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 C-D Commerce Park Drive, Annapolis, Maryland on January 9, 2009.

Members present:

Hon. Alan M. Wilner, Chair

F. Vernon Boozer, Esq.
Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Hon. Ellen L. Hollander
Hon. Michele D. Hotten
John B. Howard, Esq.
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Hon. Thomas J. Love
Zakia Mahasa, Esq.
Robert R. Michael, Esq.
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Kathy P. Smith, Clerk
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Ms. Erin Day
Ms. Amy Womaski
Mr. John Hurst
Connie Kratovil-Lavelle, Esq., Executive Director, Department of Family Administration
Paul H. Ethridge, Esq.
Anne Turner, Circuit Court for Wicomico County

The Chair convened the meeting and wished everyone a happy new year. The Reporter introduced the new Rules Committee intern, Ms. Erin Day, a second-year student at the University of Baltimore School of Law. The Chair said that he had two announcements. One was to wish Mr. Sykes a happy birthday. The other was to inform the Committee that the Court of Appeals had

approved an emergency rule to address budget problems. Judges are to give up five days of vacation in 2009. The judges are permitted to buy those days back at the per diem rate. This did not go through the Rules Committee, nor did a similar rule several years ago.

Agenda Item 1. Consideration of proposed amendments to: Rule 9-205 (Mediation of Child Custody and Visitation Disputes) and Rule 17-104 (Qualifications and Selection of Mediators)

Ms. Ogletree presented Rule 9-205, Mediation of Child Custody and Mediation Disputes, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 200 - DIVORCE, ANNULMENT AND ALIMONY

AMEND Rule 9-205 to add provisions concerning designation of a mediator and to delete a cross reference, as follows:

Rule 9-205. MEDIATION OF CHILD CUSTODY AND VISITATION DISPUTES

(a) Scope of Rule

This Rule applies to any case under this Chapter in which the custody of or visitation with a minor child is an issue, including an initial action to determine custody or visitation, an action to modify an existing order or judgment as to custody or visitation, and a petition for contempt by reason of non-compliance with an order or judgment governing custody or visitation.

(b) Duty of Court

(1) Promptly after an action subject to this Rule is at issue, the court shall determine whether:

(A) mediation of the dispute as to custody or visitation is appropriate and would likely be beneficial to the parties or the child; and

(B) a properly qualified mediator is available to mediate the dispute.

(2) If a party or a child represents to the court in good faith that there is a genuine issue of physical or sexual abuse of the party or child, and that, as a result, mediation would be inappropriate, the court shall not order mediation.

(3) If the court concludes that mediation is appropriate and feasible, it shall enter an order requiring the parties to mediate the custody or visitation dispute and designating a mediator in accordance with subsection (b)(4) of this Rule. The order may stay some or all further proceedings in the action pending the mediation on terms and conditions set forth in the order.

(4) Ordinarily, the court shall select and designate a mediator whose name is on the appropriate list maintained pursuant to Rule 17-107, but if the parties agree on a person to conduct the mediation, the parties shall file a joint written request for the designation of that person and provide to the court the person's name, address, telephone number, and qualifications. Regardless of whether the person's name is on the list, the court:

(A) shall rescind any prior designation and designate that person if the person possesses the minimum qualifications prescribed in Rule 17-104 (a) and (c) and, if applicable, Rule 17-104 (d); and

(B) may designate that person if the person does not possess those qualifications.

Cross reference: With respect to subsection b (2) of this Rule, see Rule 1-341 and Rules 3.1 and 3.3 of the Maryland Lawyers' Rules of Professional Conduct.

(c) Scope of Mediation

(1) The court's initial order may not require the parties to attend more than two mediation sessions. For good cause shown and upon the recommendation of the mediator, the court may order up to two additional mediation sessions. The parties may agree to further mediation.

(2) Mediation under this Rule shall be limited to the issues of custody and visitation unless the parties agree otherwise in writing.

(d) If Agreement

If the parties agree on some or all of the disputed issues, the mediator may assist the parties in making a record of the points of agreement. The mediator shall provide copies of any memorandum of points of agreement to the parties and their attorneys for review and signature. If the memorandum is signed by the parties as submitted or as modified by the parties, a copy of the signed memorandum shall be sent to the mediator, who shall submit it to the court.

Committee note: It is permissible for a mediator to make a brief record of points of agreement reached by the parties during the mediation and assist the parties in articulating those points in the form of a written memorandum, so that they are clear and accurately reflect the agreements reached. Mediators should act only as scribes recording the parties' points of agreement, and not as drafters creating legal memoranda.

(e) If No Agreement

If no agreement is reached or the mediator determines that mediation is inappropriate, the mediator shall so advise

the court but shall not state the reasons. If the court does not order mediation or the case is returned to the court after mediation without an agreement as to all issues in the case, the court promptly shall schedule the case for hearing on any pendente lite or other appropriate relief not covered by a mediation agreement.

(f) Confidentiality

Confidentiality of mediation communications under this Rule is governed by Rule 17-109.

Cross reference: For the definition of "mediation communication," see Rule 17-102 (e).

(g) Costs

Payment of the compensation, fees, and costs of a mediator may be compelled by order of court and assessed among the parties as the court may direct. In the order for mediation, the court may waive payment of the compensation, fees, and costs.

~~Cross reference: For the qualifications and selection of mediators, see Rule 17-104.~~

Source: This Rule is derived from former Rule S73A.

Rule 9-205 was accompanied by the following Reporter's note.

The proposed amendments to Rule 9-205 address the issue of whether the parties in child access litigation may, under the Rule, select a mediator of their choice in lieu of a mediator selected by the court.

New subsection (b)(4)(A) requires the court to designate any mediator of the parties' choice who meets the minimum requirements prescribed in Rule 17-104 (a) and (c) [and Rule 17-104 (d) if, in accordance with Rule 9-205 (c)(2), the parties are including marital property issues in the mediation], regardless of whether the

mediator is on the court's list of approved mediators maintained pursuant to Rule 17-107.

New subsection (b)(4)(B) allows, but does not require, the court to designate any person selected by the parties, regardless of the person's qualifications.

In light of the new subsections, the cross reference at the end of Rule 9-205 is deleted as unnecessary.

Ms. Ogletree said that the Family and Domestic Subcommittee had received a request to consider Rule 9-205, because in certain jurisdictions, the Rule was being interpreted as providing that the only person who could be a mediator was a person who is on the court's list of mediators. Rule 9-205 preceded the entire Alternative Dispute Resolution ("ADR") subtitle. It provided that the court could appoint a mediator in domestic cases with the consent of the parties and if the mediator were approved by the court. The Rule was enacted in 1988 in the 128th Report of the Rules Committee, and the comments to that Report indicated that there was a much greater chance of success if the parties could select their own mediator. This theme was carried forward, perhaps not as clearly stated as it could have been.

Ms. Ogletree explained that in view of the fact that mediators who are not lawyers practice around the State, many of whom are very qualified with degrees in such fields as sociology and conflict resolution, mediation is no longer primarily the province of a lawyer. There is at least one jurisdiction in the State where the court is requiring that the mediator must be

chosen from the court's list, even if the person is otherwise qualified, or is a person that the parties trust, such as a clergyperson, and is the one that the parties would choose as the mediator. Rule 9-205 should be amended to clarify that if the parties select someone as mediator, whether that person is on the court list, and whether that person possesses all of the qualifications in Rule 17-104, Qualifications and Selection of Mediator, that person is to be the mediator, and the court does not then have discretion.

The particular jurisdiction to which she had just referred was reading Rule 17-104 in conjunction with Rule 9-205 to say that the mediator must possess the qualifications and be on the court's list. This is not what was originally intended. There is material that was distributed today from one of the circuit courts, which states that someone should not be able to select his or her own mediator; the person has to come from the court's list. (See Appendix 1). Master Mahasa asked if choosing one's own mediator would mean that a person who does not have minimum qualifications could be a mediator. Ms. Ogletree responded that it could be someone's pastor or someone's aunt if all of the parties like the person, and he or she has a good rapport with everyone. If that person can get everyone to agree, why should that person not be the mediator as long as the person is neutral? If the court appoints someone, then the court has to comply with the ADR Rule, but if the parties select someone, that person does not necessarily have to meet all of the requirements.

Ms. Womaski told the Committee that she is a practitioner in a sole proprietor mediation office in Westminster. She thanked Ms. Ogletree for laying out the chronological order of how mediation has developed. She emphasized that the cornerstone of mediation is the premise of a person's right to self-determine. It gives the person an opportunity to be the author of the next chapter of their lives. The court imposes so many different benchmarks along the way to trial that this is basically someone's last chance at taking charge of his or her life. It brings two parties together, so that they may find that common ground. When they leave the court system, they have to live with whatever has been imposed. They can craft that agreement in such a way that it is tailored to their unique lives, work schedules, hobbies and interests, so that these agreements are more durable, and greater compliance results. There is less re-litigation on the same issues. It has a spillover effect on the community. The more that people are exposed to mediation, and the more that they leave the discussion table in agreement as to what they can live with, the better it is for the community. Rather than have the court impose the selection of the mediator, participants should be allowed to keep to the premise of mediation and self-selection. If the parties can make that agreement together, then half the battle is over. They are already demonstrating that they have the right mindset to go forward in mediation.

Master Mahasa remarked that she thought that the Subcommittee had decided that the parties could self-select if

the mediator that they were selecting met the appropriate qualifications. Ms. Ogletree said that the Subcommittee broadened this to include people who the parties would choose, such as a pastor, who might not have 40 hours of mediation training or 20 hours of domestic training, but might be able to get the parties to make an agreement that they could live with. These are going to be the exceptions, rather than the rule. The question is whether mediation is appropriate, and if so, if someone trusts the person chosen to mediate, the agreement is much more apt to be lasting. Section (b) was added to cover the priest, rabbi, or minister who might be working with a couple.

The Chair commented that he and a few other members of the Committee could recall when Rule 9-205 was written. When the Committee first considered the Rule, no one knew anything about mediation, particularly court-annexed mediation. Reports were coming in from a number of jurisdictions around the country, one in particular from San Francisco, where courts had tried this, and some literature following up those programs indicated that they seemed to be working very well. The Committee was very cautious about the court forcing people, who otherwise had a right to be in court and get a judicial determination of their case, to go to mediation. The Rule was crafted in a very narrow way. The original language stated that mediation could only be done when both parties were represented by counsel. There were no qualifications set out in the Rule for mediators or anyone else. There was no single list. Judges might have had lists of

people, which may have included former law clerks, and that was a concern. The Committee and the Court of Appeals were cautious, and they said that if the court ordered mediation, and the parties could agree on a mediator, that would be the person used.

Judge Norton pointed out that Rule 9-205 provides that it is mandatory that the parties can select the mediator of their choice if the mediator is on the court list, but it is discretionary for the court to designate an individual who is not on the list. What process will courts use to make this decision? The Chair responded that one of the issues for the Committee to discuss is whether this discretion is permissible. Judge Norton asked what the standard would be that the court would have to apply. The Chair said that the Rule is limited to custody and visitation issues. It was never expanded into any of the other aspects of divorce litigation. When the Title 17 Rules were proposed and adopted, they were intended to cover ADR for all civil disputes, including the monetary aspects of divorce litigation. When the Court of Appeals adopted those Rules, the Court made clear that the Rules do not affect Rule 9-205, which would not become a part of those Rules, and the Court made an express policy decision that the circuit court could not force parties into fee-for-service mediation unless they consented to it. Under the Title 17 Rules, if both parties do not consent, the court cannot order them into mediation. This was a deliberate decision of the Court of Appeals, and it left Rule 9-205 alone, so that the court could force parties into two

sessions without their consent. This makes it more important for the parties to be able to pick their own mediator, since they cannot opt out of the process itself.

Mr. Brault noted that one of the concerns was forcing mediation on the parties and making them pay for it. Ms. Ogletree observed that under the current Rule, the court can require that the parties go through two mediation sessions and can require that the parties pay for the sessions based on the court's fee schedule. The county Family Services program usually pays for the mediation when the parties are not represented, or they are of limited means, but it is only two sessions. The Chair pointed out that this is pursuant to Rule 9-205. If the parties agree to continue or to change mediators, then they are on a fee-for-service basis, and they must follow the rules in Title 17. The Chair suggested that the Rule could provide that if the court wants to order mediation, it can designate a mediator as a default. The parties are going to go to mediation, and the court can designate someone from the list, unless within so many days, the parties inform the court that they have agreed on someone else. Then there is no initial appointment that has to be rescinded.

Ms Ogletree said that Ms. Womaski had suggested that the parties be told that they have 30 days to select a mediator, or the court will appoint one. The Chair remarked that the Rule could be written that way, or it could provide that the court tell the parties that this will be the mediator unless within a

certain amount of days, the parties inform the court they have agreed on someone else. Then no appointments have to be rescinded, because one has not been made. Ms. Ogletree responded that she had no objection to structuring the Rule this way.

Ms. Womaski inquired as to how to insure that the litigants are informed of their right to select a mediator. The Chair answered that this information would be included in the order. Ms. Womaski noted that when the Rule is implemented, its intent may be lost, and this provision may not be carried out in a meaningful way. Could it be worded in such a way to insure that people are aware that they have the right to select a mediator of their own choosing?

The Chair replied that there is a way to do this. The Title 17 Rules have a similar provision. Judge Norton commented that he did not disagree that the intent seems to be that the litigants have a right to choose, but from a judge's point of view, the language in subsection (b)(4)(B), which states that the court "may designate" the mediator means that it is discretionary. A judge could be very arbitrary on this issue. The Reporter noted that what the Chair was suggesting was to delete most of subsection (b)(4) and replace it with language that would provide that the court could issue an order that informs the parties that they may select their own mediator. Ms. Ogletree added that the parties would be told that they are assigned a specific mediator, unless they would like to choose someone else within 30 days.

Mr. Sykes commented that if the parties select someone who does not have the qualifications, their selection should govern regardless. The Chair said that this is the point of amending Rule 9-205. The suggestion is to change the Rule, so that the court could order two sessions of mediation, naming the mediator, unless within a specified number of days, the parties inform the court that they have agreed on someone else. Ms. Ogletree added that both parties must agree to the selection. Ms. Kratovil-Lavelle asked about the situation where the parties pick someone who does not have the requisite qualifications to be a mediator. The Chair responded that the parties have agreed to the selection. The Reporter noted that the parties would have to file a stipulation.

Ms. Kratovil-Lavelle referred to the situation where a dispute about the chosen mediator arises later, and the parties no longer want the unqualified mediator that they have chosen. She asked if the other party could file a petition for contempt for not complying with the court order. The Chair clarified that the court can only order two sessions. Ms. Kratovil-Lavelle hypothesized a case where the parties go to one session with a mediator that they have agreed on. Ms. Ogletree said that the parties could go to one session with their pastor, who does not qualify as a mediator according to the rules. The parties have the right to go back to the court and say that they no longer want that mediator.

Ms. Kratovil-Lavelle inquired what would happen if one

party likes the mediator, and one does not. Ms. Ogletree answered that the dissatisfied person still has the right to file a petition with the court. Ms. Kratovil-Lavelle noted that the court cannot force someone to attend mediation with a non-qualified mediator. Parties often start out agreeing, and right away this agreement dissipates. The Chair pointed out that the same problem exists with the court designating a mediator who a party does not want. Ms. Kratovil-Lavelle noted that the court does have the power to force, and the court can force the parties to attend mediation with a qualified mediator but not with an unqualified mediator. The Reporter remarked that if the parties are that negative, there is not likely to be a resolution of the issues.

Master Mahasa asked why the court cannot order the parties to go to mediation, just because the mediator is not qualified. It is important that the parties go to mediation. Ms. Ogletree added that the parties have chosen the person. Ms. Kratovil-Lavelle expressed the opinion that it would be a problem with the court trying to force someone to attend mediation even if they agreed initially. There could be a problem under Title 17. The Chair pointed out that Title 17 does not apply to this. Ms. Ogletree added that Title 17 does not apply to custody and visitation issues. This is a separate carved out area, and it has been this way since long before ADR was on the horizon. The Chair stated that under Title 17, the court cannot force someone into mediation without his or her consent at all.

Ms. Turner, the Family Division Coordinator of Worcester County Circuit Court, told the Committee that although she was present for the next agenda item, parenting coordination, she was also very involved in mediation. She expressed her concern as to what the Committee was thinking about in terms of the issue of non-qualified mediators. She said that she understood giving people the option of selecting an unqualified mediator under the Rules, but the Administrative Office of the Courts contacts her office about quality assurance.

Ms. Ogletree noted that one of the things that the court system needs to recognize is that it cannot solve all problems. If the parties believe that their pastor can help them reach an agreement, even though the pastor does not have the 60 hours of requisite mediator training, he or she may have the absolute trust of the parties and be able to reach a consensus. The mediation under Rule 9-205 is not for all domestic issues, it is only for managing the children's schedules. The attempt is to reach an agreement on the issues involving their children. The mediator helps the parties get all of the problems out on the table. If resolution can be accomplished with the pastor as mediator, why should this not be allowed? The Chair commented that the Rule could provide that if the court issues an order for mediation, the clerk can send the list of mediators to the parties with the order, so that the parties can see if they like any of those mediators. Ms. Ogletree remarked that the Subcommittee would have no problem with this suggestion.

The Chair said that the concern from the beginning was that mediation is traditionally by agreement. The parties agree to mediate and to who the mediator is going to be. A court-annexed program interferes with both of those things. The court requires mediation whether or not the parties want it, and the court assigns the mediator. Conceptually, this runs against the grain of what mediation really is -- it is consensual. What brakes are put on the case when the parties have a right to a judicial determination to begin with? Ms. Kratovil-Lavelle commented that the Rule should encourage facilitating agreements. She expressed her concern that one of the parties may want to file a petition for contempt, and the court is put in the position of enforcing an order directing a party to go to a non-qualified mediator. The Chair remarked that if there is no longer any agreement on the person chosen by the parties, then the mediator would be the person selected by the court.

The Chair asked the Committee if they had any suggested changes to Rule 9-205. Ms. Ogletree commented that the Subcommittee would be willing to redraft the Rule to include the default situation. The court could appoint a mediator in default of the parties reaching an agreement, and the parties would have a certain amount of days to reach an agreement and notify the court that they did; otherwise, the mediator would be the person that the court selects from the list. Ms. Ogletree added that she liked the idea of sending out the list with the order, so that the parties can see if there is anyone on that list that

they would want to be the mediator.

The Reporter asked how many days should be put into the initial draft for the parties to respond. Ms. Turner expressed the view that the appropriate number of days would be 15. Most of their orders in the Family Division state that the parties have 60 days to complete the two mediation sessions. The Chair asked to what extent cases under Rule 9-205 are being referred to mediation where one or both parties are unrepresented. Ms. Turner answered that she could not speak for everyone around the State, but in her county they accept everyone, because they have a separate program specifically for unrepresented parties that is subsidized by a family services grant. It is only $25 per person, and if the person cannot afford that amount, it is waived. So whether the person is represented or unrepresented, he or she has the opportunity for mediation.

The Chair asked if any party would be able to come up with a choice for mediator, and if a period longer than 15 days would be helpful for *pro se* parties. He asked if the mediation referrals pursuant to this Rule tend to precede or follow or are not related to the educational seminars (parenting classes) that are provided for in Code, Family Law Article, §7-103.2, Child Support and Custody Educational Seminar, and Rule 9-204, Educational Seminar. Ms. Ogletree answered that in her county, the referral and the educational seminars are concurrent, and Ms. Turner added that it is the same in her county. The orders for parenting classes and mediation go out at the same time the case becomes at

issue and is set in for a scheduling conference. The parties should be setting up their mediation and attending their parenting classes. The Chair inquired if it is intended that the parenting class occur before the mediation. Ms. Turner answered that this is the ideal. Ms. Ogletree remarked that it depends on the jurisdiction. In her county, the classes are offered only once a month.

Master Mahasa said that she was hesitant about parties picking their aunt or their cousin or anyone else as the mediator, if the person does not have the skills to help people work out their own arrangements and might inflame the situation with the best of intentions. She was not sure that people should be allowed to pick anyone just because they feel comfortable with that person. The Chair noted that the person the judge picks may not be the best person to handle the mediation.

Ms. Ogletree observed that if the court orders someone to go to mediation, other than in a custody or visitation case, Title 17 requires that the person have certain qualifications. With respect to children, the situation is a little different. There could be a grandmother whom the parties love who sits the parties down and is able to work out the disagreement. She may not have finished high school, but she has the trust of all of the parties, and as the matriarch of the family, she is listened to by everyone. If the right to opt out is provided, and the parties no longer agree, then the mediator is the one chosen by the court. Not much has been lost, since there have only been

two mediation sessions.

Master Mahasa noted that a situation could be made much worse in two sessions. She said she is in favor of families working things out. In Baltimore City, they have allowed the family members or significant other people to be a part of the mediation to help the parties work through the problems, but the family members are not the primary mediator. Ms. Ogletree remarked that she is thinking more about the pastor or the rabbi as a mediator. Master Mahasa pointed out that the Rule states that anyone could be the mediator and suggested that the language of the Rule should be more specific.

The Chair commented that there have been studies that indicate that one element of success in mediation is that the mediator, particularly in certain ethnic communities, will succeed more if the mediator is part of that community. That mediator understands much that is not learned in mediation training. The mediator may not have all of the required qualifications. This cannot be quantified or put into the Rule, but it is a factor. The parties may agree on someone whom they know and they know knows them. This person may be far more successful than someone who has countless hours of training.

Mr. Brault questioned whether the time period to be included in the Rule is going to be 15 or 30 days. Ms. Ogletree replied that the Subcommittee will need some guidance as to what it should be. Mr. Brault suggested that the time period should begin running after service of the order. Ms. Ogletree explained

that in her county, everyone is required to attend the scheduling conference in person. The master instructs the parties that they are required to go to the parenting class. The Family Services Coordinator gives them a schedule. Mr. Brault stated that this constitutes service. Rule 1-203, Time, takes care of computing the time.

Mr. Leahy referred to the letter that was distributed at the meeting from Powel B. Welliver, Family Law Administrator of the Circuit Court for Carroll County, who raises issues about unqualified mediators soliciting business inappropriately and the court lacking control. (See Appendix 2). He asked if these are legitimate issues. Ms. Ogletree answered that they are not legitimate issues in the particular case to which she is referring. The particular mediator is qualified and has had all of the training required by Title 17. This mediator may be too popular and is nudging some lawyers out. It is a knee-jerk reaction with antitrust connotations. The Chair said that Rule 9-205 will be referred back to the Subcommittee.

Ms. Ogletree presented Rule 17-104, Qualifications and Selection of Mediators, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

AMEND Rule 17-104 to add the phrase "other than by agreement of the parties" to

sections (b) and (d) and to add a cross reference following section (b), as follows:

Rule 17-104. QUALIFICATIONS AND SELECTION OF MEDIATORS

(a) Qualifications in General

To be designated by the court as a mediator, other than by agreement of the parties, a person must:

(1) unless waived by the court, be at least 21 years old and have at least a bachelor's degree from an accredited college or university;

Committee note: This subsection permits a waiver because the quality of a mediator's skill is not necessarily measured by age or formal education.

(2) have completed at least 40 hours of mediation training in a program meeting the requirements of Rule 17-106;

(3) complete in every two-year period eight hours of continuing mediation-related education in one or more of the topics set forth in Rule 17-106;

(4) abide by any standards adopted by the Court of Appeals;

(5) submit to periodic monitoring of court-ordered mediations by a qualified mediator designated by the county administrative judge; and

(6) comply with procedures and requirements prescribed in the court's case management plan filed under Rule 16-202 b. relating to diligence, quality assurance, and a willingness to accept a reasonable number of referrals on a reduced-fee or pro bono basis upon request by the court.

(b) Additional Qualifications - Child Access Disputes

To be designated by the court as a mediator with respect to issues concerning child access other than by agreement of the parties, the person must:

(1) have the qualifications prescribed in section (a) of this Rule;

(2) have completed at least 20 hours of training in a family mediation training program meeting the requirements of Rule 17-106; and

(3) have observed or co-mediated at least eight hours of child access mediation sessions conducted by persons approved by the county administrative judge, in addition to any observations during the training program.

Cross reference: See Rule 9-205 (b)(4).

(c) Additional Qualifications - Business and Technology Case Management Program Cases

To be designated by the court as a mediator of Business and Technology Program cases, other than by agreement of the parties, the person must:

(1) have the qualifications prescribed in section (a) of this Rule;

(2) within the two-year period preceding application for approval pursuant to Rule 17-107, have completed as a mediator at least five non-domestic circuit court mediations or five non-domestic non-circuit court mediations of comparable complexity (A) at least two of which are among the types of cases that are assigned to the Business and Technology Case Management Program or (B) have co-mediated an additional two cases from the Business and Technology Case Management Program with a mediator already approved to mediate these cases;

(3) agree to serve as co-mediator with at least two mediators each year who seek to meet the requirements of subsection (c)(2)(B) of this Rule; and

(4) agree to complete any continuing education training required by the Circuit Administrative Judge or that judge's designee.

(d) Additional Qualifications - Marital Property Issues

To be designated by the court as a mediator in divorce cases with marital property issues, other than by agreement of the parties, the person must:

(1) have the qualifications prescribed in section (a) of this Rule;

(2) have completed at least 20 hours of skill-based training in mediation of marital property issues; and

(3) have observed or co-mediated at least eight hours of divorce mediation sessions involving marital property issues conducted by persons approved by the county administrative judge, in addition to any observations during the training program.

(e) Additional Qualifications - Health Care Malpractice Claims

To be designated by the court as a mediator of health care malpractice claims, other than by agreement of the parties, the person must:

(1) have the qualifications prescribed in section (a) of this Rule;

(2) have completed as a mediator at least five non domestic circuit court mediations or five non domestic non circuit court mediations of comparable complexity;

(3) be knowledgeable about health care malpractice claims because of experience, training, or education; and

(4) agree to complete any continuing education training required by the court.

Cross reference: Code, Courts Article,

§3-2A-06C (c).

Source: This Rule is new.

Rule 17-104 was accompanied by the following Reporter's note.

> The proposed addition of the words "other than by agreement of the parties" to Rule 17-104 (b) and (d) conforms the sections to sections (a) and (c) of the Rule and to the concept of the parties' selection of an alternative dispute resolution provider by agreement, which is contained in Rules 17-101 (b) and 17-103 (a) and (b) and the proposed amendments to Rule 9-205. A cross reference to Rule 9-205 is proposed to be added following Rule 17-104 (b).

Ms. Ogletree explained that Rule 17-104 contains changes conforming to Rule 9-205. The Chair commented that the only change he would suggest is the cross reference after subsection (b)(3). This will come back to the Rules Committee with Rule 9-205. Mr. Sykes remarked that if the party chosen is a lay person who does not have the qualifications under Title 17, there must be some way to make certain that the person is instructed about certain basic aspects of mediation, such as confidentiality, neutrality, and impartiality. This could go into the order if the parties choose the mediator. The mediator ought to be informed of civility and politeness at the very least. Ms. Turner pointed out that a grandmother who is chosen to be the mediator may not understand any of this. Ms. Ogletree noted that she still could get the parties to agree. Master Mahasa reiterated that the grandmother could be involved in the

mediation, but she should not necessarily be the mediator.

Ms. Ogletree questioned how a rule could provide that someone can self-select the mediator if certain people are being excluded. The Rules Committee decided a very long time ago that parties should be able to select their own mediator. Ms. Turner asked if this means unqualified or qualified. Ms. Ogletree replied that in the case being discussed, it was unqualified unless that person was approved by the court. The court can always ask the parties if they are certain that this is the mediator that they want. If a list of qualified mediators is going to be given out, this issue may arise. She expressed the view that it would be huge risk to exclude someone not on the court's list who may still be in school, or may be a social worker, who does not meet all of the requirements, but who has the necessary skills to bring about a resolution of the custody issues. If people are excluded at the outset, litigation will be increased. The goal is to encourage the parties to come up with a plan that they can live with for the rest of their lives and the rest of their children's lives, as Ms. Womaski had stated earlier.

The Chair said that the Reporter had pointed out that subsection (b)(4) of Rule 17-103, General Procedures and Requirements, states: "In an order referring an action to an alternative dispute resolution proceeding, the court may tentatively designate any person qualified under these rules to conduct the proceeding. The order shall set a reasonable time

within which the parties may inform the court that (A) they have agreed on another person to conduct the proceeding, and (B) that person is willing and able to conduct the proceeding. If, within the time allowed by the court, the parties inform the court of their agreement on another person willing and able to conduct the proceeding, the court shall designate that person. Otherwise, the referral shall be to the person designated in the order." Master Mahasa inquired as to the meaning of the language "willing and able." At a minimum, "able" should mean that the person is aware of the aspects of mediation noted earlier by Mr. Sykes. Bringing in a grandmother who is unable to understand all of the aspects of mediation may not be a good idea. Even if this is left up to the court, there are many judges who do not understand the basis of mediation. The Chair commented that this is what the Rule provides now. His view of the word "able" means within the time frame available, not the person's qualifications.

Ms. Smith inquired as to what paper the parties would file, if they decide that they do not want the mediator chosen by the court. Ms. Ogletree replied that they would file a signed statement that they are choosing a certain person. Ms. Smith questioned whether there would be a form for this. Ms. Ogletree responded that *pro se* parties often have trouble filling out forms. Ms. Smith remarked that people will ask the clerks what to file. The Reporter suggested that there be a form signed by both parties and the mediator that they have selected. Mr. Sykes remarked that when the Subcommittee reconsiders this Rule, the

Subcommittee can draft this form. Ms. Smith asked whether the court would have a certain time period to respond. Ms. Ogletree replied that the agreed-upon selection is automatic. It does not have to go to the court. If the parties select, that is the person who will be the mediator.

Rule 17-104 was remanded back to the Family and Domestic Subcommittee.

Agenda Item 2. Consideration of proposed: New Rule 9-205.2 (Parenting Coordination in Cases Involving Child Custody or Visitation Issues) and Amendments to Rule 17-102 (Definitions)

Ms. Ogletree presented Rules 9-205.2, Parenting Coordination in Cases involving Child Custody or Visitation Issues and 17-102, Definitions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 200 - DIVORCE, ANNULMENT, ALIMONY,

CHILD SUPPORT, AND CHILD CUSTODY

ADD new Rule 9-205.2, as follows:

Rule 9-205.2. PARENTING COORDINATION IN CASES INVOLVING CHILD CUSTODY OR VISITATION ISSUES

(a) Scope of Rule

This Rule applies to any case under this Chapter in which the custody of or visitation with a minor child is an issue, including an initial action to determine custody or visitation, an action to modify an

existing order or judgment as to custody or visitation, and a petition for contempt by reason of non-compliance with an order or judgment governing custody or visitation. This Rule is intended to be used in high-conflict actions where the parents demonstrate an inability to make parenting decisions. Its use does not preclude the use of other forms of alternative dispute resolution.

(b) Appointment of a Parenting Coordinator

To reduce the effects or potential effects of parental conflict on the child in a child custody or visitation case, the court may, on its own motion or on the request of either party, appoint a parenting coordinator, or subject to the approval of the court, the parties may agree to the selection of a parenting coordinator, who has consented to serve and who meets the qualifications set out in section (c) of this Rule. In exercising its discretion, the court may decide whether parenting coordination is appropriate in light of any colorable allegations that a party or any child of the parties has been the victim of domestic violence. When a domestic violence issue has been raised by either the court or the parties, the court shall articulate on the record or in writing why the appointment of a parenting coordinator is in the best interest of each child of the parties and shall include special provisions to address the safety and protection of the parties and the child. If the court has already appointed a *pendente lite* parenting coordinator pursuant to subsection (d)(2) of this Rule, the court may select that person to serve as a post-judgment parenting coordinator.

Cross reference: For the definition of "parenting coordination," see Rule 17-102 (h).

(c) Qualifications of Parenting Coordinator

(1) Education and Experience

A parenting coordinator shall:

(A) hold a masters or doctorate degree in psychology, law, social work, counseling, medicine, negotiation, conflict management, or a related subject area;

(B) have at least three years of related professional post-degree experience; and

(C) if applicable, hold a current license in the parenting coordinator's area of practice.

(2) Parenting Coordination Training

A parenting coordinator shall have completed:

(A) at least 40 hours of mediation training in a program meeting the requirements of Rule 17-106,

(B) at least 20 hours of training in a family mediation training program meeting the requirements of Rule 17-106, and

(C) at least 12 hours of training in topics related to parenting coordination, including conflict coaching, the developmental stages of children, the dynamics of high-conflict families, family violence dynamics, mediation, parenting skills, problem-solving techniques, and the stages and effects of divorce.

Committee note: Some or all of the 12-hour training requirement may have been satisfied by graduate studies in the areas listed.

(3) Continuing Education

Unless waived by the court, every two years a parenting coordinator shall accumulate a minimum of eight hours of continuing education in the topics listed in subsection (c)(2) of this Rule and recent developments in family law.

(d) Scope of Appointment and Duties

(1) Generally

The Order of Appointment shall specify the scope of the appointment and whether the parenting coordinator is serving *pendente lite* or post judgment. Duties of the parenting coordinator may include:

(A) working with the parties to develop an agreed-upon, structured plan for complying with the custody and visitation order;

(B) monitoring compliance with existing orders and schedules;

(C) educating the parties about making and implementing decisions that are in the best interest of the child;

(D) developing guidelines with the parties for appropriate communication between them;

(E) suggesting resources to assist the parties; and

(F) assisting the parties in modifying patterns of behavior and in developing parenting strategies so as to manage and reduce opportunities for conflict between them and to reduce the impact of any conflict upon their child.

(2) *Pendente Lite* Parenting Coordinator

(A) Time of Appointment

A parenting coordinator may be appointed at any time *pendente lite*, including a reopened modification case or contempt action.

(B) Term of Service

The term of service for a *pendente lite* parenting coordinator shall be terminated by the entry of a final order, unless the order reappoints the parenting coordinator for another term. The court shall send a notice by ordinary mail to the parties informing them of the termination or

reappointment of the parenting coordinator.

(C) Duties

In addition to the duties listed in subsection (d)(1) of this Rule, a *pendente lite* parenting coordinator may (i) assist the parties in resolving disputes that arise under any *pendente lite* custody and visitation order; (ii) facilitate joint decision-making between the parties; and (iii) report to the court the coordinator's observations of the parties' efforts and abilities to make and implement joint decisions that are in the best interest of their child.

(3) Post-judgment Parenting Coordinator

(A) Time of Appointment

A post-judgment parenting coordinator may be appointed simultaneously with the entry of a final order, decree, or judgment determining or modifying custody or visitation.

(B) Term of Service

The term of service for a post-judgment parenting coordinator shall be specified by the court in its Order of Appointment but shall not exceed two years. The term may be extended by the court for a specified period of time with the agreement of the parties and with the consent of the parenting coordinator.

(C) Duties

In addition to the duties listed in subsection (d)(1) of this Rule, a post-judgment parenting coordinator may (i) if the child's privilege previously has been waived, confer with the child of the parties and with any third party, such as a teacher or physician, who may have knowledge of facts relevant to the dispute, if the child privilege has previously been waived and (ii) if the parties agree and the court so orders, decide minor or temporary departures from,

additions to, or interpretations and clarifications of the court's final custody and visitation order, which decisions shall be binding upon the parties until further order of the court. If the post-judgment parenting coordinator has served as the *pendente lite* parenting coordinator, the court shall enter a separate order in writing that continues, modifies, or supplements the duties of the parenting coordinator. The order may be included in the court's final custody or visitation order, judgment, or decree.

Committee note: Examples of the issues that the post-judgment parenting coordinator may decide include disagreements about visitation exchanges, holiday scheduling, school and extracurricular activities, and temporary and minor departures from or additions to the court-ordered visitation schedule.

(D) Limitation on Decision-making

The post-judgment parenting coordinator's decision-making authority is not a delegation by the court of its power to decide custody and visitation. The coordinator is not authorized to make any decision that changes the terms of the final custody or visitation order or that deprives a party of the rights the party has been granted by the court in its final custody and visitation order.

(e) Removal or Resignation of Parenting Coordinator

(1) Removal

The court may remove the parenting coordinator:

(A) on the motion of one or more of the parties, if good cause is shown, or

(B) on a finding that the appointment is not in the best interest of the child.

(2) Resignation

A parenting coordinator may resign at any time by mailing to the parties by first class mail at least 15 days before the effective date of the resignation a notice that states the effective date of the resignation and contains a statement that the parties may request the appointment of another parenting coordinator. Promptly after mailing the notice, the parenting coordinator shall file a copy of it with the court.

(f) Fees

Pursuant to Rule 17-108, the court shall designate how and by whom the parenting coordinator shall be paid. If the court finds that the parties have the financial means to pay the fees and expenses of the parenting coordinator, the court shall allocate the fees and expenses of the parenting coordinator between the parties and may enter an order against either or both parties for the reasonable fees and expenses.

Committee note: If a qualified parenting coordinator is an attorney and provides parenting coordination services *pro bono*, the number of *pro bono* hours provided may be reported in the appropriate part of the *pro bono* reporting form that the attorney is required to file annually in accordance with Rule 16-903.

(g) Parenting Coordinator as Witness

Unless otherwise provided in the order appointing the parenting coordinator, communications with or information provided to the parenting coordinator in the exercise of the coordinator's duties shall not be confidential and may be disclosed in any judicial, administrative, or other proceeding. Nothing in this section affects the duty to report child abuse or neglect under any provision of federal or Maryland law.

(h) Finality of Order, Decree, or Judgment

A final custody or visitation order,

decree, or judgment that includes a provision appointing a post-judgment parenting coordinator is a final order for purposes of appeal.

Source: This Rule is new.

Rule 9-205.2 was accompanied by the following Reporter's note.

The Conference of Circuit Judges approved a proposed rule to authorize and guide the practice of parenting coordination in the Maryland courts. The Rule was developed by the Custody Subcommittee of the Judicial Conference Committee on Family Law. The Family and Domestic Subcommittee recommends the addition of the Rule with some stylistic and substantive changes. The substantive changes include: (1) clarifying the difference between parenting coordination and other alternative dispute resolution processes, by adding a definition of "parenting coordination" to Rule 17-102, (2) broadening the list of educational degrees that qualify someone to be a parent coordinator, (3) decreasing the amount of time required for training and continuing education, (4) allowing certain graduate studies to count toward the training requirements, (5) notifying the parties of the termination of the *pendente lite* parenting coordinator, (6) changing the term of service of a post-judgment parenting coordinator from one to two years, (7) requiring good cause to be shown any time a parenting coordinator is removed on request of any party, (8) adding notice to the court and parties when a parenting coordinator resigns, and (9) not including the suggested allocation formula to determine fees.

MARYLAND RULES OF PROCEDURE

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

AMEND Rule 17-102 to add a new section (h) defining "parenting coordination" and to make a stylistic change, as follows:

Rule 17-102. DEFINITIONS

. . .

(h) Parenting Coordination

"Parenting coordination" means a process in which the parties work with a parenting coordinator, an impartial third-party professional who meets the qualifications set out in Rule 9-205.2 (c) and who has consented to be appointed by the court or by the parties subject to the approval of the court. The goal of parenting coordination is to resolve disputed parenting or family issues in any action for custody or visitation of a minor child. Although a parenting coordinator may use alternative dispute resolution techniques such as mediation, the coordinator does not engage in formal mediation, arbitration, neutral case evaluation, neutral fact-finding, or other alternative dispute resolution processes.

~~(h)~~ (i) Settlement Conference

"Settlement conference" means a conference at which the parties, their attorneys, or both appear before an impartial person to discuss the issues and positions of the parties in the action in an attempt to resolve the dispute or issues in the dispute by agreement or by means other than trial. A settlement conference may include neutral case evaluation and neutral fact-finding, and the impartial person may recommend the terms of an agreement.

. . .

Rule 17-102 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 9-205.2.

Ms. Ogletree told the Committee that Rule 9-205.2 was written at the request of the Conference of Circuit Court Judges ("the Conference"), who had given the Subcommittee a draft of a proposed rule. The Subcommittee reviewed the draft. Parenting coordination is a form of alternative dispute resolution, which involves much skill but is not necessarily mediation, although mediation skills may be used to come to a conclusion. It involves working with families either pendente lite or post judgment. There are a number of issues that the Subcommittee dealt with based on the draft submitted by the Conference. The Subcommittee wanted to bring a few of the issues to the attention of the full Committee to determine which way the Committee would like to go. Since Rule 9-205.2 is new, the Committee has to consider all of it. Ms. Ogletree introduced John Hurst, who does parenting coordination work both in Maryland and in Virginia. She asked Mr. Hurst to tell the Committee what his work entails before the Committee looks at Rule 9-205.2.

Mr. Hurst told the Committee that he is a parenting coordinator and a mediator in Northern Virginia, and he only works with high-conflict families. The concept behind parenting coordination is that it is more than mediation and involves

intervention with a select group of litigants who are in high-conflict situations. He noted that 90% of parenting coordination is helping the parents to find out what is best for their children, to understand what their problems are and what their interests are, and to find better ways of solving the problems by themselves. If this 90% does not work, then about 10% of the process is actually making minor decisions for the parties. This is one of the issues that concerns the courts -- the extent to which a parenting coordinator should have the quasi-authority they have to make changes, rulings, or decisions for the parties.

Mr. Hurst said that he has to make a decision in only 2 or 3% of his own cases. If he is doing his job correctly, he helps the parents to be able to make their own decisions or come to a decision on their own. He prefers not to make an actual ruling or a decision but to make a recommendation that he presents to the lawyers and to the court. If it is a good recommendation, then the judge will probably go along with it. Also, most parents realize that if he makes a recommendation, it is probably futile for them to go against that recommendation.

Ms. Ogletree said that the first question to consider is whether Rule 9-205.2 should be a separate part of the ADR Rules, or if it should be in the Domestic Rules. The Conference wanted it to be a part of Title 9. It is intended to be used in the custody and visitation cases. Often, if a child is returned from one parent to another five minutes late, the receiving parent is in court filing a petition for contempt the next day. Sometimes,

one parent wants to take the child to a sporting event, and they would be returning two hours later than the agreed-upon usual time. These are the types of situations that the parenting coordinator can get the parties to work out. Section (a) pertains to scope. It applies to any case where custody or visitation of a minor is at issue, including initial actions, an action to modify, or a petition for contempt, and it is intended to be used only in the high-conflict situations. It is probably only going to be used in the cases where the parents can afford to pay for it, because it is expensive.

Ms. Turner told the Committee that about eight years ago, the concept of parenting coordination came to the attention of the Family Division judges. The Maryland Judiciary brought in two experts, Joan Kelly and Christine Coates, who began training all of the coordinators and the mental health people and mediators around the State who were interested in the new concept of parenting coordination. Ms. Turner said that she participated in the training. California was the first state that had a rule applying to parenting coordination where it could be ordered, and the courts would oversee it. It was made very clear to those being trained that parenting coordination is a post-judgment process.

Ms. Turner remarked that this is what she wanted to impress on the Committee more than anything else. Parenting coordination is not intended to be yet another form of pretrial ADR. It is for the high-conflict cases after an order is in place. It is

usually used when the court determines that shared custody is not an option, because the parents cannot communicate, and one parent has been given the sole physical and legal custody of the children. These are the same people noted by Ms. Ogletree who are going to fight post-judgment over every single time that they have to exchange the children for visitation. Instead of a petition for contempt being filed every time a child is late, a parenting coordinator is appointed with the parents' consent. It is a facilitative process, including education and a focus on the best interest of the child. If the parents cannot reach an agreement without the facilitation of the parenting coordinator, then the court gives the authority to the coordinator to resolve the issue.

The Chair said that Ms. Turner had raised the issue about whether the process is only post-judgment, and he pointed out that the Rule covers both pendente lite and post-judgment cases. Ms. Ogletree explained that the Subcommittee had based its version of the Rule on the draft sent by the Conference which had included pendente lite relief. It is important to know whether it should be applied pendente lite. Ms. Ogletree added that she had seen it used pendente lite, and it is a quasi-enforcement mechanism. Ms. Turner reiterated that it is not mediation. The parenting coordinator may be a trained mediator and use some of those skills, but it is a facilitative process. Ms. Kratovil-Lavelle remarked that the Custody Subcommittee and subsequently the Family Law Committee intended for the concept to include

pendente lite cases. The Reporter questioned as to whether the earliest point that a parent coordinator could be used would be the time that the pendente lite order is entered. Ms. Kratovil-Lavelle replied affirmatively. Ms. Ogletree added that it would be pre-judgment, but after there is an order in effect.

Mr. Sykes pointed out that the next-to-the-last sentence of section (a) goes beyond the scope of the Rule as suggested by the Conference. Does the intention to use the Rule in high-conflict actions mean that there has to be a preliminary determination by the judge that this is a high-conflict case? Ms. Ogletree responded that it is usually already known that the case is high conflict, because so many cross-petitions and motions have been filed in the matter by the time that the first order is entered. The Chair said that the parenting coordination will be somewhat different depending on whether it is being done pre-trial or post-judgment. Judge Hollander remarked that the case is not necessarily one where there is an inability to make parenting decisions, because the parents may feel that they can make those decisions, and they do make them -- it is that they cannot make them jointly. Ms. Turner suggested that the language of this provision could refer to co-parenting.

The Chair commented that there are many issues associated with this Rule that tend to overlap. Guidelines for Parenting Coordination that were developed by the AFCC (the Association of Family and Conciliatory Courts) Task Force on Parenting Coordination were distributed at the meeting today. (See

Appendix 3). The AFCC is an organization of judges, mediators, and therapists. What the AFCC has developed are guidelines and not rules, but they describe what the process is. The Chair drew the Committee's attention to Guideline XI on page 13. This is the list of issues that a parenting coordinator has the authority to resolve. Most are more applicable post-judgment than pre-judgment. There are 17 items on the list, and many are a significant intrusion on the rights of parents and on the parenting process. It does not mean that it is necessarily wrong for the parenting coordinator to be involved with the items on the list, but it is a significant intrusion into the parents' authority. This is limited to high-conflict cases where the parents cannot agree to anything. How are they going to agree to having a parenting coordinator? Should the court be able to appoint a parenting coordinator with this authority if the parents do not agree to it? Some of the Rule looks like it would mesh with some kind of parenting agreement, even if it is a simple agreement to have a parenting coordinator and to what the coordinator will do. What is the process for getting this agreement, particularly if the litigants are *pro se*? To make this work, there will have to be waivers of confidentiality. A waiver with respect to the child pursuant to *Nagle v. Hooks*, 296 Md. 123 (1983) will be necessary. There will have to be waivers by the parents, because it appears that the coordinator can talk to the parents' therapists. The Chair said that he was not sure how all of this works.

Ms. Turner remarked that in Worcester County, parenting coordinators have been used for three or four years. The order used there is based on the recommendation of Joan Kelly. Ms. Turner offered to email the Committee a copy of the order. The Chair commented that a consent order had been attached to one of the handouts. Ms. Turner responded that the parties have to consent to the appointment of a parenting coordinator. In Worcester County, they have not appointed a parenting coordinator in any *pro se* cases so far. The Chair pointed out that the Rule does not require counsel. Ms. Turner said that in her county, there is a basic list of issues for the coordinator to handle that is provided in the order, but counsel and the parties are allowed to go through the list and strike out the items that they do not want the parent coordinator to have the authority to resolve.

The Chair inquired if Ms. Turner's recommendation is for a statewide rule that would be limited to cases where both parties are represented by counsel. Ms. Turner replied that she was not making a recommendation. In the cases in Worcester County that have been assigned to parenting coordinators so far, the parties have been represented by counsel. They have found that when formal mediation is offered to *pro se* litigants, they are less likely to come back than when the parties are represented by counsel. When *pro se* litigants are offered formal mediation, they are able to reach agreements that they can live with.

The Chair noted that parenting coordination is something

different than mediation. Ms. Turner reiterated that since the parties in cases with a parenting coordinator have all been represented by counsel, they have had the opportunity to be thoroughly informed as to what the role of the coordinator is. Ms. Ogletree told the Committee that this is the same for Caroline County. She had never seen a parenting coordinator in a *pro se* case, and sometimes, depending on the financial resources of the parties, the court will refuse to appoint one if it will be a financial burden. The Chair clarified that he was not making a judgment as to how the Rule should read, but he was simply noting that the Rule does not require that the parties must be represented. Ms. Turner reiterated that she was not suggesting that parenting coordination is not appropriate for *pro se* cases.

The Chair inquired who is going to counsel the parties in terms of agreeing to the appointment of a coordinator, including a variety of waivers, if the Rule does not exclude *pro se* parties. Ms. Turner answered that it most likely would be the judge from the bench who would advise the parties of their rights, or the judge could refer the case to the Family Services Coordinator to discuss the possibility of appointing a parenting coordinator. The court would strike out the items on the list that would be inappropriate for that case.

The Chair commented that the judges will have to be educated about this subject as well. Ms. Turner observed that the judges would have to know what particular areas of decision-making they

feel would be appropriate for a parenting coordinator to handle in any particular case. The Chair asked if the parties would have to agree to the parenting coordinator having that decision-making authority, or if that was something the court would determine. Ms. Kratovil-Lavelle replied that in a post-judgment case, the parties would have to agree to what powers of decision-making the parenting coordinator should have. These would not be decisions to alter or amend a previous order, but simply an interpretation of the orders. Ms. Ogletree added that it would include minor deviations such as what time the children need to be brought back to the other parent. Ms. Kratovil-Lavelle emphasized that the availability of self-represented persons to the tool of parenting coordination should not be limited, since it may result in a more harmonious relationship that is better for children. The Chair clarified that he was not asking whether *pro se* parties should be excluded, but since the decision to have a coordinator must be by agreement, and will cover waivers and privacy rights under the Health Insurance Portability and Accountability Act (HIPAA), PL 104-191, he inquired as to who will counsel *pro se* parties on what this is all about.

Mr. Hurst commented that the court needs to be careful that the parenting coordinator is well-qualified. This is not like the previous discussion of a mediator who is the grandmother or aunt of one of the parties. The parenting coordinator needs to have the proper qualifications, and parenting coordination should be that person's main business. A qualified coordinator will sit

down with the parents and go through all of their concerns. The Chair asked if this would happen before the coordinator is actually appointed. Mr. Hurst answered that it would be after the appointment, but the Chair noted that this would be too late. Mr. Hurst said that the coordinator will have the waiver forms, and this will be part of the entire process. He was not certain how this could be effected prior to the appointment unless the judge takes on this responsibility. He also cautioned that if the parenting coordinator is used during the pendente lite part of the case, the coordinator should not be put into the role of a custody evaluator, which sometimes happens. This is not the job of the coordinator. Parenting coordination is not a confidential process. It cannot be, because the coordinator has to report back to the court. If the parenting coordination takes place during the pendente lite process, there is a chance that the court will use the parenting coordinator's information in making the final determination, which is not what the role of the coordinator should be.

The Chair pointed out that this same issue applies post-judgment because of petitions for modification. Mr. Hurst expressed the opinion that during the pendente lite portion of the case, it is very easy for the parenting coordinator to get drawn into the actual case, especially if the lawyers try to draw the coordinator in. There is also much ex parte communication. The Chair asked Mr. Hurst if he thought that the Rule should be limited to the post-judgment part of the case. Mr. Hurst

responded that he could understand if it were so limited. He added that a new concept has been presented by Joan Kelly that there is some sort of limited role for parenting coordination from pendente lite to the final judgment, but that is still being formulated. The need is there, but what is it going to be? This issue has not been decided across the country.

Ms. Kratovil-Lavelle observed that as to the issue of whether to limit the Rule to post-judgment cases, the Custody Subcommittee and the Family Law Committee felt strongly that the Rule should also apply to pendente lite stages of the case, particularly because families are in their highest point of conflict right after a complaint is filed. The parenting coordinator can help families make the process less devastating by having more immediate resolution to conflicts, such as who picks up the child for soccer practice. If this tool is not available, the parties have to file an emergency petition. The Chair asked Ms. Kratovil-Lavelle if she agreed that the role of the parenting coordinator in terms of the items on the list in Guideline IX may be more limited in the pendente lite part of the case. She and others answered affirmatively. Ms. Turner remarked that it would be a good idea to limit these items in the earlier part of the case. Mr. Hurst said that the parenting coordinator is more of an adviser and an educator than a decision-maker.

The Chair pointed out that one of the items in the list in Guideline IX is number 9, religious observances and education.

If the parties disagree about this subject because of different faiths or different views about religion, is that appropriate for a parenting coordinator to decide? Ms. Turner responded that this item was worded differently in the Worcester County order to mean issues such as pickup and drop-off time at the synagogue or church or a conflict involving church schedules or religious time in terms of exchanges. The Chair reiterated that this is a guideline and is not necessarily in an order.

Ms. Turner suggested that the Subcommittee or the full Committee review the list in the Guidelines when the list of items which a parenting coordinator can resolve is incorporated into the Rule and make the necessary changes. Some of the categories are too broad. Mr. Hurst remarked that much controversy over this already exists. Even within the AFCC, some groups believe that this list has gone too far. One way to handle this is to only give the authority to the parenting coordinator to make binding recommendations subject to judicial review. Either party can always bring any recommendation back to the court for judicial review. This avoids turning power over to the parenting coordinator. Other camps in the AFCC believe that for a parenting coordinator to be effective, they must be given judicial authority. Mr. Hurst said that he is not in this camp.

Mr. Michael inquired as to whether there have been any studies that have tracked the success of this program. Mr. Hurst responded that there are several studies. The one that is best known is in Marin County, California. Programs that started in

both Colorado and California, and now Arizona, the state of Washington, New York, and Canada use the program very successfully. In 1994, there were 166 cases in Santa Clara County, California with over 933 court appearances. Following the appointment of a parent coordinator, the number of court appearances went down to 37. Ms. Ogletree said that she had been appointed the lawyer for a child in a case that lasted 10 years. When a judgment of divorce was finally obtained, the court appointed her as the parenting coordinator. At the beginning of the case, she was getting barraged with e-mails from the parties every day. The parties could never agree on anything, including how to split up the winter vacation between the parents. Within six months, the e-mails dropped by 50%, and within a year, the e-mails ceased. Mr. Michael remarked that he was bothered by the idea of a parenting coordinator making decisions about a child's psychotherapy or religious observances, according to the Guidelines. Ms. Ogletree responded that some of the items on the list should not be included, but they are only guidelines. The Rule limits the authority of the parenting coordinator to minor deviations from visitation and custody schedules (e.g. attending a sporting event), and minor questions concerning vacations and places where the children are transferred from one parent to the other. Mr. Michael observed that those kinds of decisions are appropriate for a parenting coordinator to make, but not some like whether a child is allowed to have a tattoo or body piercing.

Ms. Kratovil-Lavelle noted that the Custody Subcommittee and the Family Law Committee felt that the role of the parenting coordinator would be described as more facilitative in helping parents come to an agreement. The coordinator is not making decisions as much as facilitating. This has been working in Maryland. If the case is post-judgment, the parties have to agree as to what the parenting coordinator is able to do, such as making decisions as to the tattoos. If they no longer agree, the order appointing the coordinator can be rescinded. Ms. Ogletree stated that the Subcommittee intended that the parents consent to what the coordinator is able to do.

Judge Norton referred to the language in section (b) that reads: "When a domestic violence issue has been raised by either the court or the parties, the court shall articulate on the record or in writing why the appointment of a parenting coordinator is in the best interest of each child of the parties and shall include special provisions to address the safety and protection of the parties and the child." In many cases, the allegations of domestic violence occur after the appointment of the parenting coordinator. Is there any mechanism to go back to the court to have those special provisions put back into place? The Chair replied that this issue was addressed in Rule 9-205 (b)(2), as follows: "If a party or a child represents to the court in good faith that there is a genuine issue of physical or sexual abuse of the party or child, and that, as a result, mediation would be inappropriate, the court shall not order

mediation."

Ms. Ogletree said that there are two issues that Rule 9-205.2 does not address. The first one is ex parte communications. Any time a parenting coordinator confers with the court, it has to be in writing with a copy to all parties. This is not in the Rule, although everyone intended that this would be the case. The second issue is what happens if a party or the parties do not like the person who is the parenting coordinator. The Subcommittee had agreed that there should be a mechanism to file a petition for removal. The parenting coordinator should be given the right to ask for instructions. The Subcommittee did not view their role in drafting a rule as deviating greatly from the version of the Rule drafted by the Conference. The Subcommittee made some stylistic changes, but there were some aspects of the Rule that the Subcommittee was not sure how to handle. One example was: should parties have the right to self-select the parenting coordinator? Although Ms. Ogletree expressed the view that the parents should have this right, the Subcommittee did not address this. The Subcommittee would like some constructive criticism from the Rules Committee as to how the Rule should be changed. The idea behind the Rule was brand new.

Ms. Kratovil-Lavelle pointed out that another reason Rule 9-205.2 is being proposed is not just because it provides another way to resolve conflict, but also because parenting coordination is a practice that is emerging, and it is as important to address

the quality of the coordinators as it is to address the quality of the mediators. The proposed Rule also outlines the qualifications for the parenting coordinator, so that the judges can feel confident that there are good quality services being provided. The Chair commented that there are many details associated with designing this Rule. One question that is raised pertains to the qualifications, which are predominantly the same as for mediators. When the Court of Appeals adopted the Title 17 Rules, they added some standards to the mediator training. The additional training referred to in Rule 9-205.2 does not address any standards as to who does the training and how it is to be handled. There was a concern when the mediation rules were drafted that cottage industries would develop that would provide training by unqualified people. Should there be something similar to what is provided for in the mediation rules in this parenting coordination Rule? Ms. Ogletree answered that the Subcommittee was very general as to what the training would entail. Parenting coordination training is very specialized and usually involves three-hour seminars given by recognized organizations. The Subcommittee felt that additional training in such areas as psychology, sociology, and family-domestic relations law would satisfy the requirement for continuing education, and the Rule has a requirement of 12 hours beyond the base 60 hours plus an advanced degree of some kind for a parent coordinator to even be considered. There is no curriculum available that is entitled "parenting coordination."

The Chair noted that the twelve hours required is a precursor to the rest of the training. Who will do this training, and how can the public have confidence in this procedure? Ms. Ogletree responded that it will be on the basis of what is submitted to the court when someone applies to get on the court's list. The Chair said that someone could aver that he or she has had twelve hours of training by the Parenting Coordinator Training Council of Gettysburg, Pa. in a variety of the subjects referred to in the Rule. How would the judge know if this is a legitimate enterprise? Ms. Turner commented that most of the training that has been conducted thus far around the State has been done by Joan Kelly or Christine Coates and has been funded by the Administrative Office of the Courts ("AOC"). It was offered twice a year for two or three years in a row. Many people within the Judiciary and the health professions did get the training by what is considered the national model. It was recently offered, partially funded by the AOC. The Chair inquired whether the AOC approved these training programs. Ms. Turner replied in the negative, but she noted that some models exist that are considered to be qualified.

The Chair asked how someone would know what training program is appropriate. Ms. Turner questioned whether the court maintains a list of qualified training programs. Ms. Kratovil-Lavelle responded that attempts were made to ensure that persons had some qualifications for dealing with high-conflict families, whether it was a person educated in mental health or someone in

the legal field. Many lawyers also work as parenting coordinators and have been very successful. It is important not to exclude the lawyers. The Rule is purposefully broad to provide that someone with higher education in mental health or law, plus a domestic practice would be allowed to do this. The twelve hours is meant to be discretionary within the courts. When the court personnel are reviewing the applications of people to be on the list of parenting coordinators, the applicant must satisfy the judge in the particular jurisdiction that he or she meets the qualifications. The intent was to have some discretion at the local level as to who is on the list, because the qualifications are broad enough.

Master Mahasa questioned what the difference is between a facilitator and a mediator. There is a mediation model entitled "facilitation mediation." Is the only difference that a facilitator can make a decision? Ms. Kratovil-Lavelle answered that this is a nomenclature issue in the mediation community, and there is not necessarily an agreement on it. There seems to be some consensus that the facilitative model helps encourage people, and there is more of an aim towards reaching an agreement. Ms. Turner added that the facilitation is more suggestive. In mediation, the mediator is finding ways to get the parties to come up with suggestions as to how they can find this common ground. In a facilitative process in a non-domestic civil case, the facilitator will hear both sides and will make suggestions. It is a more directed process.

Ms. Turner said that according to the training she has had, it is for the parties and counsel to identify those items in the decree that they feel that they will need assistance with in resolving conflicts, such as what time to pick the child up. The parenting coordinator is much more directed in informing the court what the problem is. The problems usually arise on Friday or Sunday night, and they are communicated to the parent coordinator via e-mail or a telephone call. The parties are not getting together and sitting down for a two-hour session. The decision has to be made quickly by the parents with the assistance of the parenting coordinator, or if the parents cannot decide, and a decision must be made immediately, then the coordinator will make the decision.

Master Mahasa expressed the opinion that the terminology is blurred. Ms. Turner agreed that the concept has many blurry areas. The Chair commented that it sounds like this process is similar to what the ADR industry refers to as "med-arb." Parent coordination is an evaluative form of mediation, not a facilitative model, coupled with arbitration where the parties through the mediation process cannot agree, and the parent coordinator acts as an arbitrator and makes a decision. Ms. Turner expressed her agreement with the Chair. The parenting coordinator helps identify the issues and facilitate the agreement. If the parties cannot agree, then the parenting coordinator makes the decision.

Mr. Hurst told the Committee that it may be helpful to

describe what a parenting coordinator is not. A coordinator is not a therapist, nor an advocate for one party. The coordinator is not a coach, nor a parenting educator, a counselor, attorney, or a mediator. He or she is not a custody evaluator or a judge. The Chair remarked that the coordinator does all of those things. Mr. Hurst explained that the role of a parenting coordinator is a hybrid role that takes the skills, talents, knowledge, and the function of all of those jobs he just named and brings them all together into a kind of hybrid role to help implement parenting plans and to assess impasses of co-parenting, finding out where the parents are not able to work together. It is an ongoing process, and it involves educating the parents about child development, communication, and conflict resolution. The coordinators mediate disputes and if the disputes are not able to be resolved, they either make recommendations, or they make decisions or arbitrate for the parents.

Judge Norton inquired whether the counties maintain funds to pay for parenting coordination. Ms. Ogletree replied that in her county, no case gets referred unless the parties can pay for it. Mr. Klein said that he had a problem with the proposed language in the last sentence of section (h) of Rule 17-102. The sentence reads as follows: "Although a parenting coordinator may use alternative dispute resolution techniques such as mediation, the coordinator does not engage in formal mediation, arbitration, neutral case evaluation, neutral fact-finding, or other alternative dispute resolution processes." Ms. Ogletree

explained that the Subcommittee wanted to ensure that the parenting coordinator could use any of the ADR techniques in bringing about an answer. The Chair suggested that in place of the word "mediation," it would be preferable to use the term "mediative techniques." Mr. Klein expressed the concern that there are other concepts in Title 17 that should not go along with parenting coordination. The Rule needs to provide that the other provisions of Title 17 do not apply and that Rule 9-205.2 controls what the parenting coordinator must do and cannot do. The ADR Subcommittee has not looked at this.

The Chair said that in fairness to the Subcommittee, they were trying to create something from nothing. When Rule 9-205 was being developed, it was not finished in one meeting. Unless the Committee is of the view that they do not want to get involved in this at all, then the Rule should be referred back to the Subcommittee to make some changes and address some of the details that have been raised. Ms. Ogletree reiterated that the Subcommittee was given a raw product from the Conference. The Subcommittee had not been sure if they were supposed to try to modify what the Conference had done or to start over. If the Committee is telling the Subcommittee to review the Rule and go through every concept that is in the Rule, the Subcommittee has no objection to doing this.

Mr. Sykes suggested that the Rules Committee intern could research how other states handle these concepts, such as the timing, the judicial review, the scope of decision-making power,

and the consents. The Chair added that one issue is how consents are obtained. Ms. Ogletree remarked that the Conference draft did not provide for the parenting coordinator to be able to contact the children's teachers, but there was no language that addressed waiving the privilege of confidentiality, so the Subcommittee had put in language that the privilege had to be waived, not thinking about how one would go about doing this.

Mr. Michael pointed out that the most worrisome aspect of the Rule is the scope of the powers that the parenting coordinator may possess depending on how the order is formulated. Ms. Ogletree explained that the Subcommittee intended to limit the post-judgment parenting coordination to making minor decisions only. Mr. Michael asked if one way to do this would be to start with some kind of representative listing, such as resolving the time for picking up the children on a weekend night. Ms. Ogletree drew the Committee's attention to the Committee note after subsection (d)(3)(C) which reads, as follows: "Examples of the issues that the post-judgment parenting coordinator may decide include disagreements about visitation exchanges, holiday scheduling, school and extracurricular activities, and temporary and minor departures from or additions to the court-ordered visitation schedule." Mr. Michael recommended that this be moved into the body of the Rule. Ms. Ogletree responded that she had no problem with doing this.

The Chair commented that another question is whether whatever powers the parenting coordinator has must be limited to

what the parties agree to. Another issue is how the agreement is obtained so that it is fair, informed, and not coerced. People should not agree for fear of losing custody or having their visitation modified by the judge. Ms. Ogletree added that the Rule needs to address ex parte communications. Mr. Michael remarked that there is a difference between pendente lite and post-judgment evaluations. A post-judgment situation brings in an entirely new set of values. Mr. Sykes suggested that there should be some discussion about fees, how they are determined, particularly in light of *pro se* litigants. The Chair added that the issue of how long the parenting coordination should go on must be discussed. The Rule provides that it can last up to two years. Ms. Kratovil-Lavelle noted that any post-judgment parenting coordination would have to be by consent.

Ms. Turner said that she wanted to respond to the issue of fees. Because the parties have to agree to the appointment of the parenting coordinator, they understand up front that it is a service that they will be paying for. There are no Family Services funds to pay for this, and the fees cannot be waived. Out of ten cases with parenting coordinators in Worcester County, only three are left. The other seven appointments expired within the first year, because once the parties got the first bill, suddenly they were able to make mutual decisions on their own, and they have not been seen since. There is a good reason why parents should have to pay for this service themselves. The Chair stated that the issue is whether there should be any

control over the fees.

Mr. Brault asked where the authority for the parenting coordinator comes from. The coordinator could be a special master under Rule 2-541, Masters; a mediator under Title 17; or an arbitrator by agreement. Where else would this power be derived from? Ms. Ogletree replied that the power is from the parties' own consent. Mr. Brault added that parenting coordinators are not licensed psychologists, but they may behave as if they are. It is important to make sure that there is some legal authority and control, such as the court controlling a special master, reports of a special master, or no orders but only recommendations to the court. He said that he could see benefit from using a parenting coordinator, but there could also be harm caused by someone who is not trained but sees himself or herself as a psychologist. Many of the coordinators are not trained, educated, or licensed, and this causes Mr. Brault some concern. The Chair suggested that in the beginning, this concept should be strictly limited to see how it plays out. The Subcommittee can take this into consideration.

Ms. Potter pointed out that the order from Howard County that was attached as an appendix is very logical and touches on issues discussed at today's meeting. Are all counties using parenting coordinators or only some counties? Ms. Ogletree commented that they are rare in Caroline County, because few of its residents can afford to pay for them. Ms. Potter inquired as to whether it would help the Subcommittee to look at the orders

of all of the counties that are using parenting coordinators to compare them. The Chair suggested that it may be worthwhile to contact other counties and other states who are using parenting coordination to find out what issues have surfaced and how the jurisdiction addressed those issues.

Ms. Kratovil-Lavelle said that the process of developing parenting coordination by the Family Law Subcommittee was complex. There were open meetings with practitioners, attorneys, and members of the bench, and all of the issues and decision points associated with parenting coordination were listed. Meetings were dedicated to resolving certain decision points. The Subcommittee surveyed what other states are doing with this concept. They reviewed the guidelines from other states. There was a fairly exhaustive survey of the various issues after two years of meetings on the subject. The Reporter asked Ms. Kratovil-Lavelle if she had that information. Ms. Kratovil-Lavelle answered that it is in the minutes of the Custody Subcommittee of the Family Law Committee. The Reporter inquired who staffs that Committee. Ms. Kratovil-Lavelle replied that it had been staffed by Pamela Ortiz, Esq. until recently. The Chair said that the Rules Committee would appreciate having this material, and Ms. Kratovil-Lavelle agreed to provide it.

Master Mahasa expressed concern about the *pro se* parties who cannot afford to pay for parenting coordination, referring to Ms. Turner's statement that in her county, parenting coordinators are not used when the parties are *pro se*. Master Mahasa noted that

the same high-conflict issues may be present for families who cannot afford to pay for a coordinator. Judge Norton pointed out that indigent litigants will become aware of parenting coordination, particularly if there are family law clinics. The question will be who is going to pay for it, and how will it be paid for. Ms. Kratovil-Lavelle remarked that there have been discussions about this in advance of a possible rule being enacted, because a majority of cases are *pro se* in family law courts. Her office has had preliminary discussions with the Maryland Volunteer Lawyers Service (M.V.L.S.), the Maryland Legal Services Corporation (M.L.S.C.), and the Access to Justice Program in the AOC.

Mr. Hurst said that he has done a great deal of pro bono work for families who cannot afford to pay for a parenting coordinator. Generally, he has found that people with lower incomes tend to learn faster and have less conflict. Part of the reason is that they are too busy trying to make ends meet, work, and parent, so that they do not have the emotional time and energy to put into fighting. He prefers to work with these people, because they respond to his input, and they actually use it and learn from it.

The Chair asked if the Committee was agreeable to recommitting the Rule to the Subcommittee for further work. Ms. Ogletree remarked that the Subcommittee has enough guidance after hearing today's discussion. Mr. Sykes added that the Subcommittee should consult with the Honorable Deborah S. Eyler,

Judge of the Court of Special Appeals. The Chair said that he had spoken with Judge Eyler, who would have attended the meeting today, but she was sitting on a case at the Court of Special Appeals. Her view was that for post-judgment cases, parenting coordination should be done only with the consent of the parties.

Mr. Bowen inquired as to the use of the word "colorable" in the second sentence of section (b) of Rule 9-205.2. Ms. Ogletree explained that some allegations of domestic violence are believable and some are not. Many divorce cases have some domestic violence allegation. Some of them are colorable, and some of them are not. The Reporter asked Mr. Bowen if he could suggest a more appropriate word. Ms. Ogletree remarked that the Subcommittee had discussed whether or not to use the word "colorable." Mr. Bowen suggested the words "credible" and "incredible." Judge Norton noted that Code, Family Law Article, §9-101, Denial of Custody or Visitation on Basis of Likely Abuse or Neglect, uses the language "reasonable grounds to believe." Ms. Ogletree reiterated that the Subcommittee will take another look at these issues. The Subcommittee felt that the word "colorable" was the word of choice.

The Chair thanked all of the consultants who were present. He said that their input was very helpful, and the Committee was deeply appreciative of their presence and of their contribution. This Rule is starting from the beginning, and the Committee really needs some guidance.

Agenda Item 3. Consideration of proposed amendments to: Rule 2-433 (Sanctions) and Rule 1-341 (Bad Faith - Unjustified Proceeding)

Mr. Klein presented Rules 2-433, Sanctions and 1-341, Bad Faith - Unjustified Proceeding, for the Committee's consideration.

ALTERNATIVE

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-433 to add to section (d) a reference to Rule 2-434 and to add the words "costs and" before the word "expenses," as well as to add a new section (e) pertaining to motions requesting an award of costs and expenses and an award of attorney's fees, as follows:

Rule 2-433. SANCTIONS

(a) For Certain Failures of Discovery

Upon a motion filed under Rule 2-432 (a), the court, if it finds a failure of discovery, may enter such orders in regard to the failure as are just, including one or more of the following:

(1) An order that the matters sought to be discovered, or any other designated facts shall be taken to be established for the purpose of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the failing party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in

evidence; or

(3) An order striking out pleadings or parts thereof, or staying further proceeding until the discovery is provided, or dismissing the action or any part thereof, or entering a judgment by default that includes a determination as to liability and all relief sought by the moving party against the failing party if the court is satisfied that it has personal jurisdiction over that party. If, in order to enable the court to enter default judgment, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any matter, the court may rely on affidavits, conduct hearings or order references as appropriate, and, if requested, shall preserve to the plaintiff the right of trial by jury.

Instead of any order or in addition thereto, the court, after opportunity for hearing, shall require the failing party or the attorney advising the failure to act or both of them to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(b) For Loss of Electronically Stored Information

Absent exceptional circumstances, a court may not impose sanctions under these Rules on a party for failing to provide electronically stored information that is no longer available as a result of the routine, good-faith operations of an electronic information system.

(c) For Failure to Comply with Order Compelling Discovery

If a person fails to obey an order compelling discovery, the court, upon motion of a party and reasonable notice to other parties and all persons affected, may enter

such orders in regard to the failure as are just, including one or more of the orders set forth in section (a) of this Rule. If justice cannot otherwise be achieved, the court may enter an order in compliance with Rule 15-206 treating the failure to obey the order as a contempt.

(d) Award of Costs and Expenses, Including Attorney's Fees

If a motion filed under ~~Rule 2-432 or under Rule 2-403~~ Rule 2-403, 2-432, or 2-434 is granted, the court, after opportunity for hearing, shall require the party or deponent whose conduct necessitated the motion or the party or the attorney advising the conduct or both of them to pay to the moving party the reasonable costs and expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court, after opportunity for hearing, shall require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable costs and expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable costs and expenses incurred in relation to the motion among the parties and persons in a just manner.

(e) Contents of Motion

(1) Costs and Expenses

A motion for costs and expenses shall contain or be accompanied by an itemized statement of the costs sought, a list of the expenses sought, and any

available documentation of either, except that the moving party may defer the filing of the statement, list, and documentation until 15 days after the court determines the party's entitlement to costs and expenses.

(2) Attorney's Fees

A motion for attorney's fees shall (A) be prepared in accordance with the Guidelines for Determining Attorney's Fees that are appended to the Maryland Rules and (B) contain or be accompanied by a memorandum, except that the moving party may defer the filing of the memorandum until 15 days after the court determines the party's entitlement to an award of attorney's fees. The memorandum shall set forth:

(A) a detailed description of the work performed, broken down by hours or fractions of hours expended on each task;

(B) the amount or rate charged or agreed to in the retainer;

(C) the attorney's customary fee for like work;

(D) the customary fee for like work prevailing in the attorney's community; and

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

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 422 c 1 and 2.
Section (b) is new and is derived from the 2006 version of Fed. R. Civ. P. 37 (f).
Section (c) is derived from former Rule 422 b.
Section (d) is derived from the 1980 version of Fed. R. Civ. P. 37 (a) (4) and former Rule 422 a 5, 6 and 7.
Section (e) is new.

Rule 2-433 was accompanied by the following Reporter's note.

In Rule 2-433, the Discovery Subcommittee recommends the addition of a reference to Rule 2-434 in section (d) and a new section (e), which establishes a bifurcated procedure for determining whether costs, expenses, and attorney's fees should be awarded as sanctions. The issue of entitlement to the award should be decided first, so that the moving party does not have to prepare a full accounting or other documentation at the time the motion is filed. The Subcommittee suggests that, unless the court orders otherwise, the moving party need not file an accounting or other materials pertaining to computation of an award until 15 days after the court determines whether the party is entitled to the award.

ALTERNATIVE

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

AMEND Rule 1-341 to add a sentence referring to Rule 2-433 (e), as follows:

Rule 1-341. BAD FAITH - UNJUSTIFIED PROCEEDING

In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification the court may require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorney's fees, incurred by the adverse party in opposing it.

The motion shall comply with Rule 2-433 (e).

Source: This Rule is derived from former Rule 604 b.

Rule 1-341 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 2-433.

Mr. Klein told the Committee that last year, the Attorneys Subcommittee suggested some changes to Rule 2-603, Costs, pertaining to attorney fee-shifting. In conjunction with the discussion of that Rule, the idea was raised that there are other kinds of fee-shifting that take place or can take place in civil litigation, i.e. discovery disputes where costs may be awarded as sanctions, and also in the area of sanctions for bad faith pursuant to Rule 1-341, Bad Faith -- Unjustified Proceeding. It was not intended that the changes to Rule 2-603 would cover these situations.

The Discovery Subcommittee was asked to look at these other situations, and although Rule 1-341 is in the General Provisions section of the Rules, enough members of the Discovery Subcommittee also sit on the General Provisions Subcommittee, so that for expediency, the Discovery Subcommittee also looked at Rule 1-341 at the same time. In the course of discussing Rule 2-603, there was a discussion about a detailed set of federal guidelines on procedures for documenting claims for attorneys' fees, including what one can and cannot claim for, how much detail is required, and whether an expert opinion is needed. The

Discovery Subcommittee's view is that the discovery aspect of attorneys' fees should incorporate by reference the same set of guidelines that the Attorneys Subcommittee develops, rather than there being two sets of guidelines. The meeting materials contain the federal guidelines, but they are there only for informational background. It is not a topic for discussion today.

Mr. Klein explained that in giving some guidance to the Discovery Subcommittee, the Rules Committee had discussed bifurcating the process. First, the court is asked to decide whether the conduct warrants the imposition of a sanction, and if so, then the party who is entitled to recover his or her fees and expenses files a document with the court that details what the fees and expenses are. In some simple cases, the fees are so nominal that the party seeking the sanctions may elect up front to put in the detail that is required. There are expenses associated with developing the paperwork necessary to present the monetary aspect of the claim, and it will not be awarded until the court determines that one is entitled to it to avoid incurring the expense of the paperwork.

The directive by the full Committee to the Discovery Subcommittee was to develop a bifurcated process which is what the Subcommittee set out to do. The Subcommittee developed a draft set of Rules which the Committee was to consider at the meeting in November, 2008, but the Rules were never discussed because other agenda items took a long time. In the interim, the

Vice Chair had looked at the original draft. Although the Vice Chair was unable to attend the meeting today, the Vice Chair provided comments to Mr. Klein, and a few days ago, the Committee received an alternative set of proposals for Rules 2-433, Sanctions, and 1-341 reflecting changes suggested by the Vice Chair.

Mr. Klein said that the original draft from November was trying to make the distinction between the narrowly defined word "costs," a term of art in the Rules, and the word "expenses." This dichotomy presents itself in Rule 1-341. The word "reasonable" appears in different iterations. Sometimes it modifies everything that can be collected, and sometimes it does not. Rule 1-341 provides that the prevailing party who is awarded sanctions may recover costs of the proceeding and reasonable expenses, including reasonable attorneys' fees. However, Rule 2-433 provides that someone can recover reasonable expenses, including attorneys' fees, and Rule 2-434, Expenses for Failure to Pursue Deposition, provides that one may recover reasonable expenses and reasonable attorneys' fees in a case where someone does not appear for a scheduled deposition. Neither of these rules uses the word "costs."

The suggestion of the Vice Chair is to streamline the process by permitting recovery of costs even in a discovery dispute. It greatly simplifies the structure of the Rule. This is why there are two drafts of the Rules. The changes impact Rule 2-433.

The Chair inquired if there is any substantive difference between the two drafts, other than putting in the word "costs." Mr. Klein answered that there were some differences. The Vice Chair's changes greatly simplify the wording of the Rule. He said that he liked the suggested changes, but the practical aspect of this is that this issue may not come up in discovery matters. His recommendation is the alternative draft. Ms. Potter expressed her agreement with the alternative version, because the Rule is more concise. Mr. Klein added that the newer version of the Rule is much easier to follow. If the Committee is in agreement with the second version, then the Committee can consider the language of Rule 2-433. The changes begin to appear in section (d).

Mr. Brault commented that the concept of costs and expenses arose when the major revision of the Title 2 Rules was done in the late 1970's and became effective in 1984. Under federal practice and procedure in the Superior Court for the District of Columbia, court costs and related expenses for transcripts of depositions and expert fees are all intermingled. If someone requests costs following a sanction or a judgment in D.C., that person can recover almost anything, and it can amount to thousands of dollars, including the cost of all of the transcripts of every deposition and all of the expert fees. The judges will add them all in, because the way the Rule has been written and interpreted, anything the attorney spends falls within the scope of the Rule. When Rule 2-603 was redrafted, the

term "costs and expenses" was used in order to distinguish between court costs and all of the other related expenses. In a State post-judgment recovery, one cannot get the expenses of transcripts of depositions, expert fees, and similar items as part of the costs recoverable in a judgment. This is why Mr. Klein commented that costs are not likely to come up in a discovery matter -- the only cost would probably be the cost of a subpoena. Mr. Brault added that he could not think of any other court cost that could be incurred.

Mr. Klein noted that section (d) of Rule 2-433 provides that motions filed under the particular discovery rules could result in expenses incurred, including attorneys' fees. The word "costs" has been added before the word "expenses" in the three paragraphs of section (d). The Chair asked if the only change to the underlined language was the addition of the reference to Rule 2-434, and Mr. Klein answered affirmatively, indicating that it had been inadvertently left out.

The major changes to Rule 2-433 are in section (e). Subsection (e)(1) provides what a motion for attorneys' fees and expenses must include. The Rule distinguishes costs and expenses from attorneys' fees. It provides that a motion for costs shall be accompanied by an itemized statement of the costs sought, a list of the expenses sought, and any available documentation of either. The moving party may defer the filing of the itemized statement until 15 days after the court determines that the party is entitled to recover the costs and expenses. Subsection (e)(2)

states that to seek attorneys' fees, one must prepare a motion in accordance with the Guidelines for Determining Attorneys' Fees in Statutory and Contractual Fee-shifting Cases that the Attorneys Subcommittee is working on, and the filing of the memorandum may be deferred until 15 days after the court determines that the party is entitled to recover the attorneys' fees. The Rule spells out what the memorandum must contain. Master Mahasa referred to the language in subsection (e)(1)(B) that reads: "and any available documentation," and she asked the meaning of this language. Mr. Klein replied that this would mean that the moving party would attach a bill.

The Chair commented that he saw two differences between the two versions of Rule 2-433 in subsection (e)(2). In the original version, the ability to defer the memorandum is introduced by the language "unless otherwise ordered by the court." The alternative version does not state this. This raises the question of preparing the motion for attorneys' fees in accordance with the Guidelines as provided for in subsection (e)(1)(C). He asked Mr. Klein if both preparing the motion in accordance with the Guidelines as well as deferring the memorandum shall be limited by the phrase "unless otherwise ordered by the court" or not.

Mr. Klein responded that he had not noticed this difference between the two drafts of the Rules. Ms. Potter inquired about whether the lawyer has to ask to defer. Mr. Klein replied that the issue is that it is the lawyer's decision whether he or she

wants to file the memorandum immediately if it is simple, or, if it is complicated, wait to file the memorandum until the lawyer finds out that he or she is entitled to the fees. Mr. Klein expressed his preference to leave the Rule this way and avoid having some case management order that turns this around.

The Chair said that in addressing the question of whether the phrase "unless otherwise ordered by the court" applies to both preparing the motion and deferring the memorandum, he recollected that the federal guidelines are applicable to 42 U.S.C. §1983 civil rights actions and actions in which there is fee-shifting in significant litigation. In the simpler cases, it may not be necessary to provide all of the information required by the Maryland Guidelines. Should it be necessary to provide this information in every case? Or, can a lawyer tell the court that it is not necessary to provide all of the documentation set out in the Guidelines, because the case is simple? Ms. Potter remarked that the Subcommittee wanted to keep the process simple. The Chair pointed out that the Guidelines require a long list of information, most of which probably will not be applicable. Ms. Potter noted that the memorandum is not that complicated. It asks for the fees that the lawyer charges per hour. It could be as simple as putting in two sentences to fill in the requirements.

Mr. Klein suggested that the reference to the Guidelines could be eliminated. Instead, a Committee note could be added that would state that the Guidelines apply to more complicated

cases. The Chair expressed doubt as to that approach. He reiterated that his concern was whether the intent was to provide an escape hatch from having to do this in a simple case. Mr. Sykes referred to the language of subsection (e)(1) that reads: "[a] motion...shall contain or be accompanied by an itemized statement of the costs sought, a list of the expenses sought...". Then the Rule provides that the moving party may defer the filing for 15 days. It would be better to provide that a party may file a motion for costs and expenses. Instead of the language "accompanied by," the Rule could provide that the list of the expenses and documentation may be filed with the motion or within 15 days after the motion is filed. Mr. Klein suggested that in place of the word "filed," the words "ruled on" could be substituted. Mr. Klein expressed his agreement with Mr. Sykes' suggested language with the one amendment. By consensus, the Committee agreed to this change.

Mr. Sykes remarked that the same change would apply to subsection (e)(2). The motion would then set out what happened and why there should be liability for the costs and expenses. That is all the motion would need to contain, supplemented by the other items filed with it. The Chair said that the intent was that if the court tells the party that he or she is not entitled to the costs and expenses, then there is no reason to get into the documentation. The Chair reiterated that his question was whether the guideline format had to be used in every case, or whether the party could ask the court to be excused from filing

them. The Guidelines are complex.

Mr. Klein remarked that in a discovery dispute, the Guidelines will not have too much relevance. The Chair added that this is true in any fee-shifting case where there is a judgment that provides for this. What originally was driving this change to the Rules was in cases where there was contractual or statutory fee-shifting. Mr. Leahy asked whether the reality is that the lawyer would be putting "not applicable" for many of the categories when applying the Guidelines. Mr. Brault suggested that the words "where applicable" could be added to the Guidelines. Mr. Sykes observed that if someone does not appear for a deposition, there is no reason to go through the Guidelines, even to put down "not applicable."

Ms. Potter asked about moving the Guidelines to a Committee note. The Chair pointed out that this would apply to bad faith proceedings, also. He again asked if this should be introduced by the phrase "unless otherwise ordered by the court." Mr. Klein commented that if the Attorneys Subcommittee changes the Guidelines, the Vice Chair had also suggested some changes that Mr. Klein then gave to Mr. Brault. Mr. Brault remarked that many of the Guidelines will be eliminated, but some may be necessary. Anyone involved in a fee-shifting case knows that the lawyers' charges can be very high. The Chair said that the federal guidelines that were initially proposed have more significance in fee-shifting cases. There had been a case in the Court of Appeals with many lawyers and parties. The lawyers were charging

$100,000 for preparing the list to get the fees. Mr. Brault noted that a major issue is whether a lawyer gets a fee for asking for a fee. He had not realized that this was an issue, until the consultants at the Attorneys Subcommittee meeting explained that this is the case. The Chair commented that in terms of setting out motion practice, court hearings, discovery, etc., the Guidelines can be important in that context.

Mr. Klein suggested that in Rule 2-433, the reference to the Guidelines should be deleted, because the Rule already has a litany of items that must be put into the memorandum. This should be sufficient. In Rule 1-341, which provides that a memorandum must be prepared in accordance with Rule 2-433, language would be put in that would state: "and unless otherwise ordered by the court with these Attorney Guidelines." This is where the Subcommittee was concerned that the Guidelines would apply.

Mr. Brault commented that the attorneys are not looking for money to be recovered by the plaintiff, they are looking for the attorneys' fees for getting a small amount of money for a client. The Chair cautioned that in some cases this is true. In wage collection cases, the fees can exceed the recovery. In the §1983-type cases or environmental cases, the monetary recovery may be relatively modest, but it is important that the party got injunctive relief. The U.S. Supreme Court held that this can be counted in determining the extent to which the party prevailed. Mr. Klein inquired whether the Subcommittee should make the

changes to the Rules. The Chair replied that the Style Subcommittee could look at them during the lunch break. It is better for the Committee to see the Rule after it has been styled. The changes to Rule 2-433 are not that major and can be done during the lunch break.

By consensus, the Committee approved the alternative set of Rules. The Chair asked if anyone had any objection to the changes that were proposed to the alternative set of rules at today's meeting. The Committee did not object to the changes.

Agenda Item 4. Consideration of proposed amendments to Appendix: Form Interrogatories -- Amendments to: Form 2 (General Definitions) and Form 8 (Personal Injury Interrogatories) and add new Forms: Form 11 (Medical Malpractice Definitions) and Form 12 (Medical Malpractice Interrogatories)

Mr. Klein presented Form Interrogatories, Form 2, General Definitions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX - FORM INTERROGATORIES

AMEND Form Interrogatories, Form 2, General Definitions, to add "electronically stored information" and other language to the definition of "document," as follows:

Form 2. General Definitions.

Definitions

In these interrogatories, the following definitions apply:

(a) **Document** includes ~~a~~ electronically

stored information and any writing, drawing, graph, chart, photograph, sound recording, image, and other data or data compilation stored in any medium from which information can be obtained, translated, if necessary, through detection devices into reasonably usable form. (Standard General Definition (a).)

. . .

Form Interrogatories, Form 2 was accompanied by the following Reporter's note.

Standard General Definition (a), Document, is proposed to be amended to include electronically stored information and other terminology used in the December 4, 2007 amendments to Rule 2-422 (a) (effective January 1, 2008).

Mr. Klein explained that the proposed change to Form 2 is to incorporate electronically stored information and otherwise conform the definition to the revised rules that pertain to electronically stored information.

By consensus, the Committee approved Form Interrogatories, Form 2 as presented.

Mr. Klein presented Form Interrogatories, Form 8, Personal Injury Interrogatories, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX - FORM INTERROGATORIES

AMEND Form Interrogatories, Form 8, Personal Injury Interrogatories, by adding a new Standard Personal Injury Interrogatory No. 10, as follows:

Form 8. Personal Injury Interrogatories.

. . .

10. State whether you have applied for any Medicare, Medicaid, or other federally funded benefits with respect to the injuries or **occurrence** complained of in this action, and if so, for each such application:

(a) state the type of benefits involved;

(b) **identify** the funding source to which you applied;

(c) state the case number, policy number, or other identifier assigned to your application;

(d) state the amount of benefits paid, if any; and

(e) **identify** all **documents** that contain any of the information requested in this interrogatory.

(Standard Personal Injury Interrogatory No. 10.)

Form Interrogatories, Form 8 was accompanied by the following Reporter's note.

The federal government may assert a direct-action right of recovery against a defendant, the defendant's insurer, and the defendant's attorney who settled a personal injury case with a plaintiff whose medical bills were paid by Medicare or other federal programs. Recovery may be sought even if the defendant, insurer, and attorney had no actual knowledge of the claimed lien. See 42 C. F. R. §411.24 (i)(2).

New Standard Personal Injury Interrogatory No. 10 is proposed to elicit information as to Medicare and other federal statutory liens -- the so-called "super liens."

Mr. Klein told the Committee that Form 8 is a new form that is proposed to be added to the set of Personal Injury Interrogatories. It is known as the "super lien interrogatory." A change should be made to the Reporter's note, because the federal government has the ability to assert a right of recovery against a plaintiff, the plaintiff's attorney, the defendant, the defendant's attorney, and any insurers involved. Mr. Michael suggested that the Reporter's note be changed to reflect this fact. The interrogatory is intended to flush out the existence of these liens, so that the parties can deal with them intelligently for settlement purposes and protect themselves from the federal government.

By consensus, the Committee approved Form Interrogatories, Form 8 as presented.

Mr. Klein presented Form Interrogatories, Form 11, Medical Malpractice Definitions, and Form 12, Medical Malpractice Interrogatories, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX - FORM INTERROGATORIES

ADD new Form 11, Medical Malpractice Definitions, to Appendix: Form Interrogatories, as follows:

Form 11. Medical Malpractice Definitions

Definitions

(a) **Defendant** includes the agents, servants, and employees of the defendant.

(Standard Medical Malpractice Definition (a).)

(b) **Patient** means the individual, whether alive or dead, whose medical care is the subject of this action.

(Standard Medical Malpractice Definition (b).)

Form Interrogatories, Form 11 was accompanied by the following Reporter's note.

New Form 11, Medical Malpractice Definitions, is proposed by the Discovery Subcommittee in conjunction with its recommendation that Medical Malpractice Form Interrogatories be added to the Appendix of Form Interrogatories.

MARYLAND RULES OF PROCEDURE

APPENDIX - FORM INTERROGATORIES

ADD new Form 12, Medical Malpractice Form Interrogatories, to Appendix: Form Interrogatories, as follows:

Form 12. Medical Malpractice Interrogatories

Interrogatories for Use by Either Party

1. If you intend to rely upon or use in direct examination any medical article, treatise, or other publication, **identify** the **document** and state:

(a) the title of the publication, journal, magazine, or treatise in which each **document** was published,

(b) the name and address of the publisher,

(c) the date of publication, and

(d) the volume and page or section referenced. (Standard Medical Malpractice Interrogatory No. 1.)

Interrogatories to Defendant from Plaintiff

31. Describe the nature and duration of the professional or business relationship between you and any other Defendant. (Standard Medical Malpractice Interrogatory No. 31.)

32. State your professional medical training, qualifications and experience, including:

(a) each university or college you attended, each degree awarded to you, and the date of each award;

(b) each hospital with which you have been affiliated at any time up to the present, and the nature and inclusive dates of each affiliation.

(c) each medical society or association of which you have ever been a member, and the inclusive dates of your membership;

(d) each specialty or subspecialty for which you have been certified by an American speciality or subspecialty board, and the date of each certification; and

(e) a bibliography of all your publications, including titles, dates and publishers.

(Standard Medical Malpractice Interrogatory No. 32.)

33. List, by date and time of day, each occasion on which you saw the **Patient**, and as to each occasion, describe in detail:

(a) the nature and scope of your examination of the **Patient**;

(b) the nature and scope of any conversation you had with the **Patient** or with anyone who accompanied the **Patient**;

(c) what you observed or were told about the **Patient's** condition; and

(d) the treatment you provided or ordered to be provided for the **Patient.**

(Standard Medical Malpractice Interrogatory No. 33.)

34. Describe in detail and chronological order each test, procedure, or other treatment performed or ordered as part of your care of the **Patient**, and for each:

(a) **identify** all **persons** present during the test, procedure, or treatment and state the **person's** professional relationship to you, if any; and

(b) state the reasons for, and result of, the test, procedure, or treatment.

(Standard Medical Malpractice Interrogatory No. 34.)

35. For each conversation you had with any other physician or medical professional relating in any way to the care and treatment of the **Patient**, state the substance, date, time, and place of the conversation, and **identify** all **persons** involved.

(Standard Medical Malpractice Interrogatory No. 35.)

36. **Identify**, in chronological order, each writing or dictation known to you and prepared by anyone concerning the treatment

of the **Patient** and made since you first undertook care of the **Patient**, and set forth as to each:

(a) the date on which the writing or dictation was made;

(b) the **identity** of the person who made it;

(c) the meanings, in both lay and medical terms, of all abbreviations and symbols used in it; and

(d) attach a copy or transcription of it to your answers to these interrogatories.

(Standard Medical Malpractice Interrogatory No. 36.)

37. Summarize in detail each conversation that you had with the **Patient** or with any Plaintiff about any aspect of the **Patient's** diagnosis, treatment, care or medical condition, and state the date and place of each such conversation.

(Standard Medical Malpractice Interrogatory No. 37.)

38. If you gave any advice, instruction, or warning that the **Patient** did not follow, state:

(a) the advice, instruction, or warning that was given;

(b) the **identity** of all **persons** to whom you gave the advice, instruction, or warning;

(c) when and where the advice, instruction, or warning was given; and

(d) all reasons given, if any, for not following the advice, instruction or warning.

(Standard Medical Malpractice Interrogatory No. 38.)

39. If you contend that, by any act or omission occurring at any time during or following the **Patient's** care and treatment, the **Patient** caused or contributed to the **Patient's** injury or death, state the facts that support your contention.

(Standard Medical Malpractice Interrogatory No. 39.)

40. State your contention as to each cause of the **Patient's** death or injury that is alleged in the complaint and, as to each cause:

(a) state the facts upon which you rely;

(b) **identify** each **document** containing information that supports your contention;

(c) **Identify** each **person** whom you contend is responsible, in whole or in part, for the **Patient's** death or injury that is alleged in the complaint and your reasons for contending that the **person** is responsible; and

(d) state the professional relationship to you, if any, of each **person** named in your response to this Interrogatory.

(Standard Medical Malpractice Interrogatory No. 40.)

41. List by author, title, publisher or publication, any texts, treaties, articles or other works which, at the time the **Patient** was under your care, you regarded as reliable authority with respect to the care that you rendered to the **Patient**.

(Standard Medical Malpractice Interrogatory No. 41.)

42. **Identify** each instance in which you have been named a defendant, or have testified as an expert witness, in any other claim or suit for personal injury, negligence, or medical malpractice, including in your answer to this Interrogatory:

(a) the **identity** of the **person** or organization who brought each claim or suit;

(b) the date of the filing of each claim or suit;

(c) the identifying number of each claim or suit;

(d) the date, place, and nature of the occurrence from which the claim or suit arose; and

(e) the final disposition of each claim or suit.

(Standard Medical Malpractice Interrogatory No. 42.)

43. **Identify** each **person** that undertook an investigation of the events surrounding the **Patient's** death, and for each also state:

(a) the **person's** title or position;

(b) the date(s) upon which the **person** conducted the investigation;

(c) the **identity** of each **person** contacted or to whom the investigator spoke regarding the events giving rise to this action;

(d) any remedial or corrective action taken as a result of the investigation; and

(e) whether there is a written report or other **document** containing the results of the investigation.

(Standard Medical Malpractice Interrogatory No. 43.)

Interrogatories to Plaintiff from Defendant

61. State chronologically and in detail:

(a) the cause and origin of the injuries alleged in the complaint;

(b) if you contend the injuries changed or worsened over time, state how and when;

(c) the course of the treatment provided by each **defendant**;

(d) each procedure that was performed by each **defendant**;

(e) the substance of your conversations with each **defendant** prior to and after each procedure or other treatment, including how the proposed procedure or treatment was described to you; and

(f) the extent of your knowledge of, and consent to, each procedure or other treatment. **Identify** all sources of information about the procedure or other treatment that you consulted before it was performed or rendered, including any sources on the Internet.

(Standard Medical Malpractice Interrogatory No. 61.)

62. With respect to **defendant** [insert name], describe in detail each act or omission that you contend constitutes a breach of the applicable standard of professional care for the **Patient** or that otherwise forms a basis for your claim against the **defendant**, and for each such act or omission:

(a) explain how you contend it caused or contributed to the **Patient's** injuries or death alleged in the Complaint; and

(b) **identify** each **person** and **document** having or containing information that supports your contention. (Standard Medical Malpractice Interrogatory No. 62.)

63. If you contend that any portion of any medical record, chart, or report is inaccurate, false, or altered:

(a) **identify** each **document** and each part of it that you contend is inaccurate, false, or altered, and

(b) as to each contention, state the factual basis for it.

(Standard Medical Malpractice Interrogatory No. 63.)

64. State the substance of all written and oral advice, instructions, and warnings you received from **defendant** [insert name] before and after each procedure or other treatment, and attach a copy of each written advice, instruction, or warning. If you no longer have the document, summarize your recollection of its substance.

(Standard Medical Malpractice Interrogatory No. 64.)

Form Interrogatories, Form 12 was accompanied by the following Reporter's note.

This Discovery Subcommittee recommends the addition of Form 12, Medical Malpractice Form Interrogatories, to the Appendix of Form Interrogatories.

As with Form 10, Product Liability Interrogatories, Form 12 is divided into three sections: Interrogatories for Use by Either Party, Interrogatories to Defendant from Plaintiff, and Interrogatories to Plaintiff from Defendant. The numbering of the Interrogatories in the three sections allows for additional interrogatories to be

> included in each section, if necessary or advisable in the future.
>
> The Medical Malpractice Definitions and Interrogatories are intended to be used in conjunction with General Definitions and Interrogatories (Forms 2 and 3) and Personal Injury Definitions and Interrogatories (Forms 7 and 8), as well as any case-specific interrogatories framed by the parties. As noted in the Committee note that precedes Form 1, Instructions, appropriate use of a Form Interrogatory provides, as to that Interrogatory, a safe harbor from the counting rules.

Mr. Klein explained that the definitions in Form 11 are applicable to Form 12, Medical Malpractice Interrogatories, that follows. Form 12 is divided into three major parts, an interrogatory that is bi-directional for use by either party, a set of interrogatories from the defendant to the plaintiff, and a set from the plaintiff to the defendant. These interrogatories were reviewed by lawyers who do medical malpractice litigation, and they were satisfied with the interrogatories.

By consensus, the Committee approved Form Interrogatories, Forms 11 and 12 as presented.

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