point. The $2,500 amount had been the main issue.

The Chair remarked that he assumed that the intent of the Rule was to tell the defendant in the $2,500 situation that he or she had a choice. The defendant could pay a bail bondsman $250, and the bondsman would post the bond. In that event the defendant would not get the $250 back. But if the defendant or some friend or family member were to post the $250, he or she would get it back if the defendant appeared in court as required. After the most recent version of the Rule was adopted, it may have been the intent of the legislature to overturn this, but the way the Chair read the statute, it did not overturn the Rule. It did not refer to who can post the bond; it discussed how much the bond would be. Mr. Karceski commented that he agreed that posting real property would not be appropriate when the bail is less than $2,500. The Chair noted that the Rule has the same wording with respect to collateral of more than 10% but less than the full penalty amount. Mr. Karceski responded that he was willing to accede to this, but his view was that this is an issue. The Reporter said that this would be considered when the

rest of the Rule was discussed later.

Mr. Patterson observed that the discussion had digressed from the issue regarding the last line of subsection (e)(2) of Rule 4-216, which was whether the wording should be "... Rule 4-217 (e)(1)(A) or (B)...". The Chair commented that the wording could be "...(e)(1)(A) or (e)(1)(B), as applicable." The intent would be to make clear with the words "as applicable" that if the collateral is less than the full penalty amount, it can only be paid by cash, certified check, or intangible property. If the collateral is for the full penalty amount, real property can be used. Mr. Patterson moved that the language of subsection (e)(2) of Rule 4-216 read as follows: "...(e)(1)(A) or (B)...". The motion was seconded. Judge Pierson suggested that the wording be: "... as specified in the applicable provision of Rule 4-217 (e)(1)."

The Chair noted that this could be worded several ways. The Chair pointed out that the wording suggested by Mr. Patterson would not work, because it would allow the posting of real property when the collateral is 10% of the full amount. The Reporter said that the language suggested by Judge Pierson would be appropriate. Mr. Patterson stated that he would withdraw his motion, and the person who seconded the motion agreed to the withdrawal. Judge Pierson moved that the language of Rule 4-216 (e)(2) would be: "... as specified in the applicable provision of Rule 4-217 (e)(1)." The motion was seconded, and it passed

unanimously. The Chair asked if everyone approved of Rule 4-216 with the amendment that had just been agreed upon.

By consensus, the Committee approved Rule 4-216 as amended.

Mr. Karceski remarked that the Criminal Subcommittee had never seen the proposed changes to Rule 4-216. The Reporter said that she would take a look at the distinction between subsections (e)(1)(D)(ii) and (iii) and subsection (e)(1)(D)(iv) of Rule 4-216. These may be able to be compressed. The Chair added that this can be revisited when the other changes to the Rule are discussed. This was put on the agenda because of the correspondence between the legislative branch and the judicial branch over the inconsistency between Rule 4-216 and the statute.

Agenda Item 1. Consideration of proposed amendments to: Rule 1-321 (Service of Pleadings and Papers Other than Original Pleadings), Rule 2-131 (Appearance), Rule 3-121 (Appearance), Rule 2-132 (Striking of Attorney's Appearance), Rule 3-132 (Striking of Attorney's Appearance), and Maryland Lawyers'

Rules of Professional, Rule 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer)

The Chair told the Committee that Agenda Item 1 was comprised of several Rules, one of which had some problems.

Mr. Brault presented Rule 1.2, Scope of Representation and Allocation of Authority Between Client and Lawyer, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX: THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP

AMEND Rule 1.2 to require that the scope and limitations of a limited scope representation by an attorney be specified in a written agreement and be in compliance with any applicable Maryland Rule and to add a new Comment 8 pertaining to limited scope representation, as follows:

Rule 1.2. SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of the representation and, when appropriate, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered,

whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation in accordance with applicable Maryland Rules if (1) the limitation is reasonable under the circumstances and ~~the client gives informed consent~~ (2) with the client's informed consent, the scope and limitations of the representation are clearly set forth in a written agreement between the lawyer and the client.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

COMMENT

Scope of Representation. - [1] Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for

technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16 (b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16 (a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities. - [5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation. - [6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] A lawyer and a client may agree that the scope of the representation is to be limited to clearly defined specific tasks or objectives, such as: (1) without entering an appearance, filing papers, or otherwise participating on the client’s behalf in any judicial or administrative proceeding, (i) giving legal advice to the client regarding

the client's rights, responsibilities, or obligations with respect to particular matters, (ii) conducting factual investigations for the client, (iii) representing the client in settlement negotiations or in private alternative dispute resolution proceedings, (iv) evaluating and advising the client with regard to settlement options or proposed agreements, or (v) drafting documents, performing legal research, and providing advice that the client or another attorney appearing for the client may use in a judicial or administrative proceeding; or (2) in accordance with applicable Maryland Rules, representing the client in discrete judicial or administrative proceedings, such as a court-ordered alternative dispute resolution proceeding, a *pendente lite* proceeding, or proceedings on a temporary restraining order, a particular motion, or a specific issue in a multi-issue action or proceeding. Before entering into such an agreement, the lawyer shall fully and fairly inform the client of the extent and limits of the lawyer's obligations under the agreement.

~~[8]~~ [9] All agreements concerning a lawyer's representation of a client must accord with the Maryland Lawyers' Rules of Professional Conduct and other law. See, e.g., Rule 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions. - ~~[9]~~ [10] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

~~[10]~~ [11] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rules 1.6, 4.1.

~~[11]~~ [12] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

~~[12]~~ [13] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

~~[13]~~ [14] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Maryland Lawyers' Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See

Rule 1.4(a)(4).

Model Rules Comparison. -- Rule 1.2 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct except for wording changes in Rule 1.2(a) and the retention of existing Maryland language in Comment [1].

Rule 1.2 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 1-321.

Mr. Brault explained that Rule 1.2 currently states that an attorney may limit the scope of representation, and this is common in a legal practice. It is done for many reasons. The attorney can say that he or she represents the ABC corporation for specific purposes, which is allowable. Many times, attorneys write papers for clients but the clients, not the attorneys, file the papers. The attorney may give advice to a client as to how to write a will or other document, but the client does the writing himself or herself. The attorney who does this should be careful to write a retainer agreement that specifies that limitation. Many people who appear in proper person seem to write excellent papers, but someone else wrote the paper for the person. This is appropriate. It is important to make sure that when a party is in the courtroom, it is clear what is appropriate for an attorney to do when representing that person on a limited basis. The Attorneys Subcommittee created a specific change in Rule 1.2, but whether it is necessary is debatable. Much of the energy behind limited representation and changes to the Rules

applying to it come from the family law segment of the bar where limited representation seems to be far more common.

Mr. Brault noted that in section (c) of Rule 1.2, language has been added to the first sentence that provides that a lawyer may limit the scope of the representation in accordance with applicable Rules. Other new language requires the client's consent and that the scope and limitations of the representation are clearly set forth in a written agreement between the attorney and the client. A new paragraph 8. has been added to the comments at the end of Rule 1.2. It contains examples of what aspects of a legal representation may be limited. The examples give an idea of what the impetus was to amend the Rules. Initially, the Subcommittee wanted to know if everyone agreed with the concept of Rule 1.2 being amended and being interpreted in accordance with what will be put into the Rules.

The Chair asked if anyone had a comment on Rule 1.2. Mr. Leahy noted that although it may be appropriate, one of the proposed changes would put a burden on the attorney and client to enter into a fairly complex limited representation agreement. Mr. Brault explained that the idea was to avoid downstream problems. It does add a burden, but it also clarifies the situation and makes it easier. He said that he and his son, who is also an attorney, would be arguing a case in the Court of Special Appeals the following week. They had not been involved in the trial of the case in the lower court. They had gone

before the trial judge on motions relating to attempts to collect and told the judge that they were only entering their appearance to answer one motion. The trial judge had no idea what they were talking about.

Mr. Brault said that he had tried to explain to the judge that it was a limited representation agreement to simply argue the one post-trial motion, and that they did not want to enter their appearance generally, because the client was in New York, and they did not want to make service upon them available. The other side, a major law firm in Washington, D.C., argued that Mr. Brault and his son could not represent the client on the limited issue. This indicated that amending the Rules was necessary. If the attorney and client did not have a written agreement, it would be difficult to establish before the court or by the client in a post-trial proceeding that the attorney and client had a bona fide agreement.

Judge Weatherly remarked that even though it may be a burden, it is important that there will be two different groups of attorneys, those who are in the entire case and those who come in on a discovery issue or another separate issue. The court should be able to ask an attorney to provide some evidence of the limited representation agreement, which should be able to be defined. It should not be a burden to articulate in writing what the agreement is so as to avoid confusion. The Chair commented that these proposals were brought to the Committee by the

Commission on Access to Justice. The Subcommittee had discussed the need for clarity. The role of the attorney and the role of the client need to be clearly delineated, so that problems do not arise later in the case.

By consensus, the Committee approved Rule 1.2 as presented.

Mr. Brault presented Rule 1-321, Service of Pleadings and Papers Other than Original Pleadings, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

AMEND Rule 1-321 to add a new section (b) pertaining to service after entry of limited appearance and to make stylistic changes, as follows:

Rule 1-321. SERVICE OF PLEADINGS AND PAPERS OTHER THAN ORIGINAL PLEADINGS

(a) Generally

Except as otherwise provided in these rules or by order of court, every pleading and other paper filed after the original pleading shall be served upon each of the parties. If service is required or permitted to be made upon a party represented by an attorney, service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivery of a copy or by mailing it to the address most recently stated in a pleading or paper filed by the attorney or party, or if not stated, to the last known address. Delivery of a copy within this Rule means:

handing it to the attorney or to the party; or leaving it at the office of the person to be served with an individual in charge; or, if there is no one in charge, leaving it in a conspicuous place in the office; or, if the office is closed or the person to be served has no office, leaving it at the dwelling house or usual place of abode of that person with some individual of suitable age and discretion who is residing there. Service by mail is complete upon mailing.

(b) Service After Entry of Limited Appearance

Every document required to be served upon a party's attorney that is to be served after entry of a limited appearance shall be served upon the party and, unless the attorney's appearance has been stricken pursuant to Rules 2-132 or 3-132, the limited appearance attorney.

~~(b)~~ (c) Party in Default - Exception

No pleading or other paper after the original pleading need be served on a party in default for failure to appear except a pleading asserting a new or additional claim for relief against the party which shall be served in accordance with the rules for service of original process.

~~(c)~~ (d) Requests to Clerk - Exception

A request directed to the clerk for the issuance of process or any writ need not be served on any party.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 306 a 1 and c and the 1980 version of Fed. R. Civ. P. 5 (a).
Section (b) is new.
Section ~~(b)~~ (c) is derived from former Rule 306 b and the 1980 version of Fed. R. Civ. P. 5 (a).
Section ~~(c)~~ (d) is new.

Rule 1-321 was accompanied by the following Reporter's note.

> The Maryland Access to Justice Commission and family law practitioners have requested that provisions concerning limited scope representation be added to the Maryland Rules. Amendments to Rules 1-321, 2-131, 2-132, 3-131, and 3-132 and Rule 1.2 of the Maryland Lawyers' Rules of Professional Conduct are proposed by the Attorneys Subcommittee to expressly authorize the entry of limited appearances in the District Court and circuit courts, to address the service of pleadings and papers after an attorney enters a limited appearance, to provide guidance regarding informed consent of the client when an attorney and a client wish to agree to limited scope representation, and to permit the filing of a notice of withdrawal of appearance after the proceeding for which the appearance was entered has concluded or the purpose of the limited representation has been accomplished.

Mr. Brault told the Committee that the proposed changes to Rule 1-321 create a problem, which is the clerks' ability to track the limited representation on the computer. Ms. Smith said that it would cause problems for the circuit court, but she was not sure that it would affect the District Court. Mr. Brault said that the changes to the Rule address service on attorneys who have entered a limited appearance. The Subcommittee's view was that everything should be served on the attorney who entered a limited appearance. The new language states that every document required to be served on a party's attorney shall be served after entry of a limited appearance upon the party and upon the limited appearance attorney, unless the attorney's

appearance has been stricken.

The Chair commented that Ms. Smith had first notified the Committee of the problem with the Rule. There is no problem as to service of papers by the other side. The other party can serve both the attorney and the client. The problem is service of documents or notices by the court. Five counties in Maryland send out notices through legacy case management systems, which do not permit sending notices to both the client and the attorney. To change the systems so that they could do this would cost a considerable amount of money. When the court system gets into the full electronic program in about two years, this will no longer be a problem, because the system can be designed to accommodate this. The concern has been expressed that to do this now for the five counties with legacy systems would be very expensive. The judicial budget is already tight, and it is not worth going to this expense, when in two years, the new system will permit it to be done.

Mr. Broccolina told the Committee that he had distributed to the Committee a document laying out the reasons already articulated by the Chair as to why the proposed changes to Rule 1-321 would not be compatible with some aspects of the District Court Civil and UCS case management system. (See Appendix 1). He introduced Mr. Mark Bittner, the Director of Judicial Information Systems (JIS), to speak about this issue.

Mr. Bittner said that each person present should have a one-

page, two-sided document that constitutes a brief analysis of this topic. There were two primary premises on which the analysis was based. The first was that in a limited appearance by an attorney, notices from the court would be sent to both the litigant and to his or her attorney. The second was that in a limited appearance, the attorney would be attached to a specific party in the case, just as a full-time attorney would be. The time frames that they had looked at to complete changes of this nature to both the District Court and circuit court systems have to take into account all of the other activities that JIS and the resources from these systems are engaged in now and will very likely be engaged in later on this year. They engage in primarily legislative changes every year, and they are working towards instituting the new case management system. Attention diverted from that activity prolongs that effort, and they cannot afford to do that.

Mr. Brault told the Committee that the cost considerations included in the estimate of changing the system to accommodate limited representation would include assessing what needs to be done as well as changing the likely portions of the system that are typically modified in this type of adjustment. They estimate that it would cost $100,000 and it would require between eight and 12 months to complete these changes, because now the systems in question can either produce notices to the *pro se* litigant or to the attorney, but not to both. The changes to the system

would have to recognize this particular condition as unique. The limited appearance would have to be recorded in the case management system, and vehicles would have to be provided by which the clerks could manage this. The appearances and the entry and exit of the limited appearance would then be able to generate all notices that would be effective based on those in that situation and also produce any reporting or tracking associated with this activity.

Mr. Maloney commented that the legacy systems are outdated and asked what the short-term or long-term plan was to eliminate the systems. Mr. Bittner replied that the long-term plan is to eliminate the legacy systems within two years. The new system in Anne Arundel County would facilitate this. After that, it would take probably three years for the new system to be installed statewide. Mr. Maloney inquired about how the five counties using the legacy systems other than UCS will be handled. Mr. Bittner said that he and his colleagues have determined that the circuit court system used in Prince George's County would need only minimal changes, so that it could handle the limited representation. It would be the same for Montgomery County. It is primarily the District Court civil system and any court using the UCS (Unified Case System) that now are not equipped to handle this situation.

Mr. Klein asked if it would make any difference to the system whether the Rules Committee chooses the party or the

attorney if the system requires that either one or the other can be chosen. Mr. Bittner replied that if the attorney is chosen, he or she would receive the notices on behalf of the party. Notices automatically go to the attorney, so it is not a matter of choosing which one in a specific case. The Rule could state that if someone had not been entered as the attorney in the case, the self-represented litigant (SRL) would have to provide the attorney with any notices that he or she had received. The difficulty arises in sending the notices to both the party and the attorney.

Mr. Brault asked what happens when a new attorney enters an appearance and a former attorney withdraws. Mr. Bittner answered that the new attorney would be on a full-time basis, and the litigant does not get the notices. Either the former or the new attorney would get the notices. Mr. Brault inquired if the system can change attorneys. Mr. Bittner answered affirmatively. Mr. Brault asked if the system could change from notice sent to an attorney to notice sent to a SRL. Mr. Bittner responded that it would be one or the other, but both cannot receive notices. The system can change to a SRL, but then the SRL is the only one getting notices. The attorney who is in the case on a limited basis would not be sent notices. Ms. Smith remarked that the system would not allow either the party, the defendant, or the attorney to get notices.

Mr. Maloney questioned why a category could not be created

that would be entitled “attorney - proper person.” Then the attorney could be named as “attorney/self.” Mr. Bittner commented that the notices would only go to that party. Mr. Maloney noted that if the system can allow multiple attorneys, it could include one entitled “attorney - proper person.” Mr. Bittner responded that the new system would accommodate this. The existing system would add the designation to the attorney table. The way the system works is that it uses a centralized attorney table with information about the attorneys. The attorney table would be polluted with private citizens, and at the time when the new system is adopted, they would not be able to know which ones were attorneys and which ones were not. Mr. Maloney observed that if the designation is “attorney/self,” the system could identify the non-attorney. Mr. Bittner explained that the names of the non-attorneys would have to be changed and stripped out at a later time. He was not implying that procedurally there are no ways to work around this problem, but they would raise extra effort at the time of converting the data to the new system to properly reflect that they are parties in the case.

Mr. Brault inquired what must be done to implement the Rule as it has been proposed, since the system is not capable of handing the necessary electronics or all of the data processing. Mr. Bittner replied that he had been asked to comment on what it would take to solve the problem. The Chair acknowledged Mr.

Bittner's point that the current system, except for minimal changes in Prince George's and Montgomery Counties, cannot send notices to both the attorney and the party. However, Mr. Bittner had said that if the attorney enters a limited appearance, the attorney and not the party would get the notices. The Chair asked why this is so. Mr. Bittner answered that if an attorney is attached to a party, the attorney will get the notices. The Chair inquired whether the attorney has to be attached to the party for Mr. Bittner's purposes. Mr. Bittner replied that technically the attorney does not have to be attached to the party.

Ms. Potter commented that the attorney has to sign off as to the limited scope. Can the attorney be the one signing off in the document that he or she is the one responsible for checking the docket? It should be up to the attorney to take care of this.

The Chair said that the Committee may accept the JIS position that at this point, notices cannot be sent to both the attorney and the party, and it may be several years before this can be done. Mr. Bittner explained that not being able to send notices to both means that an attorney is attached to a party. The Chair asked Ms. Smith if there is some way that a limited appearance can be entered, but some code assigned, so that the attorney is not regarded as attached. Ms. Smith responded that it is possible that a different type of party could be

designated, but she was not sure. Mr. Bittner commented that he would be willing to research what the impact of this suggestion would be. Several questions would need to be answered related to that.

Mr. Brault questioned whether there is a category for an attorney who is not attached to a party in the JIS systems currently. Mr. Bittner answered in the negative.

Judge Pierson noted that there is a category for interested persons. Mr. Bittner pointed out that this is a different party type. However, they would have no data related to the fact that the interested person was an attorney at any point in time, either now or in the future after conversion. That person would be designated as another party forever. The Reporter noted that this would not be the case if the person withdraws his or her appearance. They would then be out. Mr. Bittner acknowledged this, but he noted that within the case management system, they would never have the data to identify that person as an attorney.

Mr. Brault asked if language could be added to Rule 1-321 indicating that an attorney in a case of a limited appearance shall be designated as an interested person. The Reporter expressed the view that this could be done. Mr. Broccolina remarked that if it is just an attorney entering a limited appearance in a case and he or she is listed in the system as a party to the case, that would not cause a problem. However, if data is requested, such as asking in how many cases did a certain

court have limited-appearance attorneys, it cannot be given.

Mr. Klein remarked that if attorneys are called parties, and a credit check was done to find out who has been a party to a lawsuit, this could create a problem. He asked Mr. Bittner whether the system would send notice to both the attorney and the party if no change was made in the JIS system, but the clerks were instructed that if an attorney enters a limited appearance, in addition to the attorney's name being entered in the system as would be done currently, the name of a party was also entered in the attorney fields preceded by some special character, such as an asterisk.

Ms. Smith commented that this affects the attorney table. Mr. Klein noted that the designation could be preceded with some character. Mr. Bittner responded that the character would only be the indicator that would be chosen. To allow an entry mechanism to put that character in would require programming to recognize that condition with that character. It would have to be set in the database, and all of the notice programs would have to be changed to look for that special character. He said that he understood how simple it sounded, but the legacy systems are 35 years old. It is like comparing the computers that first came out to what is able to be done today and how quickly new functionality on the computers can be obtained. With the new system, these kinds of changes can be easily made. The staff at JIS are severely limited with the lack of flexibility in the

current systems, which is one of the main reasons why they are being replaced.

Mr. Carbine asked about the attorney table. Ms. Smith responded that when there is a party who has an attorney attached to him or her, the name of the attorney is put into an attorney table, so that there can be a check to make sure someone is actually an attorney. The data has to be entered in the same way. A clerk could not put the attorney's name in one way one time, and then another way at some other time. When the name of an attorney is entered, a mail flag is switched, so that the attorney will get all of the mail. If the attorney withdraws from the case, this switches the mail flag, so that the party gets all of the notices. Once the attorney's name is put into the table, another attorney cannot be added.

Mr. Carbine said that he had thought of an approach to this problem that would cost almost nothing to implement. First, the assumption is that the computer system is archaic. Secondly, there is money in the budget to have this enormous shift over to electronic filing and electronic records in two years, so that Maryland will have a state-of-the-art computer system. This State has operated without limited appearances for a long time. The people who would like the Rules to be changed to permit limited appearances are primarily the attorneys who do not want to be in the case for the entire length of it, and the clients who do not want to pay the legal fees to have the attorneys in

for the entire case. This would only apply to written court notices, not to an attorney sending a service copy to the other side. When the notice goes to the limited appearance attorney, that attorney is obligated under the Rules to mail a copy to the client.

Ms. Potter noted that the obligation to the client does not end as soon as the attorney withdraws his or her appearance. The Chair pointed out that there are two defaults. Assuming that both the attorney and the client will not be able to get notice, notice can be sent to the attorney who can ascertain if he or she is in this case or not, or the notice can be sent to the self-represented client, who can be required to send it to the attorney as part of the limited representation. There are pros and cons to each method. Mr. Carbine remarked that the court has more control over the attorneys than the clients.

The Chair said that if the notice is sent to the attorney, he or she may only be in the case for a narrow issue, such as a motion for summary judgment, and the attorney may start getting notices about many other aspects of the case. The Reporter added that this is particularly evident in domestic cases, which may be very complicated, but the attorney may only be in for one narrow part, such as to draft a QDRO (qualified domestic relations order). The Chair pointed out that this is the down side, but the up side is that if the notice falls within the limited scope of the representation, then the attorney has it.

Mr. Brault asked what happens when the attorney enters an appearance, whether general or limited, and then withdraws. Ms. Smith answered that the mail flag switches back to the party, and the party is sent a notice that the attorney has withdrawn. When a new attorney comes into the case, the mail flag switches back. Mr. Brault asked what the problem would be requiring by rule that the attorney withdraw. Why does the notice going to the attorney not satisfy the Rule? Why does the notice have to go to both the attorney and the client? The Reporter responded that it is because the client is representing himself or herself on all of the other issues in the case. If it is a domestic case, there could be change of custody, child support, contempt, and many other issues. The attorney may only be in the case to draft a QDRO. Mr. Carbine said that if the attorney wants to do a limited representation, there is a price, which is that when the attorney gets the eight other notices that do not involve him or her, the attorney mails them to the client for a certain amount of time.

The Chair commented that they had looked at rules in other states on this issue. Most states send the notices to both the attorney and the client. Other states do not refer to who gets the notices. He asked Ms. Ortiz for her comments since her agency had raised the issue of limited representation. Ms. Ortiz told the Committee that the primary interest of the Commission on Access to Justice was to create a vehicle through which lower-

and moderate-income clients could retain limited-scope attorneys. The Commission's primary interest is in seeing that these attorneys can enter a limited appearance with the court. It would be optimal if both the self-represented litigant and the limited-scope attorney could get notice. The party does retain primary responsibility for the litigation. However, attorneys are more familiar with the litigation process. This Rule anticipates that the limited-scope attorney, when he or she enters an appearance in court, will then withdraw when the purposes for which the attorney was hired are completed. There may be a case with bifurcated issues. Ms. Ortiz said that she was not sure how often there would be separate bifurcated issues. This is the one area where attorneys may be getting notices for issues with which they are not involved.

Dawn Bowie, Esq., a family law practitioner, told the Committee that she had entered limited appearances previously and that she would speak to the issue of the burden on attorneys. The solution that had been suggested was the closest to what she and her colleagues had anticipated would happen. The limited-appearance attorneys are much like other attorneys for the period of time in which they work.

The Chair asked Ms. Ortiz if she would prefer that the attorney get the notices in terms of the two possible defaults to which he had referred, sending the notice to the attorney, or sending it to the client who would them send it to the limited-

appearance attorney. Ms. Ortiz answered affirmatively. Cases that had attorneys for a period of time would be able to be identified. It would be similar to the way it is now, and it would be seamless for the clerks to handle it that way. Ms. Bowie expressed the view that the selected solution is the better one. Her limited-scope practice reflects the full range of her professional responsibilities, but instead of an entire case, it is one event. She has the same duties in a limited-scope case that she would have for an entire case.

The Chair inquired whether JIS would have any problem with Rule 1-321 providing that once an attorney files a limited appearance, the attorney would get all notices from the court regarding that case until such time as the attorney withdraws from the case. Then the notices would be sent to the client. Mr. Bittner replied that this is how the system currently works. His thought on this was that if JIS were asked to identify cases with limited appearances, they would have no way of knowing that the entry and exit was not a change of attorney or a dismissal of an attorney as opposed to a limited appearance. The Chair noted that this would only be for two years. Mr. Bittner said that it would be only until the new system is in place, in which case that situation is resolved.

Mr. Brault suggested that section (b) of Rule 1-321 could be changed to read "Every document required to be served upon a party's attorney that is to be served after entry of a limited

appearance shall be served upon the attorney, unless that attorney's appearance has been stricken pursuant to Rules 2-132 or 3-132, in which event it would be served upon the party."

The Reporter observed that Rule 1-321 could be left as it currently is, and Rule 1-324, Notice of Orders, which addresses the court's actions could be modified. It seems like a good idea to have parties serving both the other party and the limited appearance attorney. The Chair agreed that Rule 1-324 would have to be modified. This would not have to be drafted now. Rule 1-321, addressing documents that the other side must serve, would provide that documents would have to be served on both the party and the limited-appearance attorney. He asked the Committee if they agreed with this. By consensus, the Committee agreed with this suggestion. The Chair said that Rule 1-324 would provide that notice would go to the limited-appearance attorney until the attorney's appearance is stricken. By consensus, the Committee agreed with this proposal.

Mr. Klein suggested that a Reporter's note be included for the benefit of the Court of Appeals explaining that this is an interim solution until a more up-to-date computer system can be installed. The Reporter asked if it should be a Committee note, but Mr. Klein replied that it should be a Reporter's note. Ms. Smith asked how attorneys will know about the new procedure since they are familiar with the current procedure. The Chair responded that the way to address this is in Rule 2-131,

Appearance, where the notice is. Language could be added indicating that the attorney understands that he or she must send notices to the client that do not pertain to the limited representation.

Judge Pierson commented that this will create a problem. When the notices are not sent, parties will say that they did not know about the proceeding. They may request a postponement, which could violate deadlines. The Chair agreed that this is the down side of this procedure no matter who gets the notice. The Reporter noted that there may be timing problems, also. Mr. Patterson remarked that if both the attorney and the party get the notice, then the SRL can be told that the attorney had been sent the notice. There is a reason why the notice should go to both.

Ms. Gardner told the Committee that she was from the Public Justice Center. She had a suggestion that would provide a way for both attorney and client to get notices, but she did not know what other problems would be created. If the limited-appearance attorney was entered into the system in the case, and the party was also duplicated as an interested person, then they would both get the notices. The party could be taken out of the category of "interested person" when the attorney withdrew. The Chair said that the only problem with this is that the client is not an interested person in the case; the client is the party. Ms. Gardner said that the designation would appear as both the

plaintiff and an interested person in the system. Then the plaintiff would get the notices along with the attorney.

Mr. Carbine said that he had a comment on Judge Pierson's problem. Right now, every time Mr. Carbine serves discovery requests on another party, he has to file a notice of service. A high-volume office has a form which is one sheet of paper. The attorney files the notice with the court stating that he or she had sent papers on to the client, and the judge has that put into the court file. There would be some record in the court file to indicate that the client had been mailed copies of a certain document.

Mr. Bittner remarked that this is not a technical issue, but a procedural one. Master Mahasa asked him to clarify this. Mr. Bittner responded that when an event occurred where it was a limited appearance, the clerks would not only have to record that event, but within the clerk's office, they would then have to add the party as an interested person at that point in time. It would be additional work for the clerk's office. The system would not automatically note the limited appearance and add the party as an interested person. Master Mahasa remarked that the clerk's office would have to do that anyway to add someone as an interested person. Mr. Bittner stated that the person already would have been entered into the case as a party. Master Mahasa pointed out that there may already be a category available, because sometimes interested persons are also parties. The clerk

would have to add that person's name.

Mr. Bittner noted that what had been suggested was that in the event of a limited appearance, when the attorney enters the case, the party who the attorney is representing would be added as an interested person. This would be a function of the clerk. Ms. Smith observed that this may be handled differently throughout the case. Attorneys would have to remember to withdraw from the case, so that they do not get two sets of notices at a time.

Mr. Johnson pointed out that the interested person is designated this for a reason. The person with an attorney is a party even if he or she has a limited-appearance attorney. This will confuse the system and create a great amount of work for the clerk's office. How does the clerk know that the person is no longer an interested person but a party? The Chair commented that the designation would have to be done at both ends. The party would have to be designated as an interested person when the notice of appearance of the attorney is filed, and then when it is withdrawn, the designation of interested person would have to be taken away. Mr. Durfee expressed concern about naming parties as interested persons. Protections in the access rules in Title 16 apply to parties, such as protecting the address of a party and other identifiers. These protections may not apply to interested persons. In a domestic violence case, someone could get access to confidential information. Because of

confidentiality provisions, it is important to be cautious about changing designations.

The Chair said that he understood Ms. Gardner's point to mean that the party who is designated both as a party and an interest person will have two designations. Ms. Smith noted that it would appear twice on Casesearch. Mr. Brault inquired about notices -- what triggers the clerk sending notices? If an attorney enters an appearance, what happens? Ms. Smith responded that when an attorney enters an appearance, the attorney will get all notices, including whatever the assignment office sends. Mr. Brault noted that Rule 1-321 triggers the scheduling notices sent by the clerk. The Chair pointed out that Rule 1-324 is the correct Rule. Mr. Brault pointed out that Rule 1-324 pertains to orders or rulings. Rule 1-321 applies to not only what the party must do, but also to what the clerk does thereafter to notify the attorneys and parties as to when certain events have been scheduled. The problem is that when all of the notices go to the attorney, the party gets no notice of when the trial is or does not get any other notice.

Judge Weatherly remarked that when she sends out an order from her office, the court jacket will almost always reflect it. She had learned that when the assignment office in Prince George's County sends out notices, they do not have the file. They have a computer that pulls the information up. They rely on their computer system. There are too many files to allow clerks

the time to fill out the case jacket. It would be an administrative burden. The clerk's office and the assignment office frequently send out notices without a file there. It provides a benefit to the administration of this, but it creates havoc sometimes. Mr. Brault added that the party will not get notice if the attorney does not tell the party about a court event that has been scheduled.

The Chair observed that until the new system comes into play, it is possible to send a notice to the attorney, which, subject to Ms. Gardner's point, seems to be the preferred way as opposed to sending it to the client. The only downside, other than that the attorney has to make sure that the client knows about it, is that these cases will not be able to be tracked for two years. The Chair inquired if anyone had a motion to add to the Rules Ms. Gardner's suggestion to label the party as an interested person. Master Mahasa responded that she had a concern about confidentiality as pointed out by Mr. Durfee.

The Reporter asked about the flip side of this, labeling the attorney as an interested person, although Case Search would come up with the attorney being a party. Ms. Smith remarked that it could be coded as something else. The Reporter asked what the coding could be. Ms. Smith answered that there could be a code for a limited-scope attorney, but this could not be tracked.

Mr. Bittner said that if the limited-scope attorney was entered as a party in a case, it would be an effort to establish

a new party code. Ms. Potter stated that attorneys do not want to be parties. The Chair noted that then the attorney is listed as a party on the Internet. Mr. Bittner remarked that this could not be avoided.

Judge Weatherly suggested that the attorney could be listed as a best interest attorney as in a family law case. Best Interest attorneys get notices but do not represent either party, and the child is not a party in the case. Ms. Smith noted that domestic cases are handled differently. Ms. Ortiz said that she had the unique perspective of working with the Commission on Access to Justice, while also being a part of the Administrative Office of the Courts. As much as she would like to see these Rules approved, she cautioned against this kind of circumvention of current procedure. It is very difficult to train for this kind of change, to enforce it, and to make sure that it is consistent. This kind of change would do more harm than good. The Commission will revisit this issue when the electronic system can legitimately provide for dual notice. It will create a bad name for limited representation if the solution that is decided on is not really viable. The Chair commented that this issue needs to be addressed from a global perspective. Someone has to get these notices. If the best way to do this is for the attorney to get the notice, the entire project can go forward. It can be considered again later when the new system is in place. It is not known exactly when that will be. The Commission on

Access to Justice would like the project to go forward.

Judge Pierson said that he had a comment that is relevant now. If the stopgap solution were to be that notices would be sent to the attorney during the period of that attorney's limited representation, there was also an issue that had not been discussed. The intent of the Rule is that a limited-appearance attorney moves automatically out of the case when the attorney's role is concluded. The Chair clarified that this is not automatic; the attorney has to file a notice of withdrawal. Judge Pierson added that then the court would know when that representation is over.

Mr. Brault remarked that the only other change that could be made would be to put the burden on the attorney to assure that the party gets the notice, as Mr. Carbine had suggested, and include a reference to this in Rule 1-321. It would provide that as long as the attorney receives notice, the attorney would be required to notify the party. Mr. Brault added that he would not like to see the Rule not approved due to a computer glitch. Everything that he had heard from the attorneys interested in this was that this is a Rule they need. Limited representation is actually going on, and it has to be addressed. It may be taking place more than anyone realizes. The limited representation Rules should be approved, so that the trial judges know about it. This would avoid the situation Mr. Brault had described where the judge had no idea what it meant for the

attorneys to be in a case to answer one question.

Mr. Sullivan asked if there would be a problem with a limited-appearance attorney entering his or her appearance, getting logged in as an attorney, and the name of the party linked to that attorney being designated “limited-appearance attorney.” The original party would still get notice as a party. The limited-appearance attorney would be getting the same notice as the other attorneys. The system still has something to track, because there would be a place-holder in the “party” column that reads “limited-appearance attorney.” Ms. Smith responded that this would cause a problem, because this is creating another link.

The Reporter explained that what Mr. Sullivan was suggesting was that in place of the name, the new party’s name would be “limited-appearance attorney.” Ms. Smith pointed out that some changes would still have to be made. New coding would be required. The Reporter noted that new parties could be entered as the case progresses. One would be designated “limited-appearance attorney.” Ms. Smith said that the system does not currently have a code for a “limited-appearance attorney.” Mr. Sullivan explained that for the purposes of the system only, the name would be “limited-appearance attorney,” so that if there are any future studies of data, the statistics can be screened for a limited-appearance attorney. Mr. Bittner remarked that a party named “limited appearance” would have to be added to the case.

It is an “either-or” situation. All attorneys would get the notices. The *pro se* party is still not getting the notices. Ms. Smith reiterated that a new code would have to be created.

Mr. Brault moved to amend Rule 1-321 by adding to it language to the effect that until the limited appearance is withdrawn, the attorney shall assure that the party receives all notices. When the system is corrected, this phrase can be withdrawn from the Rule. The Rule should not be disapproved because of the computer problem. Judge Norton commented that he did not know how to handle the issue of withdrawal. One of the proposals is that withdrawal can be effected by notice. A notice of withdrawal could be filed on Monday, but the attorney would still be getting communications pertaining to the case on Tuesday, Wednesday, Thursday, and Friday. The suggested language would not address this situation. Mr. Carbine remarked that his experience had been that the attorney is in the case until the judge signs the order of withdrawal, but the proposed Rule says that the withdrawal can be effected by notice. Mr. Brault said that the Rule could provide that the withdrawal is effective when authorized by the court. Judge Norton responded that this would solve the problem.

The Chair commented that the Subcommittee did not include this in Rule 1-321 for a reason. It was so that the judge would not have to get involved each time an attorney withdraws an appearance when his or her purpose for entering the limited

appearance is over. Someone may file a motion to object, and then an answer would be filed. There would be a hearing. This is what the Subcommittee was trying to avoid. The attorney had filed a notice of limited appearance pursuant to this Rule, and when his or her part in the case was over, the attorney would file a notice of withdrawal of the appearance. If anyone would like to object to the withdrawal, he or she can do so, but it would not automatically trigger the judge getting involved in the case.

Mr. Brault asked what happens currently when an attorney withdraws from a case by consent, and no successive attorney comes in. Judge Pierson replied that an order is required. The Chair noted that the idea behind the proposed change to the Rule was to supersede that and avoid going through that process. It may be that the attorney should not be allowed to withdraw while the case is going on. But if the original appearance was only for a motion for summary judgment, and that is decided, a withdrawal that does not affect the court should be permitted.

Ms. Gavin suggested that if the attorney receives documents pertaining to that particular client, the Rule should extend the obligation of the attorney to forward the documents to the client even if the attorney had withdrawn from the case. By consensus, the Committee approved this suggestion. The Chair stated that some redrafting of Rule 1-321 would be required. The Reporter suggested that in the language proposed by Mr. Brault, in place

of the words “assure that” the client gets the notices, the language would be “promptly provide that the client gets the notices.” By consensus, the Committee approved of this change. Rule 1-321 will be redrafted and sent back to the Committee for one more review.

By consensus, the Committee approved Rule 1-321 as amended.

Mr. Brault presented Rules 2-131 and 3-131, Appearance, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 100 - COMMENCEMENT OF ACTION AND PROCESS

AMEND Rule 2-131 to permit the entry of a limited appearance under certain circumstances, to add a form of acknowledgment of the scope of limited representation, and to add a cross reference pertaining to limited appearances, as follows:

Rule 2-131. APPEARANCE

(a) By an Attorney or in Proper Person

Except as otherwise provided by rule or statute: (1) an individual may enter an appearance by an attorney or in proper person and (2) a person other than an individual may enter an appearance only by an attorney.

(b) Limited Appearance

(1) Notice of Appearance

An attorney, acting pursuant to an agreement with a client for limited representation that complies with Rule 1.2 (c) of the Maryland Lawyers' Rules of Professional Conduct, may enter an appearance limited to participation in a discrete matter or judicial proceeding. The notice of appearance shall specify the scope of the appearance including, to the extent possible, the specific proceeding to which it applies, and shall be accompanied by an acknowledgment of scope of limited representation form in accordance with subsection (b)(2) of this Rule.

(2) Acknowledgment of Scope of Limited Representation

The limited scope attorney shall file with the court a signed acknowledgment of scope of limited representation substantially in the following form:

[CAPTION]

ACKNOWLEDGMENT OF SCOPE OF LIMITED REPRESENTATION

Client: _____

Attorney: _____

I have entered into a written agreement with the above-named attorney. I understand that the attorney will represent me for the following limited purposes (check all that apply):

❑ Arguing a motion or motions. (Please specify):

_____.

❑ Attending a pretrial conference.

❑ Attending a settlement conference.

❑ Attending a court-ordered mediation or other court-ordered alternative dispute resolution proceeding for

purposes of advising the client during the proceeding.

(Please specify):

_____

❑ Acting as counsel for a particular hearing, **[deposition?]**, or trial. (Please specify):

_____

❑ With leave of court, for a specific issue or a specific portion of a trial or hearing. (Please specify): _____

_____

I understand that except for the legal services specified above, I am fully responsible for handling my case, including complying with court Rules and deadlines.

_____
Client

_____
Signature

_____
Date

Cross reference: See Maryland Lawyers' Rules of Professional Conduct, Rule 1.2, Comment 8. For striking of an attorney's limited appearance, see Rule 2-132 (a).

~~(b)~~ (c) How Entered

Except as otherwise provided in section (b) of this Rule, ~~An~~ an appearance may be entered by filing a pleading or motion, by filing a written request for the entry of an appearance, or, if the court

permits, by orally requesting the entry of an appearance in open court.

~~(c)~~ (d) Effect

The entry of an appearance is not a waiver of the right to assert any defense in accordance with these rules. Special appearances are abolished.

Cross reference: Rules 1-311, 1-312, 1-313; Rules 14, 15, and 16 of the Rules Governing Admission to the Bar. See also Rule 1-202 (t) for the definition of "person".

Source: This Rule is in part derived from former Rule 124 and in part new.

Rule 2-131 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 1-321.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 100 - COMMENCEMENT OF ACTION AN PROCESS

AMEND Rule 3-131 to permit the entry of a limited appearance under certain circumstances, to add a form of acknowledgment of the scope of limited representation, and to add a cross reference pertaining to limited appearances, as follows:

Rule 3-131. APPEARANCE

(a) By an Attorney or in Proper Person

Except as otherwise provided by rule or statute: (1) an individual may enter an appearance by an attorney or in proper person and (2) a person other than an individual may enter an appearance only by an attorney.

(b) Limited Appearance

(1) Notice of Appearance

An attorney, acting pursuant to an agreement with a client for limited representation that complies with Rule 1.2 (c) of the Maryland Lawyers' Rules of Professional Conduct, may enter an appearance limited to participation in a discrete matter or judicial proceeding. The notice of appearance shall specify the scope of the appearance including, to the extent possible, the specific proceeding to which it applies, and shall be accompanied by an acknowledgment of scope of limited representation form in accordance with subsection (b)(2) of this Rule.

(2) Acknowledgment of Scope of Limited Representation

The limited scope attorney shall file with the court a signed acknowledgment of scope of limited representation substantially in the following form:

[CAPTION]

ACKNOWLEDGMENT OF SCOPE OF LIMITED REPRESENTATION

Client: _____

Attorney: _____

I have entered into a written agreement with the above-named attorney. I understand that the attorney will represent me for the following limited purposes (check all that apply):

❑ Arguing a motion or motions. (Please specify):

_____.

❑ Attending a pretrial conference.

❑ Attending a settlement conference.

❑ Attending a court-ordered mediation for purposes of advising the client during the proceeding.

❑ Acting as counsel for a particular hearing or trial. (Please specify): _____

❑ With leave of court, for a specific issue or a specific portion of a trial or hearing. (Please specify): _____

_____

I understand that except for the legal services specified above, I am fully responsible for handling my case, including complying with court Rules and deadlines.

_____
Client

_____
Signature

_____
Date

Cross reference: See Maryland Lawyers' Rules of Professional Conduct, Rule 1.2, Comment 8. For striking of an attorney's limited appearance, see Rule 3-132 (a).

~~(b)~~ (c) How Entered

An appearance may be entered by filing a pleading, motion, or notice of intention to defend, by filing a written request for the entry of an appearance, or, if the court permits, by orally requesting the entry of an appearance in open court.

~~(c)~~ (d) Effect

The entry of an appearance is not a waiver of the right to assert any defense in accordance with these rules. Special appearances are abolished.

Cross reference: Rules 1-311, 1-312, 1-313; Rules 14 and 15 of the Rules Governing Admission to the Bar. See also Rule 1-202 (t) for the definition of "person", and Code, Business Occupations and Professions Article, §10-206 (b) (1), (2), and (4) for certain exceptions applicable in the District Court.

Source: This Rule is in part derived from former Rule 124 and in part new.

Rule 3-131 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 1-321.

Mr. Brault told the Committee that Rules 2-131 and 3-131 authorize notice of appearance. Subsection (b)(1) allows an attorney acting pursuant to an agreement with a client for limited representation that complies with Rule 1.2 (c) to enter an appearance limited to participation in a discrete matter or judicial proceeding. The notice of appearance shall specify the scope of the appearance and shall be accompanied by an "Acknowledgment of Scope of Limited Representation" form. Subsection (b)(2) contains the form. The idea behind this is to

avoid disputes during the course of the representation as to whether an attorney should have done something else or did not perform a task that the attorney was supposed to do.

Mr. Klein inquired if the language "discrete matter" means something different from and less inclusive than the word "action." Mr. Brault replied affirmatively, noting that the word "action" would mean the entire proceeding. Judge Pierson pointed out that a "proceeding" is defined by Rule 1-202, Definitions, as a part of an action. Mr. Klein commented that he wanted to avoid the situation where an attorney who is hired for asbestos case "A" is not automatically assumed to be defending the client in that case for the next 3,000 asbestos cases.

The Chair remarked that he was not sure how this would work in a normal civil case, such as an automobile accident, where the plaintiff sues the defendant, who then countersues. The plaintiff then becomes a plaintiff and a defendant. The plaintiff's insurance company will select an attorney to represent the plaintiff as a defendant. Is this a limited appearance? Ms. Potter answered that if she is in the case for the plaintiff, then that is what she is in the case for. If she is served with a counterclaim, she would have to respond to the counterclaim. There will be two attorneys, one for the insurance company.

Mr. Brault stated that this scenario is not covered under these Rules. The problem that he saw was the one he had

personally encountered, which was that an attorney is an agent for process for his or her client. Once the attorney has entered an appearance, subpoenas can be served on the client by serving the attorney. Documents involving other proceedings in the case can be served on the attorney and not on the client. The limited representation concept should define what the attorney is doing, so that the attorney does not become an agent for process on anything else. Ms. Potter noted that subsection (b)(2) of Rules 2-131 and 3-131 has defined this. She expressed the opinion that subsection (b)(1) was too long, and the second sentence was not necessary, because subsection (b)(2) covers it.

The Reporter asked if Ms. Potter's idea was that the attorney as well as the client should sign the form in subsection (b)(2). Ms. Potter answered that both should sign. The Reporter noted that subsection (b)(1) allows the attorney to enter his or her appearance, and the caption to that is the acknowledgment. Ms. Potter reiterated that both the attorney and the client should sign, so that everyone knows what the limited representation is. If the client checked off more actions than the attorney had agreed to, there would be a problem. The Reporter pointed out that the attorney is linking this form with his or her entry of appearance. The attorney should not be filing it if the client has checked off too many tasks. Ms. Potter inquired why the attorney should not sign the form. The Reporter answered that the agreement that is entered into

pursuant to Rule 1.2 should be broader. Ms. Potter remarked that she may not want to attach her retainer fee agreement, which states what she is charging the client. That is a matter that is not required by the Rule.

Mr. Michael said that the ideal would be a clear statement that is on the record indicating what the client and the attorney had agreed to as far as the limited representation. It would show exactly what that representation is. He moved that this requirement be added to the Rule. The motion was seconded. Mr. Brault inquired if the agreement would be signed by both the attorney and the client. The Chair replied affirmatively, noting that Rules 2-131 and 3-131 would have to be redrafted. The motion passed unanimously.

Judge Pierson expressed the view that the word "matter" should be eliminated from subsection (b)(1). The word is not defined anywhere in the Rules. Rule 1-202 already defines the word "proceeding" as part of an action. The introduction of the word "matter" will introduce confusion. Ms. Potter suggested that the wording of the first sentence should be: "...may enter a limited appearance." Then subsection (b)(2) provides the details of how the limited appearance works. Mr. Johnson suggested that in place of the language: "limited to participation in a discrete matter," the language "limited to participation in a judicial proceeding" could be substituted. Since "judicial proceeding" is defined already as part of an action, he noted that this narrows

the scope.

Ms. Ortiz pointed out that what the Commission had intended in this Rule is that an attorney could enter his or her appearance on an issue. It may be better to substitute the word "issue" for the word "matter." A "proceeding" is defined as a format. The Chair pointed out that a "proceeding" may involve several issues, and the attorney may be in the case for only one issue. The Reporter said that the word "proceeding" is a defined term in section (v) of Rule 1-202, Definitions, meaning any part of an action. However, the attorney may be in the case for only one issue, such as a QDRO. Ms. Ortiz remarked that the issue may be significant.

Mr. Klein suggested that subsection (b)(1) could read "...limited to participation in the action for the purposes specified in the agreement." The Chair responded that this language would be appropriate as between the attorney and the client. The idea was that the court would have a record of what the attorney is in the case for. It makes it easier when an attorney withdraws from the case to know that the appearance is over. Mr. Klein remarked that he had been trying to address the words "matter" and "judicial proceeding," because neither one of them really fit. The Chair noted that it is not an agreement but an acknowledgment. Mr. Klein pointed out that the word "agreement" had been used earlier in subsection (b)(1). He suggested the language: "An attorney, acting pursuant to an

agreement, may enter an appearance limited to participation in the action for the purposes specified in that agreement." The Chair pointed out that the agreement is not filed. Subsection (b)(1) could provide that it would be pursuant to the agreement, but it would be limited to the purposes stated in the attached acknowledgment. By consensus, the Committee approved the Chair's suggestion.

Mr. Karceski asked if someone had said earlier that there is no limited appearance in an auto tort case. Mr. Brault responded that if the insurance company retains an attorney to defend the insured, the attorney will be in the entire case. Mr. Karceski inquired if an attorney is allowed to enter a limited appearance in that type of action in a pretrial conference or something similar. Mr. Brault answered affirmatively. Mr. Karceski asked if the limited representation is only for certain types of actions. Judge Pierson inquired if it would be appropriate before the new system is available to put into the "Acknowledgment and Scope of Limited Representation" form language that would provide that the client understands that while the attorney's appearance is in, all court notices will be sent to the attorney. The Chair answered that this was a good idea. By consensus, the Committee agreed with Judge Pierson's suggestion.

The Chair noted that the same changes would be made to Rule 3-131. When the changes to Rule 4-216 involving representation

by the Public Defender are implemented, one issue that may need to be considered is a limited appearance in a criminal case. Mr. Brault remarked that this is more difficult than in a civil case. The Reporter pointed out that an attorney can appear for a bail review but not be in the remainder of the case. Mr. Karceski added that the only way an attorney is obligated to remain in the case is if he or she had appeared in the District Court, and the defendant asks for a jury trial.

By consensus, the Committee approved Rules 2-131 and 3-131 as amended.

Mr. Brault presented Rule 2-132 and 3-132, Striking of Attorney's Appearance, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 100 - COMMENCEMENT OF ACTION AND PROCESS

AMEND Rule 2-132 to permit an attorney who has entered a limited appearance to file a notice of withdrawal under certain circumstances, as follows:

Rule 2-132. STRIKING OF ATTORNEY'S APPEARANCE

(a) By Notice

~~When the client has another attorney of record, an~~ An attorney may withdraw an appearance by filing a notice of withdrawal when (1) the client has another attorney of record; or (2) the attorney entered a limited

appearance pursuant to Rule 2-131 (b), and the particular proceeding for which the appearance was entered has concluded or the purpose of the limited representation has otherwise been accomplished.

(b) By Motion

When ~~the client has no other attorney of record, an~~ an attorney is not permitted to withdraw an appearance by notice under section (a) of this Rule, the attorney wishing to withdraw an appearance shall file a motion to withdraw. Except when the motion is made in open court, the motion shall be accompanied by the client's written consent to the withdrawal or the moving attorney's certificate that notice has been mailed to the client at least five days prior to the filing of the motion, informing the client of the attorney's intention to move for withdrawal and advising the client to have another attorney enter an appearance or to notify the clerk in writing of the client's intention to proceed in proper person. Unless the motion is granted in open court, the court may not order the appearance stricken before the expiration of the time prescribed by Rule 2-311 for responding. The court may deny the motion if withdrawal of the appearance would cause undue delay, prejudice, or injustice.

(c) Notice to Employ New Attorney

When, pursuant to section (b) of this Rule, the appearance of the moving attorney is stricken and the client has no attorney of record and has not mailed written notification to the clerk of an intention to proceed in proper person, the clerk shall mail a notice to the client's last known address warning that if new counsel has not entered an appearance within 15 days after service of the notice, the absence of counsel will not be grounds for a continuance. The notice shall also warn the client of the risks of dismissal, judgment by default, and assessment of court costs.

(d) Automatic Termination of Appearance

When no appeal has been taken from a final judgment, the appearance of an attorney is automatically terminated upon the expiration of the appeal period unless the court, on its own initiative or on motion filed prior to the automatic termination, orders otherwise.

Source: This Rule is derived as follows:
Section (a) is new.
Section (b) is in part derived from former Rule 125 a and the last sentence of c 2 and is in part new.
Section (c) is derived from former Rule 125 d.
Section (d) is derived from former Rule 125 e.

Rule 2-132 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 1-321.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 100 - COMMENCEMENT OF ACTION AND PROCESS

AMEND Rule 3-132 to permit an attorney who has entered a limited appearance to file a notice of withdrawal under certain circumstances, as follows:

Rule 3-132. STRIKING OF ATTORNEY'S APPEARANCE

(a) By Notice

~~When the client has another attorney of record, an~~ An attorney may withdraw an

appearance by filing a notice of withdrawal when (1) the client has another attorney of record; or (2) the attorney entered a limited appearance pursuant to Rule 3-131 (b), and the particular proceeding for which the appearance was entered has concluded or the purpose of the limited representation has otherwise been accomplished.

(b) By Motion

When ~~the client has no other attorney of record, an~~ an attorney is not permitted to withdraw an appearance by notice under section (a) of this Rule, the attorney wishing to withdraw an appearance shall file a motion to withdraw. Except when the motion is made in open court, the motion shall be accompanied by the client's written consent to the withdrawal or the moving attorney's certificate that notice has been mailed to the client at least five days prior to the filing of the motion, informing the client of the attorney's intention to move for withdrawal and advising the client to have another attorney enter an appearance or to notify the clerk in writing of the client's intention to proceed in proper person. Unless the motion is granted in open court, the court may not order the appearance stricken before the expiration of the time prescribed by Rule 3-311 for requesting a hearing. The court may deny the motion if withdrawal of the appearance would cause undue delay, prejudice, or injustice.

(c) Automatic Termination of Appearance

When no appeal has been taken from a final judgment, the appearance of an attorney is automatically terminated upon the expiration of the appeal period unless the court, on its own initiative or on motion filed prior to the automatic termination, orders otherwise.

Source: This Rule is derived as follows:
Section (a) is derived from former M.D.R. 125 a.
Section (b) is in part derived from former

M.D.R. 125 a and is in part new.
Section (c) is derived from former M.D.R. 125 b.

Rule 3-132 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 1-321.

Mr. Brault explained that the problem about notice in a limited representation also affects Rules 2-132 and 3-132. If there is another attorney in the case with the attorney who is withdrawing, it does not cause a problem. Ms. Potter expressed the opinion that the word "may" in the first sentence of section (a) was inappropriate for a limited representation. The attorney would have to get out of the case, so that notice would then be sent to the party. The Chair said that the word "shall" could apply only to the limited representation. The word "may" has to apply to the rest of the Rule. By consensus, the Committee approved this change.

Mr. Sullivan inquired if language that provides that the limited-representation attorney has the ongoing obligation to send to the party notices received even after the attorney has withdrawn from the case should be included. Mr. Brault suggested that the language of section (a) of Rules 2-132 and 3-132 should be: (1) the client has another attorney of record; and (2) the attorney....". Ms. Potter noted that the "shall" is only going to apply to the limited representation. The Chair said that this is simply a matter of drafting. If the obligation to continue to

send notices is added, the Rules may need to be restructured.

The Reporter questioned whether adding to the Rule the obligation to send notices should be left open-ended, or whether a time frame should be added, such as for the next 60 days. Ms. Potter remarked that the clerk's office may be so busy that notices may not be docketed for three weeks. The Reporter acknowledged this and said that the obligation to send the notice should not be indefinite. The Chair suggested that a time frame could be added that would be that the attorney is obligated to send notices to the client until such time as the withdrawal is docketed. Attorneys are supposed to check the dockets.

Judge Weatherly observed that as long as the attorney is getting notices, the client is not getting them. The Chair commented that after the withdrawal is docketed, the attorney should no longer be getting the notices. Judge Weatherly responded that this may not be true for Prince George's County. By consensus, the Committee approved the suggestion to add language that provides that the limited-representation attorney has the ongoing obligation to send to the party notices received even after the attorney has withdrawn from the case.

By consensus, the Committee approved Rules 2-132 and 3-132 as amended.

Ms. Gardner told the Committee that she had a problem with the amendments to Rule 1.2. The requirement for the written agreement where the limited-representation attorney would be

representing someone in court is important, but the requirement for a written agreement in a broader context would be very difficult logistically. The Rule uses the word "representation," but this actually encompasses many other forms of limited assistance for which a written agreement, as opposed to informed consent, is logistically impossible.

Ms. Gardner observed that one example is the Public Justice Center's Tenants in Foreclosure project, which provides advice to tenants in properties subject to foreclosure proceedings. The tenants are given a form to fill out and file to notify the foreclosure court that the tenant is an interested person and should be getting notices concerning the foreclosure. To be required to have a written agreement before her agency can provide that limited assistance would be very difficult. Limiting the requirement for a written agreement to matters involving a limited appearance in a court proceeding is sensible, but short of entering a limited appearance in a proceeding, the informed consent procedure for lesser forms of advised assistance is better.

The Chair inquired how the informed consent procedure can be documented. Ms. Gardner replied that it is typically in a cover letter with the sample motion. The letter would be addressed to the tenant stating that included with the letter is the motion that had been discussed on the telephone. The letter would explain the extent of the assistance that the Public Justice

Center would be providing the tenant in the foreclosure matter. The Chair asked if the client could send back a letter indicating that he or she agreed with what the attorney had sent. Ms. Gardner cautioned that they might not send back a letter. Does the staff at the Public Justice Center have to get that agreement from the person before they can send them the material?

Mr. Carbine questioned how one would know that it is informed consent. Ms. Gardner answered that the attorney and the client would have had the conversation on the telephone, and what the extent of the representation or the extent of the assistance by the Public Justice Attorney is would have been confirmed in writing. The Legal Aid Bureau provides a huge array of limited assistance to people, sometimes in very short proceedings. She stated that it may be impossible to get a written agreement for all of those kinds of limited assistance. None of them pertain to an attorney undertaking to enter an appearance and become involved in a judicial proceeding.

The Chair pointed out that there are limited appearances in settlement discussions either before or after the case is filed. An attorney may represent someone for an Alternative Dispute Resolution proceeding either before or after the case. The limited appearance may be in a foreclosure action where the attorney would represent the person only in the proceeding before the Office of Administrative Hearings for the mediation, but the attorney is not in any other part of the case. The intent of the

requirement for a written agreement was to have some evidence that both the attorney and the client understand what the arrangement is. Ms. Gardner said that up until now in a situation where the attorney is providing limited assistance that does not involve entering an appearance and becoming engaged with third parties, such as in a settlement negotiation, or in the wide array of other forms of limited assistance, the memorialization of the informed consent has sufficed.

The Chair asked Ms. Gardner if her problem would be solved if the exception to the written agreement would only be providing advice to the client and not representing the client. Ms. Gardner responded that she had been thinking of the wide variety of circumstances to which this would apply. Her problem would be solved if the requirement for a written agreement was limited to matters in which the attorney was going to enter an appearance. The Chair pointed out that this would be too narrow, because there are other kinds of proceedings that do not involve entering an appearance in court. Is the concern only giving advice to the client, and not otherwise representing the client? Ms. Gardner remarked that her concern with that approach was the definition of the word “advice” and whether that would create problems or questions.

Ms. Gardner told the Committee that one way to address this would be to require a written agreement only where there was in-person contact, and the attorney was able to get the written

agreement. What if the attorney were doing an outreach event, talking to 100 people, providing them with legal information and legal advice? The Chair asked whether the attorney is representing any of the people if the attorney gave advice to 100 people at a community meeting. Ms. Gardner responded that the attorney is providing limited assistance under Rule 1.2, and the revised Rule would require a written agreement. She may be telling 100 people at the same time how to fill out forms. The Chair inquired if she would be representing any of those 100 people, which is what the Rule addresses. Ms. Gardner replied that the word "representation" is used, but the Rule covers a wide array of provision of services.

The Chair noted that Rule 1.2 addresses scope of representation. Ms. Gardner observed that paragraph 8 of the Comments to the Rule references assessing a client's case and providing him or her advice. The language does not quite match what the scope of the Rule covers, including the other forms of assistance. Ms. Hager pointed out that Rule 6.5, Nonprofit and Court-Annexed Limited Legal Services Programs, covers self-help groups. She asked about a retainer agreement, but Ms. Gardner responded that there may not be one.

The Chair said that he understood Ms. Gardner's concern, but he asked how Rule 1.2 could address this without changing the meaning of the rest of the Rule. Mr. Klein inquired if one solution would be to eliminate from paragraph 8 of the Comment

the language: “(i) giving legal advice to the client regarding the client’s rights.” This seems to be causing the problem. The Chair noted that the point raised was brought up in a slightly different context and became the subject of some discussion. It is if an attorney is only giving advice to a client who is able to use that advice to draft documents, is it necessary to disclose that the attorney gave that advice? Mr. Carbine said that he saw no problem. The Rule does not require that the written agreement be signed by the client. If the form letter that goes out from the agency states what the attorney is doing, and there is nothing else being done, that is the end of it.

The Chair asked what would happen if the last sentence of the letter to the client read: “If you disagree with this, you must let us know within 48 hours.” Ms. Gardner asked what the next step would be. The Chair answered that otherwise the attorney would assume that the client acquiesces, and this could also go at the end of the letter. Ms. Gardner noted that what the client would be disagreeing with is that the assistance of the attorney is limited. The Public Justice Center would not agree to provide further assistance, but the client would not agree to the limited assistance that the attorney had provided.

Mr. Brault commented that the agreement would not be signed. In the real world, attorneys write letters stating “I will be representing you for “X” only.” Included in this is a statement

that the attorney is going to charge a certain amount per hour, the client agrees to pay, and if the client does not pay, the case would go to arbitration. However, the scope of representation is what the attorney says that he or she will do. If the client accepts it, it is an agreement. Mr. Brault agreed with Mr. Carbine that there is no problem.

Ms. Gardner remarked that when Rule 1.2 had the language in section (c) "with the client's informed consent," she and her colleagues were comfortable memorializing informed consent in a unilateral communication. If the language of the Rule will be "in a written agreement between the lawyer and the client," unless the history of the proceedings of the Rules Committee is incredibly clear that the unilateral communication without a signature from a client remains acceptable, she could never counsel her staff that a written agreement between an attorney and a client would not have to be signed by the client.

The Reporter agreed with Ms. Gardner that the language of Rule 1.2 should be "memorialized in a writing" if the communication is unilateral. The Chair inquired if the term "acquiescence" could be used in place of the term "agreement." Ms. Gardner responded that this would be changing greatly what the Rule is trying to require, which is an actual written agreement for a limited representation. Mr. Brault observed that a signed agreement is not even entered in an appearance at the court. Ms. Gardner responded that this was why she was raising

the issue, because she did not think that this is what Rule 1.2 was proposing.

Mr. Brault said that Rule 1.2 is much broader. He did not see the problem if the attorney writes to the client stating that the attorney is in the case for "X", and the client accepts this. Judge Norton noted that the problem is with a self-help center. For example, in Anne Arundel County, there is telephone assistance for legal questions. The case being inquired about may be the next day, and there is no time for the exchange of letters.

Ms. Bowie remarked that she had used the computer software "Virtual Laws of Technology," which provides a number of agreements that her clients just have to click on. She agreed with Mr. Brault that there is no problem. Judge Norton pointed out the exception for self-help advice done for media. Mr. Brault asked if Ms. Gardner would be satisfied if in place of the language "set forth in a written agreement" in section (c), the language "set forth in writing" would be substituted. Ms. Gardner replied that this would be appropriate for her, but she did not know if it would serve the purposes of the Committee for the higher forms of actual limited representation. Ms. Ortiz noted that Rule 1-321 requires a signature for a limited court appearance. A self-help center would be covered by Rule 6.5. No retainer is required. Ms. Gardner commented that much of what the Public Justice Center and Legal Aid does is beyond the scope

of Rule 6.5 but less than a limited representation in a court proceeding.

The Reporter said that there was a way to address this issue. In the first sentence of section (c) of Rule 1.2, the added language that reads: "in accordance with applicable Maryland Rules" covers the limited appearance, which is already in the Rules. There has to be a written agreement signed by both the attorney and the client. The court may not see it, but the agreement has to be signed. Subsection (c)(2) would read: "with the client's informed consent, the scope and limitations of the representation are clearly set forth in writing...". This covers Ms. Gardner's point about sending out the letter but not getting it back. Ms. Gardner agreed that this would address her concern. By consensus, the Committee agreed to this change.

By consensus, the Committee approved Rule 1.2 as amended.

Agenda Item 7. Consideration of proposed amendments to the Rules Governing Admission to the Bar of Maryland, Rule 4 (Eligibility to Take Bar Examination)

Mr. Brault presented Bar Admission Rule 4, Eligibility to Take Bar Examination, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

RULES GOVERNING ADMISSION TO THE BAR OF MARYLAND

AMEND Rule 4 to expand the Board's discretion to waive the requirements of Bar Admission Rules 3 and 4 (a)(2) under certain circumstances, and to make stylistic changes, as follows:

Rule 4. ELIGIBILITY TO TAKE BAR EXAMINATION

(a) Legal Education

(1) In order to take the bar examination of this State an ~~person~~ individual either shall have graduated or shall be unqualifiedly eligible for graduation from a law school.

(2) The law school shall be located in a state and shall be approved by the American Bar Association.

(b) Waiver

The Board shall have discretion to waive the requirements of subsection (a)(2) of this Rule and Rule 3 for any ~~person~~ individual who, in the Board's opinion, is qualified by reason of education, experience, or both to take the bar examination and:

(1) has passed the bar examination of another state and is a member in good standing of the Bar of that state; or

(2) is admitted to practice in a jurisdiction that is not defined as a state by Rule 1 and has obtained an additional degree from an American Bar Association approved law school in Maryland that meets the requirements prescribed by the Board Rules.

(c) Minors

If otherwise qualified, an ~~person~~ individual who is under 18 years of age is eligible to take the bar examination but shall not be admitted to the Bar until 18 years of age.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 5 b.
Section (b) is derived from former Rule 5 c.
Section (c) is derived from former Rule 5 d.

Bar Admission Rule 4 was accompanied by the following Reporter's note.

The proposed amendment to Bar Admission Rule 4 expands the Board's discretion to waive the education prerequisites to taking the bar examination under certain circumstances. The current rule limits waivers to applicants who are members of a bar of another state. The amendment permits the Board to grant a waiver to an applicant who has been admitted to practice law in a jurisdiction that is not a state, provided that the applicant has also received an additional degree from an ABA approved Maryland law school.

The amendment to Rule 4 is accompanied by a Board Rule that sets forth the requirements for the additional degree to qualify under Rule 4, and requires the applicant to furnish to the Board certain documents and certifications.

The word "person" is changed to "individual." Rule 1-202 (l) defines "individual" as a human being, and defines "person" to include corporations and partnerships, among other things.

Ms. Gavin explained that additional language had been added to Rule 4 of the Rules Governing Admission to the Bar of

Maryland. Generally under Rule 4, the qualifications for taking the bar examination are set out. To take the examination, someone must be a graduate of a law school approved by the American Bar Association (ABA). Rule 4 has a provision where the Board of Law Examiners may waive the requirement that the law school has to have been approved by the ABA if someone is a member of a bar of another state. The word "state" is defined in Rule 1 as follows: "'State' means (1) a state, possession, territory, or commonwealth of the United States or (2) the District of Columbia." The person would have to have the requisite education that the Board believes would entitle the person to take the examination.

Ms. Gavin said that several Board members had investigated the masters program for international students at the University of Baltimore. They had asked that additional language be added to Rule 4 to allow people who get their master of laws degree (LLM) from the foreign jurisdiction program to take the bar examination, the same one given to anyone who recently graduated from law school. Rule 4 would add an exception to the eligibility to take the bar examination for people who come through these programs at the two Maryland ABA-approved schools. Other states have similar limitations in scope. Virginia has such a rule. The proposed Rule is based on the Rule in Virginia. They have LLM programs at their law schools for foreign students, and if the students get their advanced degree at an ABA-approved

law school in Virginia, they can take the Virginia bar examination. Otherwise, they cannot take the examination. Virginia does not have the first part of the waiver that is in Rule 4.

Ms. Gavin commented that there is a Board Rule that provides strict guidelines as to what documentation must be sent to the Board, what the curriculum should be, how many hours of bar-related subjects are required, and the likelihood of success. Background documentation that is gathered by the law school must be forwarded to the Board. The school must state its reasons for admitting the person to the program. The Board went through this information very thoroughly. The University of Maryland could also institute an LLM program for foreign students.

This Rule would apply only to the two ABA-approved schools in Maryland. The Board would not accept a person with an LLM degree outside of the State.

Mr. Johnson commented that he had no problem with Rule 4 generally, but he asked why the Rule would be limited to schools in Maryland if a law school is approved by the ABA. Many people attend law school in the District of Columbia. Ms. Gavin responded that LLM programs are not ABA-accredited. The Doctor of Jurisprudence (JD) program that the school has is ABA-accredited. The ABA does not accredit LLM programs anywhere. Mr. Johnson observed that the program at the University of Baltimore currently or the potential program at the University of

Maryland are not ABA-accredited programs. Ms. Gavin said that this is correct. There would not be a problem if the programs were accredited by the ABA. Only the JD program is accredited.

Mr. Sullivan asked what gives the Board confidence that these programs at the University of Baltimore would measure up to the ABA standard. Does the Board review the program? Ms. Gavin answered affirmatively, noting that the Board had reviewed the program thoroughly. The Board Rule states: "In order for an additional degree from an ABA approved law school in Maryland to qualify under Rule 4 (b) of the Rules Governing Admission to the Bar of Maryland: (l) The requirements of the award of the degree from the applicant's law school in Maryland must contain a minimum of 26 credit hours in the bar examination subjects listed in Board Rule 4 and; (2) The applicant shall furnish the following documents and certifications in a form required by the Board: (a) a certification from the dean, assistant dean or acting dean of an ABA approved law school in Maryland that the applicant's foreign legal education, together with the applicant's approved law school degree, is the equivalent of that required for an LL.B or a J.D. Degree in that law school; (b) a certification from the dean, assistant dean or acting dean of an ABA approved law school in Maryland that the applicant has successfully completed a minimum of 26 credit hours in the bar examination subjects listed in Board Rule 4; and (c) all documents considered for admission of the applicant to the degree

program at an ABA approved law school in Maryland must be submitted by the law school and translated into the English language." The law schools must abide by the requirements of the Board.

The Chair told the Committee that the program at the University of Baltimore Law School was getting students from Japan, China, and a number of other places. The LLM program is in American law. He was not sure how many of those students had actually taken the bar examination. Ms. Gavin responded that a few of the students wanted to take the exam, and they went to New York or D.C. which allows foreign students with LLM degrees to take that jurisdiction's bar examination. Then the student could ask for a Rule 4 waiver in Maryland by being the member of a bar in another state. Essentially, the proposed Rule change would avoid the situation where the foreign students have to go to another state to become a member of the bar first and then come back to Maryland to take the bar exam here.

Mr. Johnson expressed his concern about the application of this later in time. The way that Rule 4 is drafted now, it is subject to the Board Rules. Ms. Gavin had explained earlier that the Board has certain criteria for an applicant to qualify. Why would any ABA-approved law school not qualify for the Rule 4 waiver since, by using the criteria, the Board has control over the qualification of the program? This would leave the Rule broad enough, so that it is not limited to schools in Maryland.

Many people go to law schools in D.C. If someone goes to Georgetown Law School, he or she would be prevented from taking the bar examination, because of not having attended the University of Maryland or the University of Baltimore.

The Chair acknowledged that this is an issue. He noted that the tradeoff is that, to some extent, the Board can control what the program is at the University of Baltimore or the University of Maryland. They can find out what the program is, how the program is operated, who the professors are. The Board will not have the same degree of information about a program in another law school, even if it is ABA-accredited. This was the reason that the Rule was limited to local law schools. There may be a good reason to keep it local, but there may be a commerce clause issue. Ms. Gavin remarked that the reason that Virginia kept their rule confined to Virginia law schools is that without this limitation, there would be too little control, because there are so many law schools across the country.

Mr. Brault asked if the schools in the District of Columbia could be added to the Rule. The Chair responded that this could open the door to many other jurisdictions, such as Pennsylvania and Delaware. Mr. Brault commented that Mr. Johnson was correct that the scope should be broader. Mr. Brault himself had attended Georgetown Law School. This is the trend that was seen when the Commission on the Rules of Ethics had met. The discussion involved the modern age of nation-wide and world-wide

practice of law and legal ethics.

The Chair explained that one of the concerns was that it is not just the LLM program itself, but a question of who is being accepted into these programs. What kind of law school in a foreign country did the individual go to? The concern was not being able to identify the criteria of some law school outside of Maryland. What are their criteria for accepting people? What kind of legal education did the person really have? Was it in a system that is in any way comparable to the one in Maryland? Did it require only one year of law school and two years of apprenticing, or was it a real law school?

Mr. Brault responded that someone would have to rely on the school that had accepted the person in the LLM program. The Chair noted that the question is how much information would be available about that law school. Mr. Brault remarked that he would rely on the school itself. In D.C., the law schools are at Georgetown, American, and George Washington Universities. He would not be concerned with students who went to school in another country. He would rely more on the institution that has accepted the person into an LLM program. Mr. Sullivan commented that 49 other jurisdictions are likely to be waiting to get into this.

Mr. Johnson noted that Rule 4 seems to indicate that the Board still has to make a determination under the waiver Rule in the first part of section (b) that the applicant “is qualified by

reason of education, experience, or both to take the bar examination...". Ms. Gavin responded that someone who is not a member of the bar of another state is not qualified. The application is sent back to that person. Mr. Johnson said that the way the Rule is constructed, section (b) states: "The Board shall have discretion to waive the requirements of subsection (a)(2)...," one of which is that the person goes to an ABA-approved law school in a state. A determination is already being made for a waiver that the person has the necessary education and experience. Ms. Gavin pointed out that subsection (b)(1) requires that the person has passed the bar examination of another state and is a member in good standing of the Bar of that state and (in the sentence before that) in the Board's opinion, is qualified by reason of education, experience, or both to take the bar examination.

The Chair pointed out that the problem is with subsection (a)(2) of Rule 4. Ms. Gavin observed that it is in addition to having to be the member of the bar of another state. Mr. Sullivan inquired if this determination is subject to review by the court. Ms. Gavin said that she processes waivers for every examination. She probably gets about 20 requests for them. Someone must be a member of the bar of another state in the United States. The Chair commented that the answer to Mr. Sullivan's question is that the court is not involved at this level. This only allows someone to take the bar exam. If the

person takes the exam and does not pass, the court is not involved. The court only gets involved if an individual takes the bar exam, passes, and then someone objects.

The Reporter commented that a person who does not meet the qualifications is not allowed to take the bar exam. Mr. Sullivan asked if there is any mechanism for challenging the refusal to let the person take the exam. Ms. Gavin replied that no one has challenged this. The Chair noted that someone could file for a judicial review of an administrative agency decision. Ms. Gavin remarked that in other instances, decisions could be challenged according to the Bar Admission Rules. For example, Rule 2, Application for Admission and Preliminary Determination of Eligibility, provides in subsection (c)(3) that the Board may accept an application filed after the applicable deadline for good cause shown. The new Secretary to the Board denies good cause for people who are consistently late. The Court has backed him up. These are the Rules of the Court. The Board follows the Rules, and the matter can always go to court.

Judge Norton inquired what the "additional degree" referred to in subsection (b)(2) means. Could some degree be created by a law school? The Rule does not require that the degree be an LLM. He expressed the preference for the Rule to require an LLM from an ABA-approved law school. Ms. Gavin noted that Rule 4 is limited to Maryland law schools. Judge Norton said that as long as it is limited to law schools in Maryland, he had no problem

with this language. If the Rule is to be extended to other law schools, he suggested that the degree referenced in subsection (b)(2) be an LLM.

Mr. Brault questioned whether any other school had ever asked the Board about this. Ms. Gavin answered that waiver applicants had asked her, because they have to go to other states and become a member of the bar there before they can take the exam in Maryland. They cannot go to an LLM program. Other states do offer LLM programs, and those states allow someone who got an LLM to take the bar examination. Virginia is one of those states. The Chair said that he thought that this proposed change applied only to the University of Baltimore. Currently, the University of Maryland does not have this type of program, although it may in the future. Mr. Brault commented that it is really difficult for someone to have to take two bar examinations. It is a burden on the students. To make the students at Georgetown, George Washington, or American University Law Schools go to New York for one exam and to Maryland for another exam makes no sense. Ms. Gavin noted that the Board has not explored including law schools other than those in Maryland.

Mr. Johnson moved to approve the amendments to Bar Admission Rule 4 as written. The motion was seconded. Mr. Brault asked Ms. Gavin to take this issue back to the Board to see if it could be expanded to schools such as Georgetown. Mr. Johnson inquired what the harm would be in taking out the language in subsection

(b)(2) that reads: “in Maryland” since a Maryland school is the only program that is applying for this at this point. This would provide flexibility, so that the Board does not have to ask the Committee for a change to the Rule later. The Board’s Rules are not being changed, and if the Board determines that some other program qualifies for this, then this Rule would allow it. It should state that it applies to the University of Baltimore Law School, because that is the school being discussed. The Board would still have the right to review and determine whether these applicants deserve the waiver, and the Rule would allow more flexibility. Ms. Gavin cautioned that this change would also give them a flood of waiver applicants from other states where they would have to examine all of those programs.

The motion to approve Bar Admission Rule 4 as it was presented passed with three opposed.

Agenda Item 2. Consideration of proposed new Rule 1-342 (Vexatious Litigants)

After the lunch break, Mr. Brault presented Rule 1-342, Vexatious Litigants, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

ADD new Rule 1-342, as follows:

Rule 1-342. VEXATIOUS LITIGANTS

(a) Scope

The provisions of this Rule are separate from and in addition to any other remedy prescribed by Rule, statute, or the common law.

(b) Applicability

Unless otherwise ordered by the court, a prefiling order issued under this Rule does not apply to an action for a protective order under Code, Family Law Article, Title 4, Subtitle 5 or peace order under Code, Courts Article, Title 3, Subtitle 15.

(c) Definitions

(1) Litigation

"Litigation" means any civil action or proceeding commenced, maintained or pending in any state or federal court, including administrative appeals.

(2) Security

"Security" means an undertaking to assure payment, to the party for whose benefit the undertaking is required to be furnished, of the party's reasonable expenses, including attorney's fees, and costs incurred in or in connection with a litigation instituted or maintained by a vexatious litigant.

(3) Vexatious Conduct

"Vexatious conduct" means the conduct of a self-represented individual in a civil action that satisfies any of the following:

(A) the conduct serves to harass or maliciously injure another party to the civil action;

(B) the conduct is not warranted under

existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law;

(C) the conduct is imposed solely for **unnecessary or unreasonable** delay;

(D) the conduct is imposed to hinder the effective administration of justice, to **unduly** burden judicial personnel and resources, or to impede the normal functioning of the judicial process.

(4) Vexatious Litigant

"Vexatious litigant" means any self-represented individual who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action, whether in the District Court, a circuit court, or the appellate courts of this State, and whether the vexatious conduct was against the same party or against different parties.

Committee note: The definition of vexatious litigant is limited to self-represented individuals because an attorney's conduct is governed by Rule 1-311 (b) and the Maryland Lawyers' Rules of Professional Conduct.

(d) Proposed Prefiling Orders

A prefiling order may be issued only by the chief judge or an administrative judge of the court. If the court, on its own initiative, finds that there is a basis to conclude that the individual has engaged in vexatious conduct and that a prefiling order should be issued, the court shall first issue a proposed prefiling order. The proposed prefiling order shall **be captioned "In the Matter of _____, an alleged vexatious litigant," and** shall include proposed findings to support the issuance of the prefiling order. The court may consider and include in its proposed findings:

(1) the number of litigations that the individual has commenced within a given time

frame that have been finally determined adversely to the individual;

(2) the number of motions, pleadings, or other papers that the individual filed within a given time frame;

(3) whether the individual has filed, in bad faith, unmeritorious motions, pleadings or other papers, has conducted unnecessary discovery, or has engaged in other tactics that are frivolous or intended to cause **unnecessary cost or** delay;

(4) whether, after a litigation has been finally resolved against the individual, the individual has relitigated or attempted to relitigate either (A) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (B) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined;

(5) whether the individual has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding.

Committee note: A prefiling order is not applicable to civil actions that are collateral attacks on a criminal judgment.

(e) Response; Hearing

The individual who would be designated as a vexatious litigant in the proposed prefiling order shall respond within the time provided by Rule 2-321. If a response is filed, the court may, in its discretion, conduct a hearing on the proposed order. If no response is filed, or if the court concludes, based upon **[clear and convincing evidence] [a preponderance of the evidence]**, following a response and any subsequent hearing, that there is a basis for issuing the order, the court may find the individual

to be a vexatious litigant and issue the prefiling order. No determination made by the court shall be deemed to be a determination of any issue in the litigation.

(f) Contents of Prefiling Order

The court may enter an order requiring a vexatious litigant to:

(1) furnish security to assure payment of the party against whom the vexatious conduct is imposed, including estimated costs, attorneys' fees, and other expenses;

(2) obtain legal counsel before the vexatious litigant can continue legal proceedings or commence new litigation;

(3) obtain leave of court before filing any paper, pleading or motion in a pending action;

(4) obtain leave of court before commencing any new litigation;

(5) take any other action reasonably necessary to curtail the vexatious litigant's conduct. **A prefiling order also may direct that a ruling on a request by the vexatious litigant for a waiver of costs be made only by the chief judge or an administrative judge of the court.**

(g) Violation of Prefiling Order

If a vexatious litigant files a pleading or motion in violation of a prefiling order, the court on its own initiative or on motion of a party may strike the pleading or motion; initiate a proceeding for contempt pursuant to the Rules in Title 15, Chapter 200; or take any other action the court deems appropriate.

(h) Security

(1) Generally

If the court issues an order requiring

a vexatious litigant to furnish security, the court shall determine the amount of security and the time within which the security shall be furnished.

(2) Dismissal on Failure to Furnish Security

If the court has ordered a vexatious litigant to post security, and the vexatious litigant does not furnish it as ordered, the court, in its discretion, may dismiss the litigation as to the defendant for whose benefit it was ordered to be furnished.

(i) Application for Leave of Court; Where Filed

If the court has ordered a vexatious litigant to obtain leave of court pursuant to section (f) of this Rule, the application shall be filed, together with the proposed pleading or motion, in the court in which the vexatious litigant wishes to file the pleading or motion.

Committee note: The administrative judge of a court may give to the clerk of that court a directive for the handling of proposed filings by vexatious litigants that differs from directives given by administrative judges of other courts. For example, if a vexatious litigant attempts to file a paper in an open case, the clerk could be directed to bring the application for leave of court and paper to a judge prior to docketing, or the clerk could be directed to docket the documents without first bringing them to the attention of a judge. If a vexatious litigant attempts to file a pleading that would open a new case, the directive to the clerk could be to handle the matter in a manner similar to the manner in which a request for the waiver of prepayment of a filing fee is handled by that court.

Source: This Rule is new.

Rule 1-342 was accompanied by the following Reporter’s note.

New Rule 1-342 is proposed in light of issues associated with self-represented litigants who repeatedly file frivolous lawsuits. The Court of Special Appeals acknowledged some of these issues in *Riffin v. Baltimore County*, 190 Md. App. 11 (2010) and suggested that:

> It may be desirable for the Rules Committee to consider whether it should propose a rule that expressly authorizes pre-filing orders and establishes procedures for notice, opportunity to be heard, standards for issuance of such orders, appropriate parties, and case captioning.

Id. at 36.

At its September 2010 meeting, the Rules Committee passed a motion that a Rule should be drafted that sets forth procedures for handling vexatious litigants. California, Delaware, Florida, Hawaii, Ohio, and Texas have adopted statutes regarding vexatious litigation. Idaho has adopted a Rule on the subject, and Utah has proposed a Rule. Those statutes and Rules were used as guides in drafting Rule 1-342.

Section (a) makes clear that the Rule is separate from other remedies that can be used to handle vexatious litigants, such as injunctions or the denial of prepayment waivers.

Section (b) allows vexatious litigants to file peace orders and protective orders without regard to any restrictions imposed by the prefiling order unless otherwise ordered by the court.

Section (c) contains definitions.

Section (d) outlines the procedure for the court, on its own initiative, to issue proposed prefiling orders. The Rule does not contain a provision allowing a party to file

a motion for a prefiling order. Section (d) also lists the facts the court may consider and include in its proposed prefiling order.

Section (e) provides the procedures for a response and hearing. Two alternatives are presented regarding the standard of proof for finding an individual to be a vexatious litigant: clear and convincing evidence, or a preponderance of the evidence.

Section (f) outlines the contents of a prefiling order.

Section (g) outlines possible ramifications for violating a prefiling order.

Section (h) deals specifically with furnishing security.

Section (i) states that an application for leave of court must be filed in the court in which the vexatious litigant wishes to file the proposed pleading or motion.

A Committee note following section (i) explains that the administrative judge of a court may give the clerk a directive for handling proposed filings, and provides an example of a directive.

Mr. Brault explained that the topic of vexatious litigants had been before the Committee once previously. The Reporter added that it had been presented as a policy question as to whether there should be a Rule on this subject. Mr. Brault told the Committee that section (b) of Rule 1-342 addressed one of the problems that arose. People who need protective orders, peace orders, and other similar orders may have to get them repeatedly because of spousal abuse or other reasons, so the Attorneys Subcommittee did not want the Rule to prohibit this. In those

instances, there is a need for multiple litigation. The next problem was to define the term "litigation." The question of federal litigation came up. Rule 1-342 includes federal court and administrative appeals. The point of the Rule is not to try to control what the federal courts do but to include in the determination of vexatious conduct the litigant's past conduct in federal court.

The Chair commented that he was not sure that this had been accomplished by keeping the term "federal court" in the definition of the word "litigation" in subsection (c)(1) of Rule 1-342. It could be added to the definition of the term "vexatious litigant" in subsection (c)(4) by taking into account what is done in federal court. Mr. Brault noted that the term "security" is defined. The term "vexatious conduct" is generally defined. He asked the Chair about his question as to whether the definition should also particularize what it means. California and other jurisdictions have put in fairly definite details. The Subcommittee had not wanted to define this in too much detail.

Mr. Brault said that another issue to discuss was the addition of the language "unnecessary or unreasonable delay" as opposed to the word "delay," because almost everything is delayed in litigation. The Chair said that in this definition, the language "or the U.S. District Court for the District of Maryland" could be added after the word "State" and before the

word “and.” Another possibility is to add in a reference to all federal courts. Mr. Brault asked if the reference in Rule 1-342 should be limited to the U.S. District Court of Maryland. The Chair responded that it could apply to all federal courts. The language “or federal court” should be taken out of the definition of the word “litigation” in subsection (c)(1). By consensus, the Committee agreed to these changes.

The Chair referred to the definition of “litigation” in subsection (c)(1) and inquired if the language “administrative appeals” means judicial review actions. Usually, they are not appeals, but are actions for judicial review that are within the original jurisdiction of the circuit court. The language could be “judicial review actions.” The Chair noted that he was not sure that this language is needed, because if it is a civil action, then it is in the circuit court. Judge Weatherly pointed out that the Rule may be trying to include actions pending before administrative law judges. The Chair responded that if this is what is intended, the Rule should have this language.

Mr. Brault asked if the language “or federal court” should remain in subsection (c)(1). The Chair answered in the negative, noting that in section (f), which addresses contents of prefiling orders, one of the items is to obtain leave of court before commencing any new litigation. One need not get leave of a circuit court judge to file an action in the U.S. District Court. Mr. Brault commented that the definition of the term “litigation”

would be: "'Litigation' means any civil action or proceeding." The Chair asked if the term "court" in Maryland should include administrative agencies. However, can those agencies be controlled? They are executive agencies. Mr. Brault responded that these are not controlled, so the Rule would apply only to a Maryland court.

The Chair pointed out that the Committee note after section (d) belongs in section (a), Scope. The Committee note provides that this does not apply to civil actions that are collateral attacks on a criminal judgment. The Rule does not apply to habeas corpus and coram nobis actions nor does it apply to actions under the Post Conviction Procedure Act. The Committee note should be in the Rule. Mr. Sullivan noted that some vexatious litigants may get a free pass, because many persistent litigants have some past involvement in criminal cases that gets woven into whatever the person's current grievance is. It is a collateral attack on criminal actions, and their subsequent filings may involve criminal cases.

The Chair explained that habeas corpus, coram nobis, and post conviction actions are civil actions. Post conviction actions are limited by statute, but there is no limit to the number of habeas corpus and coram nobis actions that can be filed. Mr. Sullivan suggested that this be defined, so that the specific vehicles that should be excluded be named, rather than leaving it open as "civil actions." Litigants are not always

meticulous as to how they style a particular cause of action that they are pursuing. The Chair expressed his concern with habeas corpus and other such cases. Mr. Brault inquired if the courts preclude the refiling of habeas corpus cases. The Chair answered that the person may not get any relief but that the court could not preclude the filing of a habeas corpus petition.

Mr. Klein questioned whether it was the intention of the Subcommittee that for the purposes of issuing a prefiling order, the court look at the number of litigations that the person had filed only in Maryland or the number that the person had filed anywhere. Mr. Brault answered that he thought that it was meant to include cases filed anywhere. Mr. Klein noted that the Chair had narrowed this to cases only filed in Maryland. Judge Norton observed that the breadth of this Rule is covered under the definition of "vexatious litigant."

Mr. Klein remarked that subsection (d)(1) of Rule 1-342 provides that the court may consider the number of litigations that the person has commenced. If the litigation is narrowed to State courts, no other case can be considered. The Chair commented that he had not been concerned with section (d) but with including in the definition of the word "litigation" what can be put into the prefiling order. The filing of actions in other courts cannot be controlled. Mr. Klein said that he was asking about which other cases are counted for purposes of issuing the order. Section (d) is written using the definition

of the word “litigation” as a defined term. It had just been narrowed tremendously in scope. Mr. Sullivan expressed the view that this should be broadened to consider other jurisdictions as well.

Mr. Klein suggested that there should be no geographic limitation on the definition of the term “litigation.” If a geographic limitation is to be included, it should be put into the order. The Chair agreed with this. By consensus, the Committee agreed with this suggestion. Mr. Brault noted that this would put the Rule back to the way that it had originally been written as “any state or federal court.” He said that he thought that this was what had been intended.

The Reporter asked whether the language “including administrative appeals” should remain in subsection (c)(1) of Rule 1-342, amending it to “actions for judicial review.” The Chair noted that a period could be put after the word “court.” By consensus, the Committee agreed to this change.

Judge Norton inquired if the language “in other states” should be included in the definition of the term “vexatious litigant.” The definition provides that the individual habitually engages in vexatious conduct, and this could include conduct in other states. The Chair commented that it is a leap to forbid someone from filing an action in the State of Maryland simply because he or she has been a vexatious litigant in Nebraska. This is a policy question. The Reporter remarked that

it is also a leap to include the federal court in subsection (c)(4), because the structure of the Rule now is that the court is doing this *sua sponte*. How would the court in Maryland know what has been going on in federal court?

Judge Love said that there might be a sanction imposed by the Superior Court of the District of Columbia defining the person to be vexatious. Mr. Brault noted that this definition would apply after the court has made findings, after doing some investigation. The words "of this State" could be changed to "of any State or federal court." Judge Love asked if the words "District Court, a circuit court" would be deleted. Mr. Brault answered affirmatively. Judge Love suggested that the language be "trial courts or appellate courts of this or any State."

Judge Pierson expressed his agreement with the Chair. The litigant ought to vex the judges in Maryland somewhat before any action is taken. It is problematic to issue a prefiling order against someone who has been vexatious in other places but never in Maryland. The Chair added that one would not be termed a "vexatious litigant" when he or she filed the first suit in Maryland. Mr. Sullivan expressed the view that finding out that someone was a vexatious litigant in another state should be considered irrelevant. Judge Pierson commented that this fact should be considered, but his point was that the first suit filed in Maryland should not trigger someone being labeled a "vexatious litigant."

Mr. Brault suggested that the words “in this State” could be added to section (d) after the word “conduct” and before the word “and,” so that it would read “...engaged in vexatious conduct in this State and...”. Mr. Maloney noted that someone who files the first suit in Maryland cannot be labeled as “vexatious.” The fact that the person has been termed so in other states is relevant, but he or she is not vexatious in Maryland until the person has filed a number of suits. Mr. Johnson inquired who is being vexed. It is not the court, but the other litigants who are being harassed. It is the people who have to answer all of these lawsuits.

The Chair pointed out the language in subsection (d)(5) of Rule 1-342, which provided that in deciding whether to file a prefiling order, the court may consider whether the person has previously been declared to be a vexatious litigant by any state or federal court. The Chair commented that is not necessary for the court to find out what caused the order to be issued in the other state. It is a judgment to which the judge in Maryland gives full faith and credit. Judge Norton inquired if the word “vexatious” is a term of art that is applicable to all other states and federal jurisdictions. Do other states use different words to describe this? Mr. Sullivan said that he thought that this label had been adopted widely. Judge Norton asked if the language in the Rule could be “determined to meet the criteria of ‘vexatious litigant.’” The Chair pointed out that the statute in

Florida is termed the “vexatious litigant” law. Judge Pierson noted that the statutes that had been distributed at the meeting all used the term “vexatious litigant.” If someone has abused another party in another state, the Rule being discussed today would not let someone file a case at all. If the person tries to use the courts in Maryland, the person would be totally barred.

The Chair commented that it is necessary to be careful in drafting this Rule. It runs up against Article 19 of the Maryland Declaration of Rights, which guarantees access to the courts as well as due process. He had had an experience with a vexatious litigator, Michael Sindram, in the Court of Special Appeals; ultimately, the U.S. Supreme Court entered an order terming Mr. Sindram a “vexatious litigant” and would not let him file anything in that court without prior approval. The way the Court of Special Appeals handled this was by preventing a clerk from waiving filing fees without the approval of the Chief Judge. Under Rule 1-325, Filing Fees and Costs – Indigency, in order to get a waiver, one must show not only indigency but that the action is not frivolous. Mr. Sullivan remarked that this works with the indigent person or the people of ordinary means, but his office had seen a vexatious litigant who sent voluminous papers by Federal Express. The Chair acknowledged that this approach would not stop all of these litigants, but it stops a number of them.

Mr. Brault questioned whether the language “in this State”

should be added as a prerequisite. Judge Weatherly noted that it had been suggested in the definition of "vexatious litigant" in subsection (c)(4) to delete the language "of this State." It may be preferable to keep in this language, which then requires action in this State. The Chair suggested that suits filed in other states could be considered, but before the court issues a prefiling order, there would have to be vexatious conduct in Maryland. Judge Weatherly asked if this could be addressed by the language "of this State," which was the initial language of subsection (c)(4). Mr. Brault expressed the opinion that this would be wise.

Mr. Klein asked if the second sentence of section (d) could state: "... engaged in vexatious conduct in Maryland and... ." That leaves the definition of "vexatious litigant" not restricted to the State of Maryland. There would have to be a finding that someone is a vexatious litigant in Maryland. The Chair noted that this would probably work, because it would allow the court to do this with fewer vexatious incidents in Maryland than might otherwise be required. It could be shown that the person filed many suits in D.C., Pennsylvania, and other places, and that the person has filed suits once or twice in Maryland. It is appropriate to include it in the definition of "vexatious conduct" but require that a prefiling order cite evidence of that conduct. Mr. Brault commented that he would be concerned on a jurisdictional basis that the litigant would have had to have

conducted himself or herself inappropriately in Maryland. The addition of the suggested language to section (d) would address this point. By consensus, the Committee approved the changes to section (d) of Rule 1-342.

Master Mahasa inquired who moves for the finding of "vexatious litigant." Is it opposing counsel or the court? The Chair responded that he did not know how it has come up in different courts. In the case of Michael Sindram, the clerk asked for this finding. Master Mahasa noted that it appears that the clerk, a litigant, a witness, or the court could seek this finding. The Reporter said that the Subcommittee intended for this finding to be made *sua sponte* by the court to avoid a cottage industry of motions to find someone vexatious. Mr. Brault added that the Subcommittee intentionally did not want to have individuals bring the action. If the clerk brought it to the attention of the Chief Judge or the Administrative Judge, then that judge would initiate the procedure for finding someone vexatious, but the clerk obviously would have the knowledge to alert the court as to what is going on. The addition of the language "in this State" is jurisdictional, and with it included, the first paragraph of section (d) is correct.

Master Mahasa commented that this is what the court finds, but it does not address who brings the matter to the attention of the court. Mr. Sullivan noted that it is the court's institutional knowledge that is being stressed in the Rule. To

address an earlier comment about someone being vexed, he assumed that the person could seek relief in some form. He expressed the view that there is some authority for an injunction, although he was not sure that this had ever been done. The Chair said that the U.S. Supreme Court had issued an injunction in Mr. Sindram's case, although they may not have used the term "injunction." He was not certain whether the Supreme Court had done this on its own initiative.

Master Mahasa responded that she was not sure that this had answered her question. There could be an extreme example, which may be similar to what the Reporter had said about someone starting a cottage industry. The person could scan court documents and bring them to the court's attention. Can anyone move for the finding of who is a vexatious litigant?

Judge Norton said that he was currently hearing a case initiated by the court security staff. An inmate had filed numerous lawsuits. He ate glass, and he went to the hospital to try to escape. He had selected a number of attorneys around the State and had filed suit claiming some imaginary relationship with them for a trip out for the next escape attempt. Judge Norton and his colleagues had been alerted, and Judge Norton had denied the waiver of the prefiling fee on the grounds that the suit was frivolous. He had asked a clerk to check the computer, which showed that the inmate had filed in almost every county in the State, which Judge Norton could not have known if he had not

asked the clerk to check this. Attorneys stated that they had never heard of the defendant who had named them as his attorney. Mr. Brault asked if an order had been issued addressing this situation. Judge Norton responded that the defendant is in prison, and Judge Norton had denied the waiver of the prefiling fee. He did not enter a "vexatious litigant" order.

Mr. Sykes asked if the American Civil Liberties Union (ACLU) had had any input on this issue. The Reporter replied that they had not been contacted. Mr. Sykes commented that this issue has constitutional overtones. The Chair agreed, adding that this is why the Rule has to be very narrow. Mr. Sullivan questioned if the local federal court had been contacted as to how they handle vexatious litigants. Although it is not in their local rule, they do screen. The Chair responded that he had checked the Federal Rules of Civil Procedure and the U.S. District Court Local Rules, and he had not seen anything on this. Mr. Sullivan said that he thought that the federal court handled this without a rule. Ms. Gardner asked if the cases being screened were prisoner cases. Mr. Sullivan answered that they can be. There are also suits by *pro se* litigants.

Mr. Brault inquired if the language in subsection (d)(1) of Rule 1-342 should be "the number and type of litigations...". The Subcommittee had looked at the Rule carefully. How particularized should it be? He added that he was not in favor of inviting the ACLU to give their viewpoint. Ms. Potter asked

about the phrase in subsection (d)(1) that read: “that have been finally determined adversely to the individual” and the one in subsection (d)(4) that read “... a litigation has been finally resolved against the individual...”. She expressed the view that the preferable language was “finally determined adversely to the individual.” She added that whichever is chosen, the language should be the same.

The Chair questioned whether the Subcommittee had given any thought to using the word “individual” rather than the word “person.” Someone could file in the name of a corporation too many times. Is this a situation where the word should be “person” rather than the word “individual?” Mr. Brault responded that the Subcommittee had not thought about this. He had always viewed this as meaning an individual. The Chair said that usually it is an individual, but there could be corporations filing in a vexatious manner.

The Reporter noted that Ms. Lynch, an Assistant Reporter, had pointed out in her memorandum that corporations, except in some limited District Court cases, must be represented by an attorney. Judge Norton remarked that small claim cases would be excepted. Mr. Brault agreed, noting that organizational parties also must be represented by an attorney.

Judge Norton expressed his agreement with Mr. Brault’s suggestion to add the word “type” to subsection (d)(1). It would be a good idea to know if the suit was frivolous. The Reporter

asked whether the judge making these findings needs to consider the type of litigation. Judge Norton answered that if the judge is deciding whether the suit is vexatious, some information about what the litigant has been doing would be helpful.

Master Mahasa inquired whether in subsection (d)(3), there should be a judicial determination that the filings were in bad faith. Does this mean that there was a judgment or an order? Is this information being asked because there has been a ruling? Mr. Brault responded that this information likely would be available after a ruling. Mr. Sullivan noted that a hearing on this issue is discretionary under section (e) of the Rule. Master Mahasa expressed the opinion that the Rule appears good on its face, but it involves some constitutional issues. The Chair added that the ACLU may not approve of the Rule, because it may prevent someone from filing a lawsuit without even a hearing. Judge Love suggested that the hearing could be mandatory. Mr. Sullivan said that in the cases where no hearings were conducted, the success rate on appeal was not very good. The Chair pointed out that this is generally true of administrative agencies. He assumed that an order of this kind would be immediately appealable by the vexatious litigant. The appellate courts will want to see what the basis was for the decision against the vexatious litigant.

Master Mahasa noted that the prefiling order may be issued only by the chief judge or an administrative judge of the court,

but even that is subjective, because what may be considered as vexatious on the Eastern Shore may not necessarily be vexatious in Baltimore City. Mr. Brault asked if this should be treated like a summary judgment case, which requires a hearing. The Chair responded that it would be beneficial to require a hearing. Judge Norton remarked that these lawsuits are rare enough that a hearing is not too burdensome. Mr. Maloney added that a hearing would force the vexatious litigant to order a transcript for purposes of an appeal, which much of the time he or she will not do.

The Chair pointed out that section (d) requires the court to make specific findings as to the basis for its conclusion. Mr. Maloney noted that this is easier to do from the bench as opposed to issuing a written opinion. The Chair remarked that doing so from the bench may make it easier for the judge to be reversed. He commented that this type of case had been heard in the Court of Appeals when he had been on the Court, and one had been heard in the U.S. Supreme Court. In these cases, the evidence included a list of cases filed by the vexatious litigant that all had been dismissed for lack of merit. All of this information was laid out, so that there could be no question of the litigant being vexatious.

Mr. Brault said that the goal was to create the framework. The relative merit of any order would be determined on its own. The Chair agreed, but he noted that the court has to make

specific findings. Ms. Gardner referred to Master Mahasa's point about subjectivity. Ms. Gardner said that one of the concerns she had about the way that the Rule was structured with the words "shall," "may," and the catchall provisions was that the Rule seems to indicate that an administrative judge would have to issue a proposed pretrial order but need not consider the specific list of considerations. There have to be findings, but they do not actually have to be on that list. Those are not mandatory, so a pretrial order could be issued on some other finding. Under the catchall provision, a final prefiling order could be issued prohibiting a person from filing any litigation in Maryland for reasons completely unrelated to what is set forth in a Rule. As the Subcommittee and Committee try to finalize the drafting of the Rule, it leaves open the possibility of overreaching by a judge. An example would be that some years ago, an administrative judge sought to prohibit the filing of name change petitions by prisoners who had converted to Islam.

Ms. Gardner said that there could be circumstances in which judges might want to use this Rule inappropriately, and the structure of the Rule may be looser than the genuine problem it is trying to solve. The Chair responded that this could be done with an order listing some basis for a finding but being an order to show cause why the person should not be called a "vexatious litigant" subject to any of these particular issues. The person would be allowed to respond, there would be a hearing, and the

court would make findings that would be specific along with the sanctions.

Ms. Gardner expressed the opinion that on the list of issues, the findings should be required, not optional. Mr. Brault explained that the difficulty of required findings is that it is unclear what the party's issues are. The required finding may eliminate half of the vexatious litigation going on, because it does not involve the required findings. One item that is not in the Rule and probably should be is service of a show cause order. The Rule has a response and a hearing, but no service requirement.

Mr. Sykes commented that this confirms his feelings. The Public Justice Center was present at the meeting, but not the ACLU. It would be important to get all of the possible objections. Otherwise, it would increase the likelihood that the Rule would be challenged, possibly on successful grounds. It is not a good idea to leave stakeholders out of the process when this is precisely the kind of issue that is their "raison d'être." The Chair said that this could be done, but it is not inconsistent for the Committee to first tighten up the Rule the best that they can, so there is less for the others to object to. Mr. Brault asked whether the ACLU would give an opinion without a specific case. Mr. Sykes answered that they would give their opinion on the Rule. They have an interest in how the Rule is structured as well as its specific contents.

Mr. Brault said that language would be added to the Rule addressing service of a show cause order. Then, the response has to be filed. Should the burden of proof be "clear and convincing evidence" or "a preponderance of the evidence?" Judge Love suggested that it should be "clear and convincing evidence." The Reporter explained that the reason that the standard "a preponderance of the evidence" was in the Rule was that although the original draft had the standard "clear and convincing evidence," the Conference of Circuit Court Judges preferred the language "preponderance of the evidence." The choice was given to the Rules Committee. By consensus, the Committee agreed with Judge Love's suggestion to use "clear and convincing evidence."

Mr. Brault drew the Committee's attention to section (h) of Rule 1-342. The Chair inquired if the security referred to in this section belongs in a pretrial order. The court really does not know at this point in the proceedings what kind of security to order, if there should be a security, and if so, how much. In other states, this determination is made when the vexatious litigant actually files another case. At that point, the court can tell the litigant that he or she cannot proceed without posting some amount of security. The Chair commented that this is difficult to do in a pretrial order when there is nothing to attach to it.

Judge Pierson expressed the view that this is problematic. The litigant can be told that the court would look at the

documentation to see if the litigant would be allowed to file, but it is another issue for the court to tell the litigant that the basis for the other side to get attorneys' fees from the vexatious litigant for bad faith conduct would be predetermined, and the litigant would have to post security. Judge Pierson added that the security provision should be eliminated.

Mr. Sullivan remarked that screening is a much more important function to catch the instances where it is a bad-luck litigant or where the person is a nasty character who stumbles upon a valid cause of action. There would be a procedure for a judge to take a look, or for the judge's law clerk to take a look, to see if the one-in-a-million case that the litigant has filed should actually proceed. This is more important than the security. The Chair said that the security could be ordered when the second case is filed. Mr. Sullivan asked if it would violate someone's rights to have a predetermination whether this case meets the minimum standard for the case to proceed in this court. By consensus, the Committee approved deleting section (h).

Master Mahasa inquired if someone could be ordered not to be *pro se.* A person has a right to represent himself or herself. Mr. Karceski asked what the term of the order is. Is it for life? Even a murderer can get parole, so the vexatious litigant should possibly be allowed to file suit at some later time. Mr. Brault said that the idea of security had been eliminated. The Reporter asked if it should be taken out of subsection (f)(1)

as well as section (h). She viewed subsection (f)(1) as the authority to require security, and section (h) as the implementation of it in a particular case.

Mr. Maloney expressed the opinion that the security provisions should not be in the Rule. Mr. Brault said that by eliminating these, what is being relied on is the order of the court for prefiling approval. The Chair pointed out that both can be done. It can be addressed in terms of waiver of costs. There should be no waiver of prepaid costs unless they are approved by the administrative judge. Mr. Brault noted that most of the potential litigants would not be able to post the security. Mr. Maloney added that including a security requirement would get the attention of the ACLU. The Reporter inquired if subsection (f)(1) and section (h) are to be deleted. By consensus, the Committee agreed to delete those provisions. Master Mahasa asked about subsection (f)(2). The Reporter answered that subsections (f)(1) and (2) are to be taken out as well as section (h).

Mr. Johnson referred to the question Mr. Karceski had asked about the term of the order. The Chair asked if subsection (f)(3) was intended for a pending case or a future case. The Reporter replied that it is for a pending case. The Chair said that this is not needed in a pretrial order. If there is the requirement that the administrative judge approve the waiver of prepaid costs, and subsection (f)(4) is left in the Rule, that

would be sufficient. He suggested that in place of the word "court," the words "administrative or presiding judge" should be substituted. By consensus, the Committee agreed to this change.

Judge Pierson expressed the opinion that subsection (f)(3) is necessary. The Chair noted that subsection (f)(3) applies in a pending action. Would this be affected by a prefiling order generally? It may need to be done in an order in that case. Judge Pierson said that he assumed that this provision was supposed to govern all cases in which the court would like to take action against a vexatious litigant, including a pending action. The Chair inquired if a prefiling order is needed for a pending case. Judge Pierson answered that he thought that the prefiling order was required before the person would be allowed to file the suit. The Reporter remarked that it is a question of interpretation of the word "prefiling." Does this mean before the case is filed at all, or before that particular motion is filed? Judge Pierson said that he thought that it meant before that particular motion is filed. The Chair commented that he had been mistaken, because he had thought that the procedures set out for vexatious litigants pertain to future cases. The court can deal with pending cases.

Judge Pierson noted that the Court of Special Appeals case that resulted in their referral of this to the Rules Committee was a pending case, *Riffin v. Baltimore County*, 190 Md. App. 11 (2010). That case was reversed. In that case, the Court said

that without notice and an opportunity to be heard, someone cannot be barred from filing suit. Judge Pierson's recollection was that the decision involved a pending case. The Chair asked if Judge Pierson was referring to the order that was issued by the circuit court, and Judge Pierson replied affirmatively.

The Chair observed that this could rise or fall on its own merits in that situation. If there is a pending case in which someone is filing frivolous motions, the court can deal with this. The court does not have to declare someone a vexatious litigant based on everything else the person has done, it would just be for that case. Judge Pierson asked what the court can do. The Chair answered that the court can tell the person that he or she cannot file any more pleadings without permission or something similar. Judge Pierson pointed out that the person would still have to be given notice and an opportunity to be heard. The Chair responded that this may be the case, but it is not a prefiling order affecting other cases. He had thought that this Rule was intended to stop someone from filing new litigation, because of all the vexatious litigation the person had filed in the past. Judge Pierson said that he thought that the Rule was intended to address the situation in the Court of Special Appeals case. The Chair said that this can be done, but the Rule seems to be mixing apples and oranges when the attempt is to put all of this in one Rule. It seems like the Rule addresses stopping future litigation. Mr. Maloney remarked that

this is what it is in other states.

Master Mahasa said that subsection (f)(3) refers to "a pending action." She inquired if subsection (f)(3) stops the time from running for the motion that has to be filed in 15 or 30 days if it is a pending matter. She also had thought that the Rule was intended to be for future litigation. The Chair commented that Judge Pierson was correct in saying that the Rule should provide some procedural aspect in a pending case to tell the person that he or she cannot file any more suits. He said that this is different than what the Rule is addressing.

Mr. Brault asked if the words "in a pending action" should be taken out. The Chair replied that those words should be taken out or put into a separate section. The courts can already deal with this, so no Rule is necessary. Mr. Brault said that the language should be taken out. The Reporter asked if a Committee note should be added that provides that this Rule does not apply to vexatious filings in a pending case, because that can be handled in that case. Mr. Brault answered affirmatively. The Chair pointed out that Rule 1-341, Bad Faith – Unjustified Proceeding, applies. Mr. Brault said that the note could provide that this matter is treated under Rule 1-341. Judge Pierson observed that the court has the inherent power provided that it can rely on what the Court of Special Appeals had said in that case to prevent the litigant from filing further motions in a pending case. Mr. Brault noted that there could be many motions

filed continually trying to tie up property.

Judge Pierson commented that he had heard a foreclosure case in which a self-represented litigant had filed about 60 motions. Judge Pierson had issued a show cause order, and the litigant filed an appeal, so the circuit court lost jurisdiction. Master Mahasa inquired how subsection (f)(3) of Rule 1-342 with the proposed modifications to take out the language "in a pending action" differs from subsection (f)(4). Mr. Karceski suggested that subsection (f)(4) should come before subsection (f)(3). One would have to obtain permission to file the case before he or she can file any pleadings in the case.

Master Mahasa asked if the litigant must get permission for each step of the litigation. Mr. Sullivan replied that he was not sure about that, but the word "commenced" means opening a file. The litigant may not bother to wait to hear whether the judge is going to let him or her proceed. The Chair pointed out that this is an action entitled "In re Alleged Vexatious Litigant." This is a separate case. Based on that, the judge will issue an order that states that the litigant may not file any new cases without the judge's permission. If there is a pending case, a new case entitled "In re Vexatious Litigant" will not be opened; the issues will be addressed in the pending case. Judge Pierson inquired as to what would happen if several cases are pending. Could one "In re Vexatious Litigant" case cover all pending cases? The Chair questioned whether this is a new action

that would be superimposed on existing actions. Judge Pierson responded that the person to whom he had referred earlier was involved in several other cases. The Chair inquired if those cases can be addressed the same way.

Judge Pierson asked if he would have to hold a separate hearing for each case. The Chair replied that this may not be necessary if the judge can define in one case that the litigant has been vexatious. He had suggested that the prefiling order only be entered by an administrative judge or a presiding judge, because this would be taking into consideration cases in the entire court. Judge Pierson remarked that he would be happy to cede authority to the administrative judge. However, it occurred to him that there could be a situation where it is necessary to cover several pending cases, so that adding that in would be useful. The Chair asked whether this procedure should be used for that. It would not be necessary to start a new case and declare the current litigant vexatious in six pending cases. The issue could be addressed in those cases. Judge Pierson inquired why it would not be better to address this all in one case, rather than having six hearings and six show cause orders.

Mr. Karceski asked what would be the result if one of the six cases has merit, but the judge does not review all six and generalizes from a small sample. This is not a good situation. The Reporter noted that the judge should be reviewing all six cases. Mr. Karceski remarked that the judge may not be doing so;

all of the cases are not necessarily in his or her jurisdiction. The Chair commented that he had not been aware that the courts were using this kind of rule to address vexatious conduct in a pending case. The judges do not need a Rule to do that.

Mr. Sullivan asked Judge Pierson if he had entered an order on the 51st motion in his 60-motion case, stating that the court will not entertain any further motions. Judge Pierson responded that he had never gotten to that point. Between the time he had scheduled a hearing and the date of the hearing, the litigant had appealed.

The Chair pointed out that the judge could enter an order after five motions for reconsideration have been filed. The judge could issue an order stating that no further motions could be filed. Judge Love added that the judge could issue this order without concluding that the litigant is vexatious in that case. The judge could use the conduct of the litigant in that case and the five other cases to form the basis that he or she is a vexatious litigant in the future. The Chair disagreed, pointing out that this is an issue to be determined by the administrative judge. Judge Love clarified that he meant the administrative judge. The Chair noted that this would give the administrative judge cause to issue one of these orders.

Judge Pierson observed that the Chair seemed to be saying that the administrative judge can only issue the order in cases in which the vexatious litigant is the plaintiff. The Chair

responded that it is difficult to stop someone from being a defendant. Master Mahasa asked if a defendant can be stopped from defending. The Reporter said that a defendant could file motion after motion after motion, which is the same problem. The Chair inquired if the judge can tell the defendant he or she cannot defend any more actions.

Judge Pierson reiterated that subsection (f)(3) should remain in the Rule. The Chair pointed out that this provision mixes apples and oranges. He thought that this Rule was intended to address the situation where someone has filed many frivolous lawsuits, and Judge Pierson would like to be able to issue an order controlling the ability of the litigant to file any new actions. This is how other states are handling this. What subsection (f)(3) mixes in is that it allows use of the new procedure to stop frivolous conduct in a pending case. That is not what was intended.

The Reporter said that she could try to break the Rule into one section pertaining to a new case and another section pertaining to finding the person vexatious in a pending case. Judge Pierson explained that his view was that even given the separate issues, he could imagine a circumstance where the administrative judge should be given the power to stop someone from filing in a pending case. The Chair asked Judge Pierson if, in the situation of a pending case, he would want the administrative judge from his court to tell the litigant in Judge

Pierson's case that he is not allowed to file any more papers in that case. Judge Pierson answered in the affirmative.

Judge Norton commented that his view was that the drafting of this Rule neither creates nor does not create any authority for the court. It creates a procedural framework for the authority the court already has. Mr. Karceski referred to Master Mahasa's earlier question about who initiates the vexatious litigant proceeding. He also did not see how this Rule explains how this issue is initiated. If someone is sued every six months, and he or she is a victim of the person who constantly files these suits, does the person being sued have the right to do anything except to make a complaint, or does the person not even have the ability to do that? Does the person have to rely on the court to monitor what is happening in the system? If an abundance of cases is filed, then using its supervisory power, the court would launch the application of the Rule. The Rule does not indicate how this process begins. Mr. Karceski reiterated that some limit to the time the person is not allowed to file should be in the Rule. The prohibition should not go on forever.

Judge Weatherly expressed the opinion that it would be appropriate for someone who had an order filed against him or her as a vexatious litigant to ask for a review by the court. Mr. Karceski remarked that he was also concerned as to how this process gets started. Judge Weatherly responded that in her

county, many of these cases are initiated by the clerk of the court. There have been letters concerning attorneys or private persons who are the defendants. She had seen a letter written to the Administrative Judge in Prince George's County listing cases filed in District Court and cases filed in circuit court. The cases involve the same issue that had been litigated many times. Mr. Karceski expressed the view that this should be addressed somehow.

Mr. Brault said that this would be addressed in the form of the order. When the court issues a prefiling order, this would be the time to explain how the process is initiated. Master Mahasa remarked that it should be addressed before the point of a prefiling order. Mr. Johnson commented that if someone had been sued ten times by the same person, the person sued might want to write a letter to the administrative judge asking that the suit be stopped. As Mr. Karceski had said, there is nothing that allows a litigant to get this process started. Judge Love responded that there is nothing in the Rule that does not allow it. Mr. Johnson pointed out that Rule 1-342 is silent on this issue. The problem is that the administrative judge could refuse to address this, because the person does not have the authority to raise that issue.

Judge Weatherly referred to the language in section (d) that reads: "If the court, on its own initiative...". She assumed that this meant that the court could initiate the process

blocking the vexatious litigant from continuing to file suit. The court may decide to initiate based on information from a court employee or from an individual. Mr. Sullivan pointed out the problem of potential ex parte communication issues. The person would not be communicating with the court about something in general; the communication would be about a particular person and certain grievances, issues that are going to be adjudicated by the court. Mr. Karceski commented that this is a prophylactic measure to ask for the lawsuits to stop.

Judge Norton expressed the view that this was not meant to be effected by motion. To have a motion, there has to be a case that the motion is in. This process should be generated by the court and can be effected in many different ways. It could be by the aggrieved defendant, the security personnel in the court, or the court clerk. To have a motion means that there is a court case, and it would encourage a motions practice. Master Mahasa remarked that the court could be inundated with communications from different sources who would like someone to be named a vexatious litigant. Would the court have to examine and give some time to explore each and every complaint that comes in from anyone?

Judge Love said that he frequently gets letters of complaint. He pulls the file and listens to the recording of the court proceedings. Judge Norton reiterated that a motions practice would entail hearings and responses on issues that may

not turn out to be meritorious. Mr. Karceski inquired if it is a motions practice to provide that someone can file a complaint with the chief judge or the administrative judge. What is the harm of putting a reference to this in the Rule? Since the Rule is silent, that means that anyone can call the chief judge or the administrative judge about a problem with a litigant. Is this correct? Judge Norton responded that this is incorrect. Mr. Karceski asked how it gets done. Judge Norton replied that it is however it can get done. Mr. Karceski said that Judge Love listens to every recording, which is admirable, but probably not all judges do this when a letter complaining about a vexatious litigant is sent to that judge. Judge Weatherly commented that it is not that difficult to look at the court filings, because they can easily be researched electronically.

The Chair pointed out that the letter of complaint comes to the administrative judge. The easiest way to handle this is to call the clerk and ask how many cases the person complained about has filed and what happened with each case. Senator Stone inquired how many cases are too many. The Chair answered that it is not the number of the cases, it is what happened to them. Mr. Sykes noted that the Rule has language in section (d) that provides for the court on its own initiative to find the basis to conclude that the individual has engaged in vexatious conduct. This does not rule out the litigant calling it to the court's attention, but it seems to rule out a full-scale motions hearing

whenever a complaint comes in. That part of the Rule is written well.

Mr. Brault inquired if there should be any limitations on time, type, or person. The litigation may be against one person all of the time, and the intent is to stop the plaintiff from suing this one defendant. The plaintiff could have a lawsuit against someone else. The Chair commented that in either case, if the court finds that the litigant sued someone 32 times for basically the same issue, or the litigant sued 32 people for the same issue, all of which suits the litigant lost, either one of these scenarios would qualify under the Rule. It may not be an exact analogy, but under Rule 16-731, Complaint; Investigation by Bar Counsel, Bar Counsel can initiate an inquiry either on a complaint filed by someone else or on his own initiative from information he gets from anywhere, even from the newspapers. This is an administrative agency; it is not a court. If a litigant writes to the administrative judge, it could at least trigger an inquiry with the clerk. The Chair was not certain that a show cause order could be issued based on complaints from the outside without some investigation.

Mr. Johnson referred to Mr. Karceski's point about limits on the time that someone is not permitted to be a litigant. Why is this not covered under subsection (f)(4), which requires that the litigant must obtain leave of court before commencing any new litigation? He expressed the opinion that a time frame that is

not tied to anything should not be put in the Rule. If the person has to go to court to get leave to file new litigation, that would cover this issue. This would take care of the person being foreclosed from going to court, because the person can ask the court to go forward, and the administrative judge can make a determination at that point. A "parole" provision is not necessary, because subsection (f)(4) would be the escape hatch that would allow the person to file new litigation.

Mr. Karceski said that he agreed with Mr. Johnson to a point but added that there should come a time where the vexatious litigant should not have to get permission from the court to file new litigation. Twenty years after the court issues its order, if the litigant has filed no new litigation and wishes to file a complaint, he or she would probably have to go to the administrative judge, since Mr. Karceski was not sure what the word "court" meant in subsection (f)(4). He assumed that it meant that the administrative judge or the chief judge would give permission for the litigant to file a new case. His view was that Rule 1-342 should have an end point to the ban on the litigant to file litigation.

The Chair suggested that section (d) of Rule 1-342 could begin with the language: "Subject to further order of the court...". Mr. Karceski noted that a review situation is appropriate. Mr. Brault said that the Subcommittee would redraft the Rule. He had pointed out that the Subcommittee would look at

the type of litigation and the length of time the litigant is precluded from filing other litigation. There is no statement that enjoins filing the litigation at all. The only language in the Rule is that the litigant has to get leave of court to proceed with other litigation. The Chair expressed the view that the Rule should not go any further than this.

Ms. Gardner pointed out that subsection (f)(5) of Rule 1-342 is extraordinarily broad and would permit enjoining the filing of litigation. It would allow the court to issue an order that someone is not permitted to file any new litigation. Yet the Rule does not give people notice of this. She expressed the opinion that subsection (b)(5) is far too broad. If the intention is that the administrative judge could prohibit the filing of new litigation indefinitely, the Rule should at least be explicit as to this. The Chair remarked that similar to a First Amendment argument, the Rule could be interpreted as any other action narrowly constrained to curtail the litigant's conduct.

Mr. Sullivan asked if subsection (f)(5) would include incarceration or a finding of contempt as reasonably necessary. The Chair inquired if he would suggest including a contempt provision. Mr. Sullivan replied that the Rule could provide that someone would have to show cause as to whether incarceration is applicable. Some judges would interpret the language "any other action" as very broad.

Ms. Gardner told the Committee that she had a separate concern to raise. She asked if it was intended that an administrative judge in a particular county can issue an order prohibiting the filing of litigation in every other county in the State. The Chair answered that he was not sure that the administrative judge would have that authority. In the District Court, if the Chief Judge issues the order, it could apply to the entire court, because it is a statewide unified court. Judge Norton said that the administrative judge would not have that authority outside of his or her circuit or district. Ms. Gardner noted that Rule 1-342 is less than clear on this point. The Chair responded that the order must be drafted to apply only to that administrative judge's court. On the other hand, if the litigant then goes to another county and files litigation, the judge there can look at the order in county #1 to see if the litigant had been found to be vexatious in that county, find that the suits filed in the second county are the same kinds of suits, and decide that the litigant cannot file in the second county, either. Master Mahasa inquired if each county would need to make that determination. The Chair answered that this would be the case in the circuit court.

Judge Norton remarked that the only cases that he had dismissed were the ones in the counties in his district. He had never dismissed any cases in any other part of Maryland. The Chair said that a judge can only go so far as his or her

jurisdiction extends. Master Mahasa agreed that the Rule is not clear, because she had thought that it meant that once someone is found to be a vexatious litigant anywhere, the person is precluded forever from filing new litigation. Judge Pierson noted that section (i) lends itself to that interpretation as well.

Mr. Sykes suggested that the Subcommittee take a thorough look at the comprehensive memorandum written by Ms. Lynch that was included in the meeting materials. (See Appendix 2). It addresses the provisions for vexatious litigants in other states. The Committee did not receive it until the end of December, and the Subcommittee may not have had a chance to consider it. The Chair added that it would be important to find out if there are any appellate decisions on this issue, not just statutes and rules.

Ms. Smith asked if the Subcommittee could consider the application for leave of court in section (i) -- how it can be filed, whether it is filed with no fee, or whether someone pays for the filing of the application up front, and then the fee is not refunded if the judge does not allow the filing. The clerks would need to know the procedures for this. The Chair said that the costs would only be paid if the application is granted. Ms. Smith asked where the application for leave of court would be filed. Does it go into the existing pretrial order file?

The Chair inquired what happens in a civil case where it is

A vs. B, and C files a motion to intervene. Ms. Smith answered that the motion to intervene is filed in the action in which intervention is sought. The pleading that the person wishes to file is an attachment to the motion to intervene. The court makes a ruling on the motion. If the motion is granted, the pleading can be filed. There is no fee for the motion. Mr. Brault remarked that a filing fee cannot be charged for the application. Ms. Smith questioned where it is filed. Mr. Brault replied that there would be a new category entitled "In the Matter of John Doe, Vexatious Litigant." It would go into the "vexatious litigant" file. Ms. Smith suggested that Rule 1-342 needs to be clearer on this point.

Mr. Brault pointed out that in California, security is required. The Chair asked if security is permitted in the prefiling order. Mr. Brault responded in the affirmative. The Chair noted that one or two states permit this, but he thought that most of them require security in the next case. Mr. Brault said that the definition section in the California Code of Civil Procedure, §391, reads as follows: "Security means an undertaking to assure payment, to the party for whose benefit the undertaking is required to be furnished, of the party's reasonable expenses, including attorney's fees and not limited to taxable costs, incurred in or in connection with a litigation instituted, caused to be instituted, or maintained or caused to be maintained by a vexatious litigant."

The Chair drew the Committee's attention to §§391.1 through 391.6 of the California Code of Civil Procedure. Mr. Brault read from §391.1: "In any litigation pending in any court of this state, at any time until final judgment is entered, a defendant may move the court, upon notice and hearing, for an order requiring the defendant to furnish security." The Chair observed that this is in a pending case. He noted that §391.7 addresses the prefiling order. This prohibits filing new litigation. He had not seen any provision in California that permit the court to require advance security in future cases.

Judge Pierson drew the Committee's attention to the second sentence of §391.7 (b), which reads: "The presiding justice or presiding judge may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants as provided in Section 391.3."

The Reporter noted that the amount of security cannot be determined until the person tries to file the new litigation. The Reporter said that the prefiling order pertaining to the vexatious litigant could provide that if the court grants leave to file the new case, the court shall then determine whether there should be security and the amount of any security that must be filed. It probably would require a case-by-case analysis. How much security is proper for any new case? Maybe none or maybe a large amount. If someone is vexatious, to file a future case, he or she would need permission to file and then would need

to post whatever security is required. Mr. Brault remarked that this is the way California handles this. The Chair added that this is how a number of other states do this. Mr. Brault said that filing altogether is not precluded. There is a prefiling order requiring the litigant to obtain leave of court to file new litigation. This is the same procedure in the proposed Rule.

Mr. Brault commented that to redraft the order provision, the language should be "...shall not file any new litigation without first obtaining leave of court." The Chair added that the prefiling order may provide for this. Mr. Brault was not sure if the Subcommittee should try to figure out how to include some security. The Reporter inquired if it is clear that the judge determines whether to grant leave of court, and then the judge can tell the litigant that he or she may file but only if the litigant posts "$X" amount of security. Is this expressly stated in the original order? Mr. Brault replied that this is what California does.

The Chair commented that Rule 1-342 would be remanded to the Subcommittee, which will review and revise the Rule.

Agenda Item 3. Reconsideration of proposed new Rule 2-704 (Procedure Where Attorneys' Fees Allowed by Contract)

The Chair presented proposed new Rule 2-704, Procedure Where Attorneys' Fees Allowed by Contract and an excerpt from proposed new Rule 2-703, Procedure Where Attorneys' Fees Allowed by Statute, for the Committee's reconsideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 – CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 700 – CLAIMS FOR ATTORNEYS' FEES AND RELATED EXPENSES

ADD new Rule 2-704, as follows:

Rule 2-704. PROCEDURE WHERE ATTORNEYS' FEES ALLOWED BY CONTRACT

(a) Scope of Rule

This Rule applies only to a claim for attorneys' fees in an action in a circuit court where the claim is based on a contractual undertaking by a party to pay a part or all of the attorneys' fees incurred by the other party.

(b) Assertion of Claim

(1) Generally

A claim for attorneys' fees subject to this Rule shall be made in the party's initial pleading or, if the grounds for the claim arise after the initial pleading is filed, in an amended pleading filed promptly after the grounds for the claim arise.

Cross reference: *See G-C partnership v. Schaefer*, 358 Md. 485 (2000); *Accubid v. kennedy*, 188 Md. App. 214 (2009).

(2) Fees in Connection with Appellate Proceeding

A claim for attorneys' fees in connection with an appeal, application for leave to appeal, or petition for certiorari shall be made by motion filed in the circuit court within [15] [30] days after entry of the last mandate or order disposing of the appeal, application, or petition.

Proceedings on the motion shall be in the circuit court and, to the extent practicable, shall be conducted in accordance with Rule 7-203 (e), (f), (g), (h), and (i).

DRAFTER'S NOTE:

(1) At its November 2011 meeting, the Committee voted to include in Rule 2-704 the provision in Rule 2-703 relating to attorneys' fees incurred in connection with an appeal. The determination of entitlement and amount in that situation should be for the court on remand, not a jury. The most applicable procedure would seem to be that in Rule 2-703 (e) through (i).

(2) The comparable provision in Rule 2-703 approved by the Committee required the motion to be filed within 15 days after the last mandate. That is too short a period. A party has 15 days from issuance of a mandate by the Court of Special Appeals to file a petition for certiorari in the Court of Appeals, so the other party may not know until the expiration of that 15th day whether a petition has been filed. If one is filed, the party must wait until the petition is disposed of. I suggest, in both Rules, that the period be 30 days from the last mandate. Even that could be a problem with respect to petitions filed in the Supreme Court, but that doesn't happen very often.

(c) Presentation of Evidence

(1) Timing – Generally

Except as provided in subsection (c)(2) of this Rule, evidence in support of a claim for attorneys' fees shall be presented in the party's case-in-chief.

(2) Exception

On motion of a party or on its own initiative, the court may defer the presentation of evidence on the amount of

attorneys' fees until a verdict is returned or a finding by the court is made that the party is entitled to attorneys' fees.

Committee note: If the court acts under subsection (c)(2) of this Rule, the verdict or finding constitutes an interlocutory determination pending a determination as to the amount of an award. The verdict or finding should be recorded on the docket but not entered as a judgment.

(3) Judgment by Confession

If the party seeking attorneys' fees has requested judgment by confession pursuant to Rule 2-611, evidence establishing the right to such fees and the reasonableness of the requested fee shall be included in the affidavit required by Rule 2-611 (a). If judgment by confession is not entered or is stricken and the action proceeds to trial, the evidence may be submitted at trial **in accordance with this Rule**.

(4) Form

The court may require the party making the claim to present evidence in support of it in the form set forth in Rule 2-703 (e)(3) and, in a complex case, (e)(4). If the **demand** does not exceed **[the lesser of]** 15% of the principal amount of the debt found to be due and owing **[or $4,500]**, the court shall dispense with the need for evidence in that form, provided that the party claiming the fees presents **sufficient proof** of:

(A) the legal basis of the party's right to recover the requested attorneys' fees from the other party;

(B) facts sufficient to demonstrate that the requested fee is reasonable; and

(C) that the fee sought does not exceed the fee that the claiming party has agreed to pay that party's attorney.

(d) Determination

(1) Who Makes

(A) Unless the court rules, as a matter of law, that there is no entitlement to any attorneys' fees, the issue of entitlement shall be presented to and determined by the finder of fact.

(B) The issue of the amount of any award shall be presented to and determined by the finder of fact. In a jury trial, the court shall instruct the jury on the appropriate standards to be applied in determining the reasonableness of a fee and, **on motion of a party pursuant to Rule 2-532, 2-533, or 2-535, shall review the reasonableness of an award made by the jury and may amend the amount**.

(2) Part of Judgment

An award of attorneys' fees shall be included in the judgment in the action but shall be separately stated.
Source: This Rule is new.

DRAFTER'S NOTE:

This is an attempt to deal with the issues raised at the November 2011 meeting regarding (1) how and when evidence in support of a claim for contractual attorneys' fees is to be presented, and (2) who makes the determination of entitlement and amount.

The changes made in this proposal are basically as follows:

(1) Consistent with proposed Rule 2-703 (statutory claims), section (b) generally requires the claim for attorneys' fees to be asserted in the party's initial pleading or, if the grounds for the claim arise later, in an amended pleading. In conformance with the Committee's vote, the provision from Rule 3-741 regarding fees sought in a confessed judgment proceeding was added to this Rule. *See also* DRAFTER'S NOTE above regarding fees in connection with an

appellate proceeding.

(2) Subsection (c)(1) requires that evidence in support of the claim be presented in the party's case-in-chief, but subsection (c)(2) allows the court to defer the presentation of evidence as to amount until a special verdict is returned or a finding made that the party is entitled to attorneys' fees. In most contract cases, this should be unnecessary, but in complex ones, it may be more efficient not to throw reams of time records, etc. at the jury until entitlement is resolved, notwithstanding that that may require two verdicts – a special preliminary one on entitlement followed by evidence and deliberations as to amount. There is precedent for such bifurcation, most notably in the determination of punitive damages in civil cases and non-responsibility and death sentences in criminal cases.

(3) Subsection (c)(3) is essentially as approved by the Committee.

(4) Subsection (d)(1) adds a recognition that the court may, when appropriate, decide the issue of entitlement as a matter of law, even in a jury case, but that otherwise that issue will be submitted to the trier of fact. Subsection (d)(2) submits the issue of amount also to the trier of fact, but, in a jury case, requires the court to instruct the jury on the appropriate standards to apply in determining reasonableness and, on motion of a party, requires the court to review the reasonableness of the award. The intent is to give guidance to the jury in setting the award but to allow the court to have the final say on that issue.

Excerpt from proposed new Rule 2-703
(Procedure Where Attorneys' Fees Allowed by Statute) **[not styled]**

. . .

(e) Memorandum

(1) Requirement

A motion filed pursuant to section (d) of this Rule shall be supported by a memorandum.

(2) Time for Filing

(A) If No Bifurcation

Unless the time for filing is extended by the court for good cause, the memorandum shall be filed within 30 days after the motion for an award of attorneys' fees is filed or, if a request for bifurcation was denied, within 30 days after the denial.

(B) Bifurcation; Initial and Supplemental Memoranda

On motion or on its own initiative, the court may bifurcate the issues of the entitlement to attorneys' fees and the amount of attorneys' fees to be awarded and may direct that the initial memorandum address only the issue of entitlement, subject to being supplemented upon resolution of that issue in favor of the moving party. If the court rules in favor of the moving party on the issue of entitlement, it shall include in its order the date by which the supplemental memorandum shall be filed, which shall be no earlier than 30 days after the date of the order.

(3) Contents

Except as provided in subsection (e)(2)(B) of this Rule or unless otherwise ordered by the court, the memorandum shall set forth, with particularity:

(A) the nature of the case;

(B) the legal basis for the claimant's right to recover attorneys' fees from the other party;

(C) the applicable standard for determining a proper award; and

(D) all relevant facts supporting the party's claim under that standard, including, unless otherwise ordered by the court:

(i) the underlying claims permitting fee-shifting as to which the moving party prevailed;

(ii) all other claims made by the prevailing party or by any other party which the prevailing party contested;

(iii) a detailed description of the work performed, broken down by hours or fractions thereof expended on each task, and, to the extent practicable, specifying the work allocated to claims permitting fee-shifting as to which the moving party prevailed;

Committee note: A party may recover attorneys' fees rendered in connection with all claims if they arise out of the same transaction and are so interrelated that their prosecution or defense entails proof or denial of essentially the same facts. *Reisterstown Plaza Assocs. v. General Nutrition Ctr.*, 89 Md. App. 232 (1991). *See also EnergyNorth Natural Gas, Inc. v. Century Indem. Co.*, 452 F.3d 44 (1st Cir. 2006); *Snook v. Popiel*, 168 Fed. Appx. 577, 580 (5th Cir. 2006); *Legacy Ptnrs., Inc. v. Travelers Indem. Co.*, 83 Fed. Appx. 183 (9th Cir. 2003).

(iv) the amount or rate charged or agreed to in a retainer agreement between the party seeking the award and that party's attorney;

(v) the attorney's customary fee for similar legal services;

(vi) the fee customarily charged for similar legal services in the geographic area where the action is pending;

Committee note: Geographic area is not necessarily limited to a single county but may include adjacent or nearby jurisdictions.

(vii) facts relevant to any additional factors that are required by law or by Rule 1.5 of the Maryland Lawyers' Rules of Professional Conduct for the court to consider; and

(viii) any additional relevant factors that the moving party wishes to bring to the court's attention.

(4) Additional Documentation in Complex Cases

If so ordered by the court pursuant to section (c) of this Rule and subject to any order for bifurcation pursuant to subsection (e)(2)(B) of this Rule, a memorandum in support of a motion for an award of attorneys' fees shall be accompanied by time records that are recorded by specific task and attorney, paralegal, or other professional performing the task. The records shall be submitted in the following format organized by litigation phase, referred to as the "litigation phase format":

(A) case development, background investigation, and case administration (includes initial investigations, file setup, preparation of budgets, and routine communications with client, co-counsel, opposing counsel, and the court);

(B) preparing pleadings;

(C) preparing, implementing, and responding to interrogatories, document production, and other written discovery;

(D) preparing for and attending depositions;

(E) preparing and responding to pretrial motions;

(F) attending court hearings;

(G) preparing for and participating in alternative dispute resolution proceedings;

(H) preparing for trial;

(I) attending trial;

(J) preparing and responding to post-trial motions;

(K) preparing and responding to a motion for fees; and

(L) attending post-trial motion hearings.

Committee note: In general, preparation time and travel time should be reported under the category to which they relate. For example, time spent preparing for and traveling to and from a court hearing should be recorded under the category "court hearings." Factual investigation should also be listed under the specific category to which it relates. For example, time spent with a witness to obtain an affidavit for a summary judgment motion or opposition should be included under the category "motions practice." Similarly, a telephone conversation or a meeting with a client held for the purpose of preparing interrogatory answers should be included under the category "interrogatories, document production, and other written discovery." Each of these tasks must be separately recorded in the back-up documentation in accordance with subsection (e)(3) of this Rule.

(f) Response to Motion For Award of Attorneys' Fees and Memoranda

Unless the time for filing is extended by the court for good cause: (1) any response to a motion for an award of attorneys' fees shall be filed no later than 15 days after service of the motion, and (2) any response to a memorandum or supplemental memorandum shall be filed no later than 30 days after service of the memorandum or supplemental memorandum.

(g) Hearing

If requested by a party, the court shall hold a hearing on the motion for an award of attorneys' fees.

(h) Use of Guidelines

In deciding a motion for an award of attorneys' fees in an action in which the court has imposed additional requirements pursuant to section (c) of this Rule, the court may consider the Guidelines Regarding Compensable and Non-Compensable Attorneys' Fees and Related Expenses contained in an Appendix to these Rules.

(i) Judgment

The court shall enter an order either granting, in whole or in part, or denying the motion for an award of attorneys' fees. Unless included in the judgment entered in the underlying action, the order shall be entered as a separate judgment. In the judgment, in an accompanying memorandum, or on the record, the court shall (1) state the reasons for its decision, and (2) if it makes an award, state the standard and methodology used in determining the amount of the award.

. . .

The Chair told the Committee that the next item on the agenda pertains to fee-shifting. A new wrinkle has come into this issue. It had appeared that the issue of fee-shifting by law meant by statute. On October 25, 2011, the Court of Appeals decided *Boland v. Boland*, 423 Md. 296 (2011). The case confirmed an earlier decision that had made clear that a form of attorney fee-shifting exists that is not provided for either by statute or by contract but under the common fund doctrine in a derivative

suit by stockholders on the theory that if the case is successful, the fees can be shifted to the corporation. This is generally a common law doctrine. When the Chair read the case, he wondered whether there are any other of these common fund situations in which there could be attorney fee-shifting other than by statute or contract. Rule 2-703 should have the language "attorneys' fees allowed by law" instead of the language "attorneys' fees allowed by statute," because the Rule could also address the common law setting.

Mr. Brault inquired if an argument could be that if it is provided for in the contract, it is allowed by law. The Chair answered in the negative, explaining that the Rules are different. If the fee-shifting is pursuant to a contract, Rule 2-704 provides that fee-shifting is tried in the case-in-chief. The Reporter suggested that the language could be "by law other than by contract." Judge Love proposed that this could go into a Committee note.

Mr. Carbine noted that the common fund doctrine has been in existence for some time. Mr. Brault said that the common fund doctrine had been discussed, but he had never thought about its impact on the fee-shifting Rules. The Chair responded that it would be easy to make a change to address this in the Rules. Mr. Brault commented that *Boland* had been reversed and remanded for a hearing on the independence of the Special Litigation Committee. This was never raised on appeal. The first time this issue came

up was in a Court of Appeals opinion without it ever being previously raised, briefed, discussed, or being an issue at all.

The Chair said that these Rules were back before the Rules Committee because of Rule 2-704. What he and the Reporter had tried to do in redrafting the Rule was to take into consideration all of the changes that the Committee had decided to make to the Rule. The Rule has been essentially rewritten, because it was too difficult to amend the former version of it. One of the suggestions had been to delete the reference to the term "prevailing party," which was done. In subsection (b)(2) of Rule 2-704, the Committee had decided to add language that was in Rule 3-741, Attorneys' Fees. The Drafter's note after subsection (b)(2) explains how the Rule was rewritten.

The Chair noted that the main issue that caused a great amount of discussion at the November Rules Committee meeting was section (c), Presentation of Evidence. When is evidence presented and to whom is it presented? Subsection (c)(1) provides that with the exception of subsection (c)(2), evidence in support of a claim for attorneys' fees shall be presented in the party's case-in-chief. The exception is that on motion, the court can defer presentation of evidence on the amount of attorneys' fees until a verdict is returned in a jury case or a finding is made by the court that the party is entitled to attorneys' fees. The verdict or finding should be recorded but not entered as a judgment.

The Chair noted that the concept of the judgment by confession was added at Judge Love's suggestion. Subsection (c)(4), Form, preserves the alternatives that the Committee had voted on before the meeting in November. The question was raised whether, in the circuit court, the evidence of reasonableness of the fee can be dispensed with where the claim does not exceed 15% of the principal amount of the debt or $4,500, which is in brackets. This was discussed, and the Committee had decided to send it to the Court of Appeals as an alternative. Section (d) addresses who makes the determination. The Rule provides that, unless the court rules as a matter of law that there is no entitlement to attorneys' fees, the issue of entitlement is presented to and determined by the finder of fact. In a jury case, it would be determined by the jury.

The Chair pointed out that subsection (d)(1)(B) provides that the issue of the amount of any award shall be presented to and determined by the finder of fact. In the jury trial, the court shall instruct the jury on the appropriate standards to be applied in determining reasonableness and, on motion of a party, shall review the reasonableness of the award made by the jury and may amend it. This was an attempt to coalesce the two views that had been expressed. If it is a jury trial, the jury has the first chance to determine the entitlement, unless the court rules, as a matter of law, that there is no entitlement. The jury gets to determine initially the amount with appropriate

instructions to guide their deliberations. Ultimately, on motion, the court can review this.

The Chair said that Rule 2-704 tries to coalesce preservation of the jury trial with the fact that so far, the Court of Appeals has held that the amount of the award is for the judge to determine. This sets up the structure by which the jury can make its award; the judge has a chance to look at it if there is a complaint about it and to review it pursuant to the existing post-trial motions. The Drafter's note explains this. The Chair commented that he and the other drafters had been faithful to decisions made by the Committee at the November meeting.

The Chair told the Committee that he was not sure that the other fee-shifting Rules needed to be changed, other than changing the word "statute" to the word "law." Mr. Brault asked what amendments the court can make. The Chair responded that if in someone's opinion, the jury comes in with a verdict that is much too high on the amount of attorney's fees, the court may lower the amount by remittitur. Mr. Brault commented that the court may not put an additur in. The Chair responded that he did not see a reason why the court could not put in an additur. Mr. Brault questioned if this would affect the defendant's rights to a jury. The Chair answered that this had been the subject of a debate. In the first *Friolo* case, which had been a statutory fee-shifting case, the Court held that, although the jury determined whether fees should be awarded, the amount to be

awarded was for the Court to determine. Judge Pierson and the Chair had had an honest disagreement about whether that approach also applied to contractual fee-shifting.

Mr. Brault noted that the jury in this kind of case does not determine the amount. Additurs to compensatory jury findings have never been allowed, so in subsection (d)(2)(B), using the language "amend the amount" might be allowing an additur. The Chair noted that this was the intent. If the jury comes in and finds that a party has prevailed in a contract case and is entitled to reasonable fees, and the jury decides to award $15, the judge can decide that is unreasonable and raise the amount.

Mr. Brault expressed the view that the Rule should be clear on this. The minutes of the meeting should reflect that if a jury decides the amount of the attorneys' fees is unreasonable (and this is a possibility if one or more of the attorneys is from a large law firm), there could be an additur or a remittitur. The Chair added that it needs to be in the minutes but also in the report to the Court of Appeals indicating that this is what was intended. If the jury decides on an amount that the judge feels is unreasonably low, the issue is whether the judge can add to it. The Court will have to look at this and decide if this is how they want the Rule to be.

The Chair asked if anyone had any comments on proposed Rule 2-704. Mr. Maloney expressed the opinion that the Rule was totally appropriate. Judge Pierson asked if this Rule applies to

cases in which a party is entitled to fees by virtue of a contractual term that permits the prevailing party to get the fees. The Chair answered that it would apply to these cases, but it is not limited to them. Judge Pierson noted that the jury will have to determine by a special verdict who the prevailing party is. The Chair acknowledged this and added that, in that event, the Rule permits the court to defer the presentation of evidence as to amount until that issue is resolved. Mr. Brault noted that this would be similar to punitive damages. The jury would have to be re-instructed and would go back to deliberate. The Chair pointed out that language to this effect, which was not in the Rule before, has been added. The judge instructing the jury on the appropriate standards will help. Judge Pierson asked if under this Rule, the parties can agree to litigate the issue of attorneys' fees after the trial on the merits. The Chair inquired if this would be before judgment is entered, and Judge Pierson replied in the affirmative. He said that there would be a verdict or finding determining entitlement and the amount of attorneys' fees would be determined after the return of the jury verdict.

The Chair drew the Committee's attention to subsection (c)(2) of Rule 2-704, which reads: "On motion of a party or on its own initiative, the court may defer the presentation of evidence on the amount of attorneys' fees until a verdict is returned or a finding by the court is made that the party is

entitled to attorneys' fees." Judge Pierson inquired if the parties could agree by themselves, with the approval of the court, to reserve the issue of attorneys' fees until after trial on the merits. He expressed the view that a Committee note should be added to state this. The Chair suggested that the beginning language of subsection (c)(2) could be: "[o]n motion of a party or on agreement by the parties...". This would be if there is a motion, or the other side does not object. Judge Pierson commented that the idea of the fee-shifting Rules at the outset was to provide guidance to the bar. Currently, the parties may agree that they will not try the issue of attorneys' fees, either entitlement or amount, during the case-in-chief. This will be left for the judge to determine after trial. The Chair responded that this would be appropriate. Judge Pierson said that Rule 2-704 should not imply that this is somehow improper. He added that the Rule does seem to imply this. The Chair stated that this was not the intent, and the Rule could be amended to make it clear. What is important is that it all has to be resolved before there is a judgment.

The Reporter asked how subsection (c)(2) of Rule 2-704 was to be worded. Is the intent to take it out of the discretion of the court? Judge Pierson replied that Rule 2-704 currently provides that presentation of amount evidence can be deferred, which implies that presentation of entitlement determination cannot be deferred. His thought was that the parties should have

that option. The Chair said that he had no problem with this. Mr. Brault asked if this would not ordinarily be available. Judge Pierson responded that the wording of Rule 2-704 carries some implication that the presentation of entitlement determination cannot be deferred. Mr. Maloney asked if Judge Pierson was suggesting a Committee note to make this clear, and Judge Pierson answered affirmatively. The Chair said that the language "or by agreement of the parties" could be added to subsection (c)(2) after the word "party." The words "entitlement to" could be added, so that it would read: "on motion of a party or by agreement of the parties, the court may defer the presentation of evidence on entitlement to or on the amount of attorneys' fees ...". By consensus, the Committee approved this suggestion.

Judge Weatherly pointed out the bracketed language in subsection (b)(2) of Rule 2-704. The Chair explained that this provision addresses fees in appellate proceedings. If someone is looking for attorneys' fees for the appellate proceeding, not for what happened in the circuit court, it will be resolved in the circuit court. The party makes the motion in the circuit court, and the question is when the motion should be made. In the Court of Special Appeals, there are 15 days from the issuance of a Court of Special Appeals mandate to file a petition for certiorari. Someone can file this on the 15th day. It will depend on what the Court of Appeals does with the petition. The

time period of 15 days was what was in the Rule. Someone would need to know whether that case is over before the person files the motion in circuit court, because there may be more attorneys' fees. The suggestion was to change the 15-day period to 30 days.

Mr. Maloney asked if the time period should be 30 days after all appeals are exhausted. There may be an appeal to the U.S. Supreme Court. The Chair responded that he thought that there was a 90-day period to petition for certiorari in the U.S. Supreme Court. He expressed the view that the time period in the Rule should be 30 days. If the Court of Special Appeals issues its mandate on the first day of the month, and as far as the person knows, nothing has happened in the Court of Appeals yet, the person has to file his or her motion in the circuit court by the 16th day of the month. He or she does not know whether on the 15th day of the month, a petition for certiorari has been filed. If the person waits to find out, and the petition has not been filed, then he or she is too late. There is no harm in having a 30-day time period. Mr. Maloney added that 30 days is needed, because most large law firms have billing cycles of 30 days. The Chair reiterated that the time should be 30 days, except for petitions for certiorari to the U.S. Supreme Court. Ms. Gardner asked if the same 30-day period would be applied to Rule 2-703. The Chair replied affirmatively.

Ms. Elmore told the Committee that her primary area of practice was common interest ownership law in homeowners'

associations and condominiums. She expressed her regret at missing the November Rules Committee meeting when the fee-shifting Rules in the District Court had been discussed, but she hoped that it was not too late to talk about the fee-shifting Rules at the meeting today. She and her colleagues had an issue with subsection (c)(4)(B) of Rule 2-704. If the claim for attorneys' fees is less than 15% of the principal debt, there is an abbreviated process. Subsection (c)(4)(B) states: "facts sufficient to demonstrate that the requested fee is reasonable...". She and her colleagues practice in at least 16 jurisdictions in Maryland, and every jurisdiction is different. The judges differ as to what facts they require. This makes it extremely difficult for the attorneys, the litigants, and the judges to determine what the attorneys are supposed to submit. In the District Court, she and her colleagues file judgments on affidavits, and when they are denied, they often have to go into court, because there was one particular item that the particular judge wanted to see. They recommend that the Committee consider for the claims of attorneys' fees of 15% or less, adopting a standardized model affidavit to satisfy any issues, including the authority to even receive the fees. The Chair responded that this is covered in subsection (c)(4) of Rule 2-704.

Ms. Elmore said that the second issue that she wanted to raise was the services provided. She noted that she had not used the language "the tasks performed," because this is another issue

she and her colleagues have with the fee-shifting Rules. As far as she knew, the term “task” is not defined anywhere. Does it mean “services provided,” or does it mean that the attorney got the court notice, reviewed it, entered it on his or her calendar, and the attorney has to list all of these minor activities for the court’s benefit? The affidavit would contain a category for “time expended” and “amounts requested,” and a category for payment that has been made to the attorney or that the attorney has been promised for work done, similar to a retainer agreement. Then, the attorney can be assured that any payments for any amounts requested from the court are not going to be more than the attorney is going to be paid by his or her client.

Ms. Elmore commented that another requirement for the form is the source of those funds. Finally, the form should have the catchall for the judges, which would be any other request of the judge to help him or her determine the fees. Some kind of a model affidavit would be helpful. When an attorney would file this with the court, he or she can be assured that this is the information that the court will ask for, and this will satisfy all of the requirements. Otherwise, Ms. Elmore noted that she could guarantee that some judges will always request the long form. In the District Court, when the attorneys are asking for small amounts, this would have a chilling effect on the litigant’s (particularly the plaintiffs) ability to go into court. Homeowners’ associations and condominiums are often

nonprofit associations or associations that have a contractual requirement to collect fees. It is a dynamic debt, plus these are corporate entities that are required to have attorneys, particularly if the claim is not a small one. This would make it difficult for these types of nonprofit associations to collect their debts.

The Chair remarked that Ms. Elmore had raised an interesting point. However, he pointed out that what is normally required is a huge amount of documentation. The changes began in the District Court Rule where it is difficult to deal with these requirements. The amount of 15% of the principal debt had been chosen. If this is all that an attorney was asking for, it would not be necessary for the attorney to put in all of the documentation. The attorney just has to show the judge that the attorney has a right to recover the fees, that the fees are reasonable. The attorney need not have a large "laundry list." The intent was to make the Rule simple, not to complicate it.

Ms. Elmore responded that she and her colleagues appreciate this. What they would like is something that would guarantee that when the attorney submits the documentation, it would be satisfactory. The Chair remarked that it may not be satisfactory; it depends on what documentation was submitted. Ms. Elmore commented that the way subsection (c)(4)(B) of Rule 2-704 is worded, some of the judges are going to require what basically amounts to that long list, including tasks where the

attorney is submitting timesheets, etc. The Chair referred to the second sentence of subsection (c)(4) of Rule 2-704: "If the demand does not exceed ... 15% ..., the court shall (emphasis added) dispense with the need for evidence in that form..." provided the attorney shows some reasonableness and entitlement. Ms. Elmore acknowledged this and added that hopefully the Rule will work that way.

Ms. Elmore said that another problem is subsection (e)(3)(D)(iii) of Rule 2-703. This is where the reference to the "task" is. She and her colleagues are not sure exactly what this means. Does this mean every time an attorney opens a file that is a task that has to be listed? Or does it mean the services provided, the items more like what is in the list that is referred to in subsection (e)(4), which is basically the whole log of what had happened, such as preparing the pleadings. It would be helpful to clarify what is meant by the word "task."

Mr. Klein commented that someone may have created the idea of a uniform task-based billing system. Although the word "task" is not defined anywhere, the common usage of the term on the defense side of the practice of law is generally understood. The term "task" has a wide usage in civil litigation on the defense side. The Chair asked if anyone had a motion to amend Rule 2-703, and none was forthcoming.

By consensus, the Committee approved Rules 2-704 and 2-703 as amended. The Chair told Ms. Elmore that she would be able to

present her opinion when the Rule is heard at the Court of Appeals.

Agenda Item 4. Reconsideration of Reply Memoranda Issue

MEMORANDUM

TO	:	Members of the Rules Committee
FROM	:	Members of the Process, Parties & Pleading Subcommittee
DATE	:	December 22, 2011
SUBJECT	:	Reconsideration of Reply Memoranda Issue

At its September 2010 meeting, the Rules Committee explored the possibility of amending Rule 2-504 to include in the scheduling order the time within which any reply memoranda permitted by the court shall be filed. *See* draft Minutes, pp. 102-112.

The amendment to Rule 2-504 was proposed as a result of an attorney's request that the Rules Committee address reply memoranda in motions practice. There are no express provisions in Rule 2-504 or Rule 2-311 addressing authorization to file a reply memorandum, or the time within which a reply memorandum must be filed. Most attorneys and judges do not consider the absence of an express provision to be a prohibition of reply memoranda; however, at least one judge takes the view that reply memoranda are not allowed, and will not read them unless leave to file the reply memorandum has been granted.

At the September 2010 meeting, the Honorable Joseph H. H. Kaplan made a **motion**

to make no changes to the Rules regarding reply memoranda. The motion failed, and, at the request of the Honorable W. Michel Pierson, the Rules Committee deferred consideration of a Rules change.

Judge Pierson subsequently discussed the matter with other judges on the Circuit Court for Baltimore City. Enclosed is an e-mail from Judge Pierson regarding those discussions.

The Process, Parties, and Pleading Subcommittee convened on July 21, 2011 to further discuss the issue. In light of Judge Pierson's discussions with the judges, the Subcommittee decided that it would not recommend a substantive amendment at this time.

As a result of the Rules Committee's vote on Judge Kaplan's motion and the Subcommittee's recommendation, it is necessary for the Committee to reconsider whether it still recommends that there be a substantive Rule change to address reply memoranda. If that remains the Committee's recommendation, should the proposal be an amendment to Rule 2-311 or an amendment to Rule 2-504?

Another option would be to add a Committee Note to Rule 2-311 (b), as discussed at the September 2010 meeting of the Rules Committee. The Committee note would state that the Rule does not preclude a party from filing a reply memorandum. A Committee note would provide notice of the issue without encouraging attorneys to file unnecessary reply memoranda.

At the November 2011 meeting of the Rules Committee, consideration of this topic was deferred, pending receipt of the recommendations of the Conference of Circuit Judges. Correspondence from the Hon. Marcella A. Holland, Chair, Conference of Circuit Judges, and the Hon. John Grason Turnbull, II is enclosed.

KKL:cdc
Enclosures

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 300 - PLEADINGS AND MOTIONS

AMEND Rule 2-311 to add a Committee note following section (b) regarding the filing of reply memoranda, as follows:

Rule 2-311. MOTIONS

(a) Generally

An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, and shall set forth the relief or order sought.

(b) Response

Except as otherwise provided in this section, a party against whom a motion is directed shall file any response within 15 days after being served with the motion, or within the time allowed for a party's original pleading pursuant to Rule 2-321 (a), whichever is later. Unless the court orders otherwise, no response need be filed to a motion filed pursuant to Rule 1-204, 2-532, 2-533, or 2-534. If a party fails to file a response required by this section, the court may proceed to rule on the motion.

Cross reference: See Rule 1-203 concerning the computation of time.

Committee note: The absence of a provision in this Rule concerning reply memoranda does not constitute a prohibition of such

memoranda.

(c) Statement of Grounds and Authorities; Exhibits

A written motion and a response to a motion shall state with particularity the grounds and the authorities in support of each ground. A party shall attach as an exhibit to a written motion or response any document that the party wishes the court to consider in ruling on the motion or response unless the document is adopted by reference as permitted by Rule 2-303 (d) or set forth as permitted by Rule 2-432 (b).

(d) Affidavit

A motion or a response to a motion that is based on facts not contained in the record shall be supported by affidavit and accompanied by any papers on which it is based.

(e) Hearing - Motions for Judgment Notwithstanding the Verdict, for New Trial, or to Amend the Judgment

When a motion is filed pursuant to Rule 2-532, 2-533, or 2-534, the court shall determine in each case whether a hearing will be held, but it may not grant the motion without a hearing.

(f) Hearing - Other Motions

A party desiring a hearing on a motion, other than a motion filed pursuant to Rule 2-532, 2-533, or 2-534, shall request the hearing in the motion or response under the heading "Request for Hearing." The title of the motion or response shall state that a hearing is requested. Except when a rule expressly provides for a hearing, the court shall determine in each case whether a hearing will be held, but the court may not render a decision that is dispositive of a claim or defense without a hearing if one was requested as provided in this section.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 321 a.
Section (b) is new.
Section (c) is derived from former Rule 319.
Section (d) is derived from former Rule 321 b.
Section (e) is derived from former Rule 321 d.
Section (f) is new but is derived in part from former Rule 321 d.

The Chair said that the next item would be reconsideration of the reply memoranda issue. The Chair explained that this had been triggered by a request from a member of the bar complaining that in Baltimore County, one or more judges do not allow reply memoranda to be filed. The Honorable John Fader, a retired circuit court judge from Baltimore County, had responded, commenting that this was for a good reason. The question had been whether to add a Committee note that would state that nothing in Rule 2-311 precludes the filing of reply memoranda.

The Chair commented that after the last time that this issue had been considered by the Committee, the Conference of Circuit Court Judges (the Conference), recommended no change to Rule 2-311. Their view was that no change was necessary, because (1) most reply memoranda are repetitions of what was in the motion and (2) as the memorandum from the Honorable Marcella Holland had indicated (a copy of which is in the meeting materials), reply memoranda are not precluded anyway. (See Appendix 3). An attorney can file one, although the judge may choose not to read

it. The issue is back for the Committee's consideration in light of the Conference's recommendation. One attorney's view was that there should be some language indicating that reply memoranda may be filed; Judge Fader's view is that reply memoranda should not be allowed; and the Conference's view was that it is not necessary to address reply memoranda in the Rule, because anyone who so chooses may file one.

Mr. Klein remarked that he agreed with the Conference. His view was "if it ain't broke, don't fix it." He preferred to have no implication in the minutes of today's meeting that reply memoranda are precluded. He expressed the view that there are instances where a party opposing a motion brings up something that is either new or that is completely false, and it needs to be addressed by the moving party who typically has the burden on the motion. Otherwise, the motion would be ruled on the papers already filed, and the court would not have the opportunity to read a critical fact. He also understood that the courts are concerned that there are reply memoranda that should not be filed because they simply repeat what has already been presented. Mr. Brault told the Committee that he had run into Judge Fader, who had asked Mr. Brault again to request that the Committee recommend barring reply memoranda. Mr. Brault expressed his agreement with Mr. Klein. Some attorneys would like to be able to file reply memoranda, although Judge Fader dislikes them.

Mr. Carbine commented that he had not been part of the

previous discussion on this issue. All of his information is anecdotal, but it is from the point of view of a practitioner. He looked favorably on Rule 2-311 as presented, but it had always been the assumption of the trial bar that reply memoranda may be filed. He preferred not to see the situation where the ability to file reply memoranda varies from county to county, and judge to judge. Many people say this would not happen, but anecdotally, he sees the issue heading in that direction.

Ms. Gardner expressed her disagreement with the characterization that the Rule needs no work. There are judges who take the position that reply memoranda are not permitted, and some opponents file motions to strike reply memoranda, because the Rule does not expressly permit them. There can be a motions practice on the motion to strike. Some judges strike the reply memoranda *sua sponte*. The bigger problem with these is that no time frame exists. If an attorney has a legitimate need to file a reply, there may need to be a mad dash to call the clerk's office to ask if the clerk would hold the file until the attorney files a reply, and the clerk will tell the attorney that he or she may not file a reply. The attorney may contact the judge to say that a reply is being prepared. It is a very difficult situation.

The Chair said that at the appellate level, reply memoranda are expressly permitted. They are rarely what they are supposed to be. They usually are a repetition of what is in the

appellant's brief. They are useful, however, when the appellee's brief states that a certain issue was not preserved and a reply shows that it had been preserved. They have a function when something new is raised in the appellee's brief. The Chair added that his experience was that many reply briefs are only a repetition of what had already been presented.

Mr. Carbine commented that from the perspective of the trials and tribulations of the practitioner, this is almost a bench-bar kind of issue. There are situations like this in federal court where a reply memoranda cannot be filed. The attorney's client may be upset that no reply to the opposition's brief can be filed. The attorney can tell them that he or she is not permitted to file the memoranda, or the attorney can file a reply and does so. The kind of "never, never land" in Maryland is a problem. The issue is explicit in the appellate rules and in the local Rules of the U.S. District Court. Mr. Carbine said that he had always been curious as to why it was never explicitly stated in the Maryland Rules of Procedure at the trial court level. Attorneys will continue to file reply briefs, because there is a great deal of pressure to file them. He did not care about whether to have them or not, but it seems that the trend is toward a policy of court-by court, judge-by-judge deciding whether to allow them, and the practitioner does not know how to proceed.

Mr. Maloney agreed with Mr. Carbine that there is widespread

confusion on this. The other problem is that there is no time limit on filing the reply memoranda. Mr. Carbine added that there is also no page limit. Mr. Maloney noted that most jurisdictions in the country as well as the federal system have a clear rule. Mr. Carbine commented that the federal courts have a definite time limit and page limit. Mr. Klein remarked that he was not averse to having a Rule, but he did not want the situation to be created where reply memoranda are prohibited. The Rule could provide that reply memoranda may be filed if the attorney is addressing a matter that was raised for the first time by the other side or to correct a mistake or error. Ms. Potter expressed the view that the reply memoranda should not be limited to certain situations.

Mr. Patterson said that he subscribed to the theory that the party who has the burden of persuasion should be able to have the last word. In criminal practice, when the defendant files a motion and the prosecutor files a response, no reply is filed, because a hearing is always held. An oral argument always follows the written motions in a criminal case.

Mr. Patterson's stated that allowing a reply memorandum should be spelled out in the Rules. If there is a time limit on the first memorandum and a time limit on the response. There ought to be a time limit on the reply. He expressed the opinion that it cannot be limited by simply adding the language to the effect that the reply must be limited to matters raised in the

responsive motion. It should pertain to an interpretation of the case, but new matters cannot be raised. It could be an issue that someone had the obligation to raise originally and did not.

Mr. Maloney expressed the view that the Court of Appeals likely would not be in favor of limiting existing practice. He agreed that the function of a reply brief should be limited, but trying to define this would result in many different definitions. The narrow problem that should be solved is whether reply memoranda should be allowed, and if so, what the time limit should be. The appellate courts do not define what a reply memorandum is. The Rule should model after the practice in the appellate courts. It should state that a reply memorandum can be filed 10 days after the response. It should be left at this. Everyone would know that it is authorized, and that it must be filed within 10 days of the response. This would clear up 90% of the confusion.

Judge Pierson expressed his opposition to adding this to the Rule. He originally was somewhat conflicted, because he thought that the Rule should contain a deadline. However, the vast majority of responses to motions do not call for replies, and no one thinks that replies are necessary. If a time limit is added to the Rule, every motion will have to be held until there is a reply. The current scenario is not entirely clear, and people may feel anxious, because they do not know if the judge will allow reply memoranda. However, the current situation allows

people to file a reply when they believe that there is a need for one. Most of the time, the judge will consider allowing them, but the problem with specifically providing for them is that this will slow down the docket. Mr. Maloney remarked that this is how reply memoranda are handled in federal court.

Mr. Patterson inquired how difficult a delay of 10 days would be. It does not seem to be very onerous. Reply memoranda would not be required, but the Rule can provide that if a reply memorandum is filed, it must be filed within 10 days after the response. Mr. Brault said that he has been practicing law for a long time, and he has never seen a problem with this. If someone wants to reply, they do so. He has never seen a reply rejected, and he has never seen a judge not allow one to be filed. Mr. Klein expressed the opinion that a Rule is not necessary, as long as reply memoranda are not prohibited. Mr. Brault said that if language is added to a Rule that there are 10 days to reply, replies will be filed to every response to a motion, or the judge will say that he or she cannot rule until the 10 days has run. This would mean that a motion would be filed, there would be 15 days to answer the motion, and then 10 days to reply. This would automatically extend every motion to at least 25 days before it would be ruled on.

Ms. Potter commented that she had filed many motions that the court has not ruled on for a long period of time. Many attorneys have called her to ask where reply memoranda are

addressed in the Rules. The plaintiffs' bar is not paid by the hour, so the attorneys are selective as to which procedures likely would benefit their clients. Mr. Brault inquired if Ms. Potter had ever seen an order rejecting a reply memorandum. Ms. Potter answered in the affirmative, pointing out that this was in Baltimore County. This is why the issue initially had been raised.

Ms. Gardner commented that another vexing scenario that she had experienced was the filing of a reply by the other side at 3:30 p.m. the day before the hearing on the motion. This left her no time to prepare to address it, yet the judge decided that nothing prohibits replies, and no time limit exists. Mr. Maloney added that this scenario happens frequently. Since the Rules are silent, it is difficult to avoid this situation.

Mr. Sullivan commented that he had thought that no rule was necessary, but he had checked Rule 1-201, Rules of Construction, to see if the idea that if something is not prohibited, it is permissible is embraced in the Rule. There is nothing that explicitly instructs judges that unless prohibited, litigants are permitted to do what they want. Judges know that unless prohibited, in most instances, they have discretion to allow the reply memoranda. Most judges do not have the same presumption as the litigants that unless something is expressly prohibited in the Rules, the litigants may do it. Any number of procedures not prohibited by the Rules could be annoying and vexatious if done

in the courtroom before the judge. The problem is the official determination that a void in the Rules is sufficient to guide litigants, unless Rule 1-201 is changed.

Mr. Maloney moved that Rule 2-311 should provide that a party may file a reply memorandum no later than 10 days after the response to a motion was filed. The motion was seconded. Ms. Smith expressed the opinion that this will delay every motion that is filed. The court's computer system would have to be changed, and it would be difficult to identify which cases are more serious than other cases and which ones should be held for a longer period of time. Mr. Maloney noted that the filing of reply memoranda is the overwhelming practice throughout the country in both federal and state courts. It is the overwhelming practice in Maryland, but it is just not recognized by rule. Judge Pierson added that the procedure is working well in the State. Mr. Maloney expressed the view that there is a glaring void. Mr. Brault noted that he did not think that adding a provision for reply memoranda would slow the docket. If the judges are not ruling on motions for three or four months, what harm will adding a reply memoranda provision do?

The Chair commented that Judge Fader had a fallback position, which was that a reply memorandum could be filed with leave of court.

Mr. Carbine expressed the view that this is a bench vs. bar issue. The Chair noted that if the Committee prefers to add

language to the Rule similar to the language of the appellate rules, the reply memoranda could be required in a shorter time, such as five days after the response to the motion. If this is added, the Rule would go to the Court of Appeals and the Conference would oppose it. It is a question of what the Committee thinks is the best procedure. Mr. Klein inquired whether anyone believed that reply memoranda should be prohibited. The minutes of the meeting should reflect the fact that no one subscribed to that opinion. The Chair commented that this was the reason for the Committee note that had been suggested for Rule 2-311, Motions, which would have stated that the fact that the Rule does not provide for reply memoranda does not mean that they are prohibited. The Conference opposed this, because it would encourage the filing of reply memoranda.

Mr. Klein asked if the Committee note had been approved, and the Chair replied that he thought that it had been deferred. The Rule had been sent to the Conference to get its view on this. Their response was that they did not want the Rule to be changed to specifically allow reply memoranda. The issue is back before the Committee. Mr. Maloney questioned whether the Court of Appeals has to approve the addition of Committee notes. The Chair answered in the affirmative.

Judge Pierson referred to an idea that arose when this had been discussed previously about altering Rule 2-504, Scheduling Order, to provide that a scheduling order could provide deadlines

for any reply memoranda. The Chair said that the problem with this was that the scheduling order is entered very early in the case. It may be that in complex cases, this can be determined early, but in the routine case, at the time the scheduling order is entered, the attorney does not know what kind of motions are going to be filed or what an attorney may need to reply to. How can a time deadline for a reply memorandum be set if someone does not know whether a motion or a response to the motion will be filed?

Judge Pierson said that he had been thinking of cases that would be delayed. Baltimore City has a short-track scheduling procedure that includes a 90-day discovery schedule. In that case, 10 days makes a difference in filing motions to compel near the end of the discovery period. Allowing some flexibility to put it in a scheduling order that governs a certain type of case might be the way to address this. Mr. Sullivan noted that this is similar in federal court where, in insurance cases, motions to compel are truncated with less time to respond. Ms. Potter asked if reply memoranda should be allowed only for motions for summary judgment or other dispositive motions. Mr. Carbine pointed out that many other motions also can be extremely important to cases. The Chair called for a vote on Mr. Maloney's motion. The motion carried with 11 in favor, and five opposed.

The Chair noted that there had been a Committee note to Rule 2-311 that had been deferred. By consensus, the Committee

approved the addition of a Committee note to Rule 2-311.

Mr. Brault commented that some of the local federal rules provide that someone cannot communicate with the assigned judge by letter. He had spent some considerable time in Baltimore County, where letters to judges are frequently written. There is no need to be concerned with motions and opposition to the motions and replies -- they are communicated by letter. The attorney has to answer the latest letter to the judge. He asked if this procedure should be changed to be effected only by motion. Senator Stone said while the legislature is in session, legislators who are attorneys usually postpone cases by writing a letter to the judge. The change being discussed would require the legislators to postpone cases by motion. Mr. Brault said that many aspects of legal practice are communicated by letter, including continuances and change of dates. Senator Stone noted that these have to be done by motion in Montgomery County.

The Chair told the Committee that Agenda Items 5 and 6 would be deferred until the February meeting.

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