COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in the Judicial Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland on April 16, 2010.

Members present:

Hon. Alan M. Wilner, Chair
Linda M. Schuett, Esq., Vice Chair

F. Vernon Boozer, Esq.
Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Hon. Ellen L. Hollander
Hon. Michele D. Hotten
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Zakia Mahasa, Esq.
Timothy F. Maloney, Esq.
Robert R. Michael, Esq.
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Scott G. Patterson, Esq.
Hon. M. Michel Pierson
Debbie L. Potter, Esq.
Kathy P. Smith, Clerk
Melvin J. Sykes, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Chris Norman, Rules Committee Intern
Shawn Michael
Jeffrey Dobson, Law Clerk, District Court, Baltimore County
Hon. Alexandra N. Williams, Administrative Judge, District Court for Baltimore County
Geena Asiedu, Law Clerk, District Court, Baltimore County
Brian L. Zavin, Esq., Office of the Public Defender
Pamela Harris, Circuit Court Administrator for Montgomery County
Jim Harmon, Security Coordinator, District Court Headquarters
Paul H. Ethridge, Esq.
Hon. Victoria Woodward, Circuit Court for Baltimore County
Nathan Siegel, Esq.
Kalea Clark, Esq., The Washington Post
Professor Lynn McLain, University of Baltimore School of Law
Debra Gardner, Esq., Public Justice Center

The Chair convened the meeting. He told the Committee that

he had two announcements. The first pertains to the minutes of the Rules Committee meetings. The Assistant Reporter has kept up with doing the minutes, but the process of reviewing and editing them has been slow. This is why there have been no minutes to approve. They are being worked on. One of the problems is that the minutes are running about 120 to 130 pages per meeting, including one that is 198 pages. It makes no sense to mail this amount of paper to the 26 members of the Committee. When the minutes are ready, they will be e-mailed to the Committee. Four or five of them are ready now.

The Chair said that the second matter is foreclosures. The General Assembly has passed a bill that will totally change all of the procedures in the Foreclosure Rules, basically undoing all of the changes that were made in the last year or two. The new law takes effect July 1, 2010. The Foreclosure Rules will have to be changed again to conform to the new legislation. The Chair had asked representatives of the stakeholders, including the foreclosure bar, the attorneys representing homeowners, two circuit court judges who are involved in the process, Ms. Ogletree, and the Reporter to meet next week to work on the Rules. Everyone has a common interest to make this process work. Hopefully, the group will come to a consensus. The proposed Rules will have to be presented at the May Rules Committee meeting, because the Rules must go to the Court of Appeals to be heard in June. The Rules will have to be in place by July 1, 2010.

Agenda Item 1. Continued reconsideration of a Statewide Rule on cell phones applicable to all Maryland courts - New Rule 16-110 (Cell Phones and Other Electronic Devices) and Amendments to Rule 16-109 (Photographing, Recording, Broadcasting or Televising in Courthouses)

The Chair presented Rule 16-110, Cell Phones and Other Electronic Devices, for the Committee's consideration.

CELL PHONE AND ELECTRONIC DEVICE POLICY
PROPOSAL FOR CONSIDERATION

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 100 - COURT ADMINISTRATIVE STRUCTURE, JUDICIAL DUTIES, ETC.

ADD new Rule 16-110, as follows:

Rule 16-110. CELL PHONES AND OTHER ELECTRONIC DEVICES

(a) Definition

In this Rule:

(1) Electronic Device

"Electronic device" includes a cell phone, computer, and any other device that is capable of transmitting or receiving messages or information by electronic means or that, in appearance, purports to be a cell phone, computer, or such other device.

(2) Local Administrative Judge

"Local administrative judge" means the county administrative judge in a circuit court and the district administrative judge in the District Court.

(3) Court Facility

"Court facility" means (1) the building in which a circuit court or the District Court is located, or (2) if the court is in a building that is also occupied by county or State executive agencies having no substantial connection with the court, that part of the building occupied by the court.

(b) In general

Except as otherwise provided in sections (d) and (e) of this Rule, a person may not bring any electronic device into any court facility ~~occupied by a circuit court or the District Court~~.

(c) Notice

Notice of this prohibition shall be:

(1) posted prominently outside each entrance to the court facility and each security checkpoint within the court facility;

(2) included prominently on all summonses and notices of court proceedings;

(3) included on the main judiciary website and the website of each court; and

(4) disseminated to the public by any other means approved in an administrative order of the Chief Judge of the Court of Appeals.

(d) Confiscation of devices

The local administrative judge may adopt a written policy under which, as an alternative to prohibiting an electronic device from being brought into the court facility, the electronic device may be confiscated and retained by security personnel or other court personnel until the owner leaves the court facility, provided that no liability shall accrue to the security personnel or any other court

official or employee for any loss or misplacement of or damage to the device.

(e) Exemptions

Subject to the provisions of section (f) of this Rule, section (b) of this Rule does not apply to electronic devices that are the property of:

(1) the court;

(2) judges and other officials or employees of the court who present appropriate identification approved by the local administrative judge;

[Query: Should court interpreters be included?]

(3) officials and employees of any State or local government agency that occupies space within the court facility who present appropriate identification approved by the local administrative judge;

(4) attorneys who present appropriate identification approved by the Court of Appeals;

[Query: Should this be limited to Maryland attorneys?]

(5) jurors and individuals summonsed for jury duty who present appropriate identification approved by the local administrative judge;

(6) law enforcement officers who are in the court facility on official business and who present appropriate identification approved by the local administrative judge; and

[Query: Can/should "news media" be defined and added to the list in section (e)?]

(7) other persons who present appropriate identification and written permission from a judge of the court.

Cross reference: See Rule 16-109.

(f) Presence of Devices in Jury Deliberation Room and Courtroom

(1) Except with permission from a judge of the court, an electronic device may not be brought into any room designated as a jury deliberation room.

(2) Unless precluded by the local administrative judge or the presiding judge in a case, for good cause, persons included within a category set forth in subsection (e)(2), (4), (5), (6), or (7) of this Rule may bring an electronic device into a courtroom.

Committee note: Because electronic devices may not be brought into any jury deliberation room, the administrative judge may require that jurors leave such devices in a place designated by the administrative judge, ~~and not bring them into the courtroom~~ either in or outside the courtroom.

(3) If an electronic device is permitted in a courtroom, the device (A) must remain off and may not be used to receive or transmit information, unless otherwise permitted by the presiding judge; and (B) is subject to any other reasonable limitation imposed by the presiding judge. ~~A willful violation of paragraph (2) of this section or this paragraph, including any reasonable limitation imposed by the presiding judge, may be punished by contempt.~~

(4) An electronic device that is used in violation of this section may be confiscated and retained by security personnel or other court personnel subject to further order of the court or until the owner leaves the building. No liability shall accrue to the security personnel or any other court official or employee for any loss or misplacement of or damage to the device.

(5) A willful violation of this section, including any reasonable limitation imposed by the presiding judge, may be punished by

contempt.

(g) Rule 16-109

To the extent of any conflict between this Rule and Rule 16-109, Rule 16-109 shall prevail.

Source: This Rule is new.

Rule 16-110 was accompanied by the following Reporter's Note.

New Rule 16-110 (numbered Rule 18-XXX when considered by the Committee at the April 2010 meeting) is proposed in response to a request from Chief Judge Bell that the Committee transmit to the Court of Appeals for its consideration a State-wide Rule on cell phones. Shown by underlining and strike-throughs are changes from the April 2010 draft.

The Chair said that at the March 2010 meeting, the Committee addressed who should be able to bring cell phones into the courthouse and who should not. The Committee had reached a consensus. The last group to be discussed was the news media. The issue was that not all of them could be identified. Did it include only The Washington Post and The Daily Record, or did it also include the community news associations that were representing gangs? There were the rest of the media groups to consider. The Rule will be sent up to the Court, which will have to go through this process again and decide what the policy should be. The Committee can let the Court know of any change from having a uniform policy if that is what the Committee decides. It is not necessarily that the Committee recommends

doing away with the current policy.

The Chair commented that it appears from the surveys done of all courts that the circuit courts in Allegany, Anne Arundel, Baltimore City, Baltimore County, Garrett, Montgomery, and Prince George's Counties currently allow cell phones into the courthouse. Restrictions exist as to what people can do with them once someone is in the courthouse. These include restrictions on bringing the phones into the courtroom, and keeping them turned off. Howard County Circuit Court is the most restrictive, not allowing anyone to bring cell phones into the courthouse except for staff. The rural counties tend to require that the general public cannot bring cell phones in. Some counties allow attorneys and staff to possess the devices, but most allow only staff. Some counties allow cell phones without cameras in, but most cell phones have cameras.

The Chair told the Committee that cell phone policy in the District Court varies from location to location. Disparities exist from county to county and, even within counties as between the circuit court and District Court. In Towson, the Baltimore County Circuit Court allows cell phones into the courthouse, but the nearby District Court prohibits them. If the Court of Appeals would like a uniform policy, the Committee has to decide what it ought to be. The Committee has considered all of the groups who come into the courthouse, except for the news media and the general public. The Chair asked the Committee for its opinion on this.

Judge Norton responded that allowing the general public to bring in cell phones would be a recipe for disaster, both for security reasons and for disruption in the courts. Aside from the willful violations that the contempt provisions in the proposed Rule address, the inadvertent violations occur daily and frequently by people who are somewhat oblivious. He added that he was more inclined to allow the media to bring cell phones into the courthouse. However, allowing in thousands of cell phones by the general public is counterproductive.

Mr. Patterson asked the Chair if his view was that it is not a good policy to allow each District Court or circuit court to decide for themselves their cell phone policy. The Chair replied that he was not involved personally, but he could see arguments on both sides. He had some concerns with the fact that there is one policy in one place, and a different policy in another place when the two are only three blocks apart in the same county. One county on the Eastern Shore permits cell phones in the courthouse, but the adjoining county does not, and both are rural.

The Chair said that there are local differences in terms of how cell phones can be used. The courts, including circuit courts, are State courts, not county courts. The buildings belong to the counties. The District Court is supposed to be unified. How much tolerance is there for disparity? In some courts, the cell phones can be brought in, but the policies differ as to what someone can do with them. Some courts prohibit

their use entirely. In Queen Anne's County, the cell phones can come in, but they cannot be brought above the first floor of the courthouse, which means that they cannot be taken into the courtroom. The Chair said that there is a place for local options in terms of designated areas where they can be used.

Judge Hotten remarked that the Civil Pattern Jury Instructions Subcommittee is addressing a wide sweep of all of the instructions recognizing the impact of cell phones and the jurors' use of other social networks or media. They are considering the instruction that was included in the meeting materials from the Committee on Court Administration and Case Management. The Chair noted that the circuit courts differ somewhat as to the policy on jurors. Some do not let the jurors bring in cell phones; some let the cell phones in, but the jurors are not allowed to bring them into the courtroom. In Baltimore County, the jurors can have them and use them while they are in the jury assembly room, but the phones are taken away when the jurors are in the courtroom. Other counties allow the potential jurors to bring them into the courtroom, but not while someone sits on a jury.

Ms. Potter commented that she preferred the policy in Anne Arundel County where the general public can bring in their cell phones. She asked if the proposed Rule would allow Anne Arundel County to continue its policy. The Chair answered that what is before the Committee is only a proposal. The Committee can recommend that the general public can or cannot bring in the cell

phones. Ms. Potter inquired if language could be added to the Rule to provide that if a jurisdiction would like to be less restrictive, it can ignore the Rule. She did not see a provision in the Rule to allow a jurisdiction to opt out. The Chair responded that there is no provision to opt out. What the Court of Appeals wanted was a proposal for a uniform rule. They will decide whether to include an "opt out" provision.

Judge Hollander questioned whether there is any distinction between a courtroom and a court facility. She expressed the opinion that it is bad policy to tell people who have to come to court for any number of reasons or are compelled to come to court that they cannot bring their cell phones into the courthouse. She agreed that people could be restricted from bringing the phones into a courtroom. There is an issue as to what to do with the cell phones at that point, but this seems as if it could be solved. People in today's world cannot be expected to travel without a cell phone.

Judge Norton pointed out that this pertains to the problem of the differences between the various facilities. The circuit courts have different functional rooms that people can access without going into the courtroom. In some rural District Court courthouses, there is a minimal amount of space other than the courtroom. If someone has a cell phone, he or she has it in the courtroom. The Chair commented that when this issue arose, the sheriffs expressed their concern about a rule that would allow cell phones into the courthouse, but not into the courtroom. It

is not a problem for someone who comes to the courthouse to file a paper, but if someone is a witness, what will he or she do with a cell phone when in the courtroom?

Mr. Brault said that he agreed with Judge Hollander. In Montgomery County, a new courthouse was built in 1984 with many modern, beautiful courtrooms. Each floor has four courtrooms. There had been four public telephones at each end of the courtrooms. With the advent of cell phones, public telephones are disappearing. They were removed from the courthouse in Montgomery County, and none remain. Everyone uses cell phones. These are such a part of modern life that they cannot be ignored. They cannot be banned. Otherwise, how will people communicate?

Mr. Brault noted that one way to address the problem of what the sheriff will do with these cell phones is the procedure in Montgomery County where the jurors are allowed to bring in their cell phones. The jurors use them all over the building. During the breaks in between court sessions, they can be seen walking around using their phones, keeping in touch with their world. When the jury is to deliberate, the judge tells them that they can no longer take their cell phone into the room where they deliberate. The deliberations should not be interrupted by cell phones. All of the jurors have to put their cell phones on the table in the courtroom.

Mr. Brault remarked that he had not seen a jury in the past several years where everyone did not have a cell phone. When they relinquish their cell phones, the judge assures them that

the bailiff will take good care of phones. The bailiff scoops up the six or 12 phones and puts them somewhere, then later lays them out for people to identify them. The federal court in the District of Columbia takes only the cell phones with cameras. They have an entire wall of lockers. The marshal takes someone's camera cell phone, locks it into a locker, and gives the owner a card or other receipt to identify the number of that person.

Mr. Maloney observed that the United States District Court in Greenbelt, Maryland allows people to bring in cell phones, but they cannot be used in the courtroom, and no photographs can be taken with the phones. There are no problems with this policy at all. A 30-minute hearing is different from a trial that may take two or three weeks, and parties and witnesses are in the courthouse from 9 a.m. to 5 p.m., day after day. The idea that they would not have access to their cell phones makes no sense. The problem is not with allowing the phones into the courthouse but with people who misuse the phone once they come into the courthouse either because they do not turn off the ringer, or they take a photograph of someone. This is the conduct that needs to be handled. Only a tiny minority of people do this. To prohibit cell phone use when 99.9% of the people with the phones use them correctly makes no sense. Mr. Brault recollected that in days past, when people had problems with day care for their children, and the judges would keep the juries very late, the judge would tell the jurors that if they needed to communicate with a family member as to the late hour, the clerk would

telephone the family member. This is no longer necessary, because everyone has a cell phone.

Judge Pierson said that he wanted to respond to Ms. Potter's comments. His recollection from the last meeting was that the Committee had agreed to add a class to the classes that were already included in the Rule for anyone determined by the administrative judge as a class to be excepted from the prohibition on cell phones. Subsection (e)(7) of the Rule reads as follows: "other persons who present appropriate identification and written permission from a judge of the court," which is more individual than a class. Was this changed because it is inconsistent with the idea of no local options? This would take care of the problem with the general public on an individual basis.

The Chair said that at the last meeting, the Committee agreed that electronic devices that are the property of the court can be brought in. Judges, officials, and employees of the court can bring them in. Officials and employees of any State or local government agency that occupies space in the court facility and have appropriate identification, such as State's Attorneys, can bring in cell phones. Attorneys with appropriate identification can bring in cell phones. Jurors and individuals summoned for jury duty with identification as well as law enforcement officers in the courthouse on official business can bring them in. This is what was decided at the last meeting. The discussion stopped with the news media. From that point on, is the general public

allowed to bring them in with the use of the phones controlled, such as no photographs and no text messaging, or should the policy be that the general public cannot bring them in unless the judge gives permission?

Judge Kaplan expressed the view that the general public or anyone else should be able to bring in cell phones, but they cannot be used in the courtroom without the permission of the court. The Chair noted that this is uniform in the State. Mr. Patterson agreed that cell phones are a modern life human issue. People who are inconvenienced by being in court in the first place as a litigant, a witness, or a juror should be able to maintain some semblance of control of their lives, because their lives are so complicated. There is a need to allow people to be able to communicate with others in their lives. He said that he was not annoyed by a cell phone ringing during a proceeding as much as it may annoy others. Someone may have forgotten to turn the cell phone off. But from the perspective of a trial attorney and a member of law enforcement, his only concern was that the identity of undercover police officers could be violated by camera cell phones.

The Chair added that the identity of jurors is a problem. Mr. Patterson agreed. He noted that from the standpoint of being a trial attorney, it is easy for the use of a cell phone to violate the sequestration rule. Someone's cell phone can be broadcasting a proceeding to a witness out in the hall who should not be listening because the witness is sequestered. The

sanctity of the sequestration process may be violated by someone who turns the phone on outside of the courtroom and then walks into the courtroom. The judge may not know that the person has his or her phone on and that the person is using it. The person with the phone would be able to broadcast the testimony of a witness that should not be broadcast. There may be only a small amount of people who would do this, but some people would, violating the judicial process which tries to keep proceedings fair, level, and even.

Mr. Patterson said that because of the exception, the general rule has to be considered. To avoid the exception, even though Ms. Potter had told him that nothing bad had happened in Anne Arundel County, something bad is bound to happen in the future. To maintain the courthouse and courtroom the way they should be maintained and for safety reasons, the general public should not be allowed to have the cell phones in the courtroom. This does not preclude anyone having a cell phone in the courtroom, and it does not mean that an attorney, a member of the press, or a law enforcement officer would never break the rules, but generally these are people who can be trusted. However, this may not necessarily be true for anyone who walks through the courthouse door. The Chair agreed that this is the main issue.

Judge Hollander commented that she did not disagree with Mr. Patterson's statement, but what she had been hearing was that it is too difficult to figure out a way to handle the issue of cell phones in the courtroom. The solution is to not permit cell

phones in the court building itself to achieve this result. This is like “throwing the baby out with the bath water.” She did not like the idea of the solution that no one can bring in cell phones at all. She told the Committee that she had been at the U.S. Supreme Court to listen to a case. She had tried to take notes, but the marshal told her that she could not write. Similarly, there has to be a way for someone to announce that no cell phones are allowed in the courtroom, and that they can be put on the bailiff’s desk to be retrieved when the person leaves the courtroom.

Judge Norton pointed out that in District Court, there can be 140 speeding tickets heard in 60 minutes. Scores of people go in and out of the courthouse. To manage their cell phones would require an inventory process. Judge Hollander remarked that people could be notified that the cell phones are not allowed. Someone can choose not to bring them, or they can be handled in a certain way. Judge Norton responded that there may be no one to ensure the safety of the cell phones. The Chair said that this has been the issue. The sheriffs and the constables who are in charge of security have made it clear that they cannot deal with the crowds of people coming into the courthouse. They have no place to store the phones. On the other hand, if the phones are allowed in the courtroom, they would have to be turned off. How can this be monitored?

Judge Hollander expressed the view that the points made today have been well taken, which is why most people would agree

that there is a serious concern about cell phones in the courtroom. However, the reality exists that it is difficult to keep up with technology. Whatever rule is decided today will probably be outdated by tomorrow. Anyone determined to record proceedings or do something inappropriate in the courtroom will probably figure out a way to do so.

The Chair stated that the issue that is ultimately going to be before the Court of Appeals is whether to leave the system as it is, letting each administrative judge decide for himself or herself what the policy should be, or whether there should be a uniform policy even if there is flexibility among the courts in the implementation. They want the ability to decide this themselves. This means that the Committee needs to send up a rule, so that the Court has it before them.

Mr. Maloney expressed the opinion that a uniform policy is needed. It is confusing to attorneys and to litigants. Thousands of cell phones come into the District Court in Prince George's County every day. Sometimes, someone forgets to turn off the ringer, and the bailiff tells the person to turn the phone off. This is the worst scenario that has ever happened in Prince George's County. Then if someone goes to a courthouse 50 miles away, there is a different rule. People are hiding their cell phones in the bushes outside the courthouse, because they parked many blocks away. Mr. Maloney said that he had seen this many times in some of the smaller counties. Later, when the person returns, sometimes the cell phone is still there, and

sometimes it is not. The Chair noted that someone is not going to put a laptop computer in the bushes.

Mr. Maloney commented that it would be a real service to the Court of Appeals if the Rule acknowledges where the technology is and then give some guidelines. If cell phones are going to be in the courthouse, they cannot be used in the courtroom, no text messaging or photography would be allowed, and the ringers would have to be turned off. It is not the act of bringing in the cell phone that is problematic, it is the misuse of the cell phone once it is in the courthouse. The Chair commented that the proposed Rule addresses this aspect. It also provides that a violation of any order by a judge is contempt. Unfortunately, gang members will not be concerned about that.

Mr. Karceski expressed his agreement with Judge Hollander, Mr. Maloney, and others who had spoken that cell phones generally should be allowed. The cell phone policy works in Baltimore City. He did not know about any problems in the District Court or the circuit court. As Mr. Maloney had pointed out, the biggest problem is the sound of the phone ringing during a court session. As long as anyone is allowed to bring in a cell phone, this will happen on a limited basis. He had not been present at the last meeting, and he was not sure if other exceptions to the cell phone prohibition had been considered. One example would be physicians, who are an important part of society and who need to have their cell phones with them. Subsection (e)(7) would require that a physician must get written permission from a

judge, but this may be too difficult. It appears that fire fighters and emergency medical technicians are not included in the exemptions. There are probably other people who are not ordinary lay witnesses who are not included and would need an exemption.

Mr. Karceski referred to Mr. Patterson's comments as meaning that the "bad guys" should not have cell phones in the courtroom but the "good guys" should. He acknowledged Mr. Patterson's viewpoint but noted that the sequestration rule is violated many times a day. One does not need a cell phone to violate that rule. He expressed the view that it is not appropriate to generally exclude people from bringing cell phones into the courthouse. There should be a list of people who cannot bring them in and a sanction for violating the rules.

Mr. Michael inquired if anyone at the meeting would not know how to take a battery out of a cell phone. The Rule could require that before someone comes into the courtroom with a cell phone, its battery must be taken out. The issue for many judges is the inadvertent ringing of a cell phone during a court session. It is often innocent. Many people do not know how to turn the cell phones off or silence them. Judge Hollander pointed out that in some cell phones, the battery is not accessible.

The Chair commented that there are many ways to try to address the security issues. The problem is the deliberate misuse of the cell phones and not the inadvertent misuse. If one

is brought into the courthouse, the sheriff can tell the person to turn it off until he or she leaves. Mr. Michael remarked that this is the current procedure. The Chair stated that it is a policy question for the Committee as to what to send to the Court.

The Chair inquired if anyone had a motion as to the issue of generally using cell phones in the courthouse. Mr. Michael moved that cell phones be permitted in the courthouse and that appropriate rules be adopted as to their use once they are in the courthouse, but that no one is to be prevented from bringing them in. The motion was seconded. Ms. Ogletree said that this would be difficult to enforce in Caroline County where the county commissioners have decreed that cell phones are not allowed in the courthouse. Mr. Michael responded that the Court of Appeals can supersede this. The Chair added that it is practice and procedure in the courts. Whatever the policy is going to be, the Court of Appeals, under the Constitution of Maryland, has the authority to adopt rules of practice and procedure in the court. Administrative judges do not have this authority.

Judge Norton noted that there are State agencies on different floors of some courthouses, and some of them have barred cell phones from their agencies. If this Rule is passed, then the cell phones would be allowed in the District Court but not allowed in the offices of the State agencies. The Chair remarked that he was not sure how these issues would be sorted out. It may well be that the county commissioners may be able to

enforce the ban.

Mr. Karceski referred to section (g) of proposed Rule 16-110, which provides that Rule 16-109 shall prevail if a conflict arises between that Rule and Rule 16-110. He read from Rule 16-109 b. 3 as follows: "Possession of cameras and recording or transmitting equipment, including camera-equipped cellular phones or similar handheld devices capable of capturing images, is prohibited in all courtrooms, jury rooms, and adjacent hallways except when (i) required for extended coverage permitted by this Rule or for media coverage not prohibited by this Rule or (ii) permitted by Rule 16-110." The Chair said that this Rule has been modified so that Rule 16-110 is the prevailing rule. The Reporter noted that Rule 16-109 would be conformed to the changes decided today for Rule 16-110.

The Chair called for a vote on Mr. Michael's motion. The motion passed with three opposed. The Chair referred to the second part of the motion pertaining to restrictions on the use of cell phones in the courthouse, and he asked if there was a consensus that the Rule should forbid cell phones from being used in a courtroom or any other place designated by the administrative judge, including some hallways. This is where local administration can apply. No one objected to this.

The Chair inquired if there were any objections to the proposal that a willful violation of this may constitute contempt. Mr. Karceski commented that his recollection was that the word "willful" means that one took the action, such as

bringing in the cell phone. It does not necessarily mean that the person had the *mens rea* to commit a wrongful act. If the cell phone is not turned off and rings while it is in the possession of someone in the courthouse, is this a willful violation? Or should a violation be one that actually results in a photograph or a recording of someone?

The Chair responded that under the motion that was passed, cell phones are allowed in the courthouse, but they would have to be turned off and not used for taking photographs or transmitting information. He said that he would assume that notices of that restriction would be posted around the courthouse and on courtroom doors as it is in the Court of Appeals, so people would know. When the judge comes on the bench, he or she can ask if anyone in the courtroom has a cell phone and then instruct those people who have one to turn it off. Once someone has been told, a violation of this could be willful and not inadvertent. Judge Norton expressed the view that it is a factual determination as to whether someone's action was willful.

Mr. Klein noted that he had been in a courthouse in Texas where the procedure was that if a cell phone rang in the courtroom, it was taken away, and the owner had to pay $50 to $100 to get it back. The Chair responded that confiscation is one remedy and contempt is another, but they would be available only if the violation is willful. Judge Norton said that a trial judge would probably not be eager to launch into a contempt

proceeding over the possibility of a $50 fine. The Chair agreed, but he added that it might be worthwhile if the person were taking unwanted photographs in the courtroom. Judge Norton explained that he was referring to the person who purposely makes a telephone call.

Master Mahasa remarked that she wanted to address one of Mr. Maloney's comments. The reason for having a rule would be a high profile case where it is likely that gang members or undercover agents will be in the courtroom. Could an individual judge forbid the use of cell phones in that case? The Reporter said that a procedure could be included allowing the bailiff to collect the cell phones. Master Mahasa noted that the problem will not be addressed if a gang member is instructed that he or she will be held in contempt if the person uses their cell phone inappropriately, such as to take photographs. The Chair asked how this problem is handled in Baltimore City now. Master Mahasa answered that there have been problems with gang members taking photographs in the courtroom. The judge had made several announcements during the proceedings that the cell phones had to be turned off, and if not, they could be confiscated. To put any teeth into the Rule, it would have to provide that in a high profile case, a judge should be able to ban the use of cell phones in a particular case. The bailiff would have to collect the cell phones from everyone in the courtroom.

Mr. Siegel commented that the other side of the concern that had been raised is when judges do not allow media reporters to

use their cell phones or to record any testimony. However, there should be an exception for physicians or someone who is using the phone for an appropriate reason. Judge Pierson pointed out that subsection (f)(3) has the language "...unless otherwise permitted by the presiding judge." The Chair explained that the idea was that attorneys who are in court may need to postpone a hearing and have to call their offices, or they need a laptop computer to try their case, and the judge could give them permission to use the devices.

The Chair stated that the Rule will be redrafted consistent with the policy decisions made by the Committee. It can be brought back before the Committee in May. The Reporter noted that in response to Master Mahasa's comments, she would include language that would provide that in a particular case, the presiding judge or the administrative judge can arrange for the cell phones to be collected and then given back later. The Rule can also provide that they would not be allowed in a particular courtroom. A high profile case should have much more security than a regular case.

Judge Pierson asked if there would be a provision that the administrative judge could prohibit use of the phones in certain areas of the courthouse. The Chair replied affirmatively, pointing out this is what most courthouses do now. The Reporter listed the following changes to be made to the Rule: no use of the phone inside the courtroom in general, no text messaging, no ringer, no photography, no recording, and the phone must be

turned off, except as allowed by the judge. Use in the courtroom or any other place can be forbidden by the administrative judge. Someone can be held in contempt if there is a willful violation. Phones can be confiscated for an innocent violation. Notices of the restrictions would be posted. In a high profile case, the presiding judge or the administrative judge can make provisions to collect the cell phones and keep them totally out of the courtroom.

By consensus, the Committee approved Rule 16-110 as amended.

Agenda Item 2. Consideration of proposed amendments to Rule 5-404 (Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes)

Mr. Michael presented Rule 5-404, Character Evidence Not Admissible to Prove Conduct; Exceptions: Other Crimes, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 400 - RELEVANCY AND ITS LIMITS

AMEND Rule 5-404 to modify section (a) by reorganizing the format, adding language to new subsection (a)(2)(B) allowing the prosecution to offer certain evidence, and by making stylistic changes, as follows:

Rule 5-404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character Evidence ~~Generally~~

(1) ~~In General~~ Prohibited Uses

Evidence of a person's character or ~~a~~ character trait ~~of character~~ is not admissible ~~for the purpose of proving action in conformity therewith~~ to prove that on a particular occasion~~, except:~~ the person acted in accordance with the character or trait.

~~(A) Character of Accused~~

~~Evidence of a pertinent trait of character of an accused offered by the accused, or by the prosecution to rebut the same;~~

~~(B) Character of Victim~~

~~Evidence of a pertinent trait of character of the victim of the crime offered by an accused or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;~~

(2) Exceptions in a Criminal Case

The following exceptions apply in a criminal case:

(A) Character of Accused

(i) An accused may offer evidence of the accused's pertinent trait of character, and if the evidence is admitted, the prosecution may offer evidence to rebut it;

(ii) If evidence of a crime victim's pertinent trait of character has been offered by an accused and admitted under subsection (2)(B) of this Rule, the prosecution may offer evidence **~~to rebut it~~ of the same trait of the accused**;

(B) Character of Victim

Subject to the limitations in Rule

5-412, an accused may offer evidence of a crime victim's pertinent trait of character, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) Homicide Case

In a homicide case, the prosecutor may offer evidence of the victim's trait of peacefulness to rebut evidence that the ~~**crime**~~ victim was the first aggressor.

~~(C)~~ (3) Character of Witness

Evidence of the character of a witness with regard to credibility~~, as provided in~~ may be admitted under Rules 5-607, 5-608, and 5-609.

~~(2)~~ (4) Definitions

For purposes of subsections ~~(a)(1)(A)~~ (a)(2)(A) and (B) of this Rule, "accused" means a defendant in a criminal case and a child alleged to be delinquent in an action in juvenile court, and for purposes of subsections ~~(a)(1)(B)~~ (a)(2)(B) and (C), "crime" includes a delinquent act as defined by Code, Courts Article, §3-801.

(b) Other Crimes, Wrongs, or Acts

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

Source: This Rule is derived from F.R.Ev. 404.

Rule 5-404 was accompanied by the following Reporter's Note.

> Professor Lynn McLain, who teaches Evidence at the University of Baltimore School of Law, requested that Rule 5-404 (a) be amended to conform to Federal Rule of Evidence 404 (a)(1) which was changed in 2000 so that if a defendant offers evidence attacking a victim's character trait, the prosecutor is allowed to offer evidence of the defendant's same trait. The reason for the change was due to the abundance of gang cases in which a defendant gang member could accuse the victim of being violent, but the prosecution could not bring out similar evidence about the accused. The Evidence and Criminal Subcommittees recommend a corresponding change to the Maryland Rule for similar reasons. Changes that are merely stylistic are derived from pending amendments to F.R.Ev. 404 (a). Unlike the pending federal rule, the Maryland proposal retains the subheadings "Character of Accused" and "Character of Victim." For this reason, the Subcommittees propose language codifying the substantive change under both subheadings, so as to ensure understanding by the reader. The forms of admissible character evidence remain governed by Rule 5-405.

Mr. Michael explained that Rule 5-404 exemplifies the saying: "People who live in glass houses should not throw stones." This amendment arose out of criminal cases involving gangs. In those cases, the defendant gang member is allowed to paint the victim gang member as violent, but the prosecutor cannot bring out similar evidence about the accused. The proposed Rule makes Maryland law consistent with federal law. He noted that Professor Lynn McLain of the University of Baltimore School of Law was present and with her was a law student, Shawn Michael, his son, who originated the proposed change as part of

his volunteer work with the Criminal Gang unit of the Montgomery County State's Attorney's Office. He suggested that Professor McLain speak on this Rule.

Professor McLain told the Committee that the current Maryland Rule was derived from the federal rule as it existed from the 1970's to the 1990's. In its current form, the exceptions to the propensity rule exclude evidence of a person's character to prove that the person acted in accordance with his or her character. As the current Rule exists, there are two separate boxes, one for the victim's character and one for the accused's character. It is up to the defendant to open up either one of those issues. If the defendant offers evidence of the victim's pertinent character traits, that opens the door to the prosecution to rebut that evidence, but only the evidence of the victim's pertinent character traits. Only if the defendant offers evidence of his or her own character trait does the defendant open the door to rebuttal by the prosecution as to the accused's character traits.

Professor McLain said that in 2000, the federal rule, F.R.Ev. 404, Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes, was amended to make the substantive change that in response to gang and Racketeer Influenced and Corrupt Organizations Act (RICO) type of prosecutions, the defense was undermining the victim's reputation to show that the victim was violent, because the victim was a member of a rival gang, yet the defendant did not open up anything about his or her

own character by doing so. The federal rule was changed, because it offers an unbalanced, misleading picture to the jury. If the defendant chooses to throw stones at the victim as to one particular pertinent trait, this opens up the defendant as to evidence of his or her own character trait. This is why it is called the "people who live in glass houses should not throw stones" amendment. It really was Shawn Michael who, while he was interning for Victor Delpino, an Assistant State's Attorney in Montgomery County, had asked that the same amendment that was made to the federal rule be made to the Maryland Rule.

Mr. Shawn Michael told the Committee that he had interned with Mr. Delpino two summers ago. Mr. Delpino had been involved in a case in which two rival gangs were shooting at each other at Wheaton Plaza two nights before Christmas. The star witness was a 14-year-old girl who had joined one of the gangs two weeks before. As she made her way to the witness stand, it looked like she was being punished. The entire case rested on this young girl's testimony. At one point in the case, the defense attorney tried to make her seem as if she were the leader of the gang. Mr. Michael said that he had sent an e-mail to Professor McLain in which he expressed the view that it made no sense that the entire case rested on the reputation of a 14-year-old girl. The girl came from a background in which her mother was on drugs and was a prostitute. The defense could bring out the traits of the young girl, while the Rule did allow a reference to the 19-year-old man who was the ringleader of the fight.

Professor McLain said that unfortunately, recognition of more and more gang activity in Maryland is growing. The General Assembly passed a bill, Chapter 197, Laws of 2010 (SB517/HB756) that toughened up gang prosecution. The Subcommittee substantively changed the Rule, and they also made several stylistic changes. The Federal Rules Advisory Committee has restyled all of the federal rules amendments. They say that no substantive changes are being made, but this is difficult to accomplish by making stylistic changes. There is controversy about this, but it looks as if the changes are going to go through. To draft this, as many of the style changes submitted by the Subcommittee should be included, but the Subcommittee very much wanted to keep the subheadings, which are not in the federal rule, under exceptions in a criminal case: "Character of Accused," "Character of Victim," and "Homicide Case."

Professor McLain told the Committee that the Rule handed out today is different from what was in the meeting materials. Because the Subcommittee wanted to keep the subheadings in, there had to be either a cross reference between the "Character of Victim" and the "Character of Accused" or a duplicative provision, and the Subcommittee chose the latter. An attorney or judge looking at the Rule quickly would understand how someone would open up one issue by going into the other. Subsection (a)(2)(A)(ii) should read: "If evidence of a crime victim's pertinent trait of character has been offered by an accused and admitted under subsection (2)(B) of this Rule, the prosecution

may offer evidence of the same trait of the accused...". The Chair pointed out that this is repeated in subsection (a)(2)(B), so it is duplicative. He inquired if the language in subsection (a)(2)(B)(ii) should be "the accused's same trait" and not the "defendant's same trait." Professor McLain replied that the federal rule uses the word "defendant," and the Maryland Rule uses the word "accused." The Chair explained that this is because of juvenile cases which also use the term "defendant." Professor McLain said that the language in subsection (a)(2)(B)(ii) should be "the accused."

Professor McLain noted that another difference between the version of the Rule in the meeting materials and the version that was handed out was that in subsection (a)(2)(C) of the latter, the word "crime" was deleted, because it seemed redundant in a homicide case. Master Mahasa referred to subsection (a)(2)(B). She asked if, in an assault case, the defendant could offer evidence of a crime victim's aggressiveness. Professor McLain answered affirmatively. This would be governed by Rule 5-405. It would be either opinion or reputation evidence but not specific instances.

Master Mahasa inquired how this would differ from subsection (a)(2)(C), Homicide Case. Professor McLain replied that in a homicide case, the defendant will open the door to favorable evidence of the defendant's character for peacefulness, not only through the route of offering evidence of the victim's bad traits for violence, but simply by offering evidence that in this

particular case, the victim was the first aggressor. This is no change from the current Rule. The reason for this is that the prosecution is allowed to offer good opinion or good reputation evidence of the victim's trait for peacefulness to rebut the evidence that the victim was the first aggressor. Master Mahasa questioned whether this is rebuttal evidence. Professor McLain responded that it is. Master Mahasa asked how it is different. The defendant offered evidence that the victim was an aggressor. This is being rebutted to show the victim's trait of peacefulness. Professor McLain explained that the difference is in subsection (a)(2)(C), because the defendant has not offered character witnesses about the victim at all. The defendant took the stand stating that the victim brandished a knife at him or her, or an eyewitness can be called to state that the victim came at the defendant with a baseball bat. No character evidence needs to have been offered in the homicide case. Now the prosecution will be able to call in the case in rebuttal evidence of character witnesses that are favorable towards the victim as to the trait of peacefulness. This would show circumstantially that it is unlikely that the victim would have threatened the defendant with a knife or a baseball bat.

Master Mahasa said that in subsection (a)(2)(B), character witnesses are being offered, and in subsection (a)(2)(C), there is no need to call character witnesses. Professor McLain commented that this is the difference between the two. Master Mahasa inquired whether this is clear. She added that if she

were a defense witness, she would not necessarily interpret the Rule this way.

Mr. Patterson referred to the example that Shawn Michael gave regarding the 14-year-old witness who was being attacked. Under this Rule, her character could have been attacked by accusing her of being a prostitute as her pertinent trait of character. Under the revision, the only rebuttal would be that the defendant was a prostitute, also. Professor McLain said that it would not be admitted because it was not pertinent in that case. Mr. Michael commented that Mr. Delpino had explained to him that the problem with gang prosecutions is that the victims are also gang members. It is difficult to get them to testify in the first place. When they do take the stand, their credibility is absolutely destroyed. The prosecutor's hands are tied, and he or she cannot say that the case involved gang-on-gang violence.

Professor McLain remarked that the original proposal before the Federal Advisory Committee was not restricted to the same trait. However, in response to the comment that if someone attacks the opponent on one trait, why should the person doing the attack open himself or herself up to rebuttal as to some other trait, the current rule is that the door is not opened to any character evidence. It is restricted to the same trait which the defense has attacked as to the victim.

Mr. Patterson commented that if the gang member who is testifying is the one who commits all of the thefts for the gang to supply money, the defendant, who is not stealing but is the

physical enforcer who assaults people, can attack the witness by stating that the witness is a thief, and this cannot be rebutted under this proposed change because the defendant is not a thief, the defendant is the strongman. Professor McLain responded that this would be impeaching evidence under section (b) of Rule 5-608, Evidence of Character of Witness for Truthfulness or Untruthfulness, as opposed to substantive evidence under Rule 5-404.

Mr. Zavin expressed the view that this proposed change is an attempt to add a balance where it should not be balanced and is not balanced, because of the defendant's constitutional rights in a criminal prosecution. This is going to deter a number of rights that a defendant has. Gang cases do occur. This normally comes up in a typical assault case where a defendant is claiming self-defense. Usually, the defendant has a less than illustrious background and wants to raise what could be a valid claim of self-defense. This information happened to come out about the victim during the State's case-in-chief.

Mr. Zavin said that the defendant does not have an obligation to testify. The victim is on the stand and can in effect say that he or she knows about the defendant's reputation. If the State brings this out about the defendant, the defendant is going to be forced to testify in order to rebut this allegation. To raise a claim of self-defense, the defendant is going to have to take the stand. The victim is already on the stand and is able to rebut this evidence. The defendant does not

have to take the stand but would be forced to do so. This is the way a criminal trial typically plays out. If the defendant is not going to be able to assert his or her right to self-defense, it will chill the defendant's right to confront the witness. This will interfere with the right to confrontation, the right to present a defense, and the right to remain silent in a criminal trial. If the proposed change goes into effect, the defendant will either have to forfeit the right to present a defense or forfeit the right to remain silent. It is important to remember that the victim is not on trial, the defendant is. The person who will be hurt by this is the defendant, since it is the defendant who can be convicted if the jury is overly influenced by this evidence.

Mr. Karceski inquired if self-defense can be generated by bringing forth some evidence to show the issue of self-defense. It may not be accomplished by the way Mr. Zavin described, but it may be done by generating testimony from the victim or State's witnesses who are part of the case. Once the issue is brought up, only a scintilla of evidence is needed to go forward. One would not have to choose this way to go forward. The Rule is being amended to balance the field. If the defendant chooses to put a witness on to speak about his or her character, then the prosecution deserves the do the same. This does not apply across the board in every case of self-defense.

Mr. Zavin said that the defendant has to introduce the evidence, but the defendant does not have to testify. Mr.

Karceski pointed out that the defendant does not have to testify if he or she introduces the evidence through the State's case. The defendant can introduce a claim of self-defense in some situations. Mr. Zavin responded that the defendant can present a persuasive case if he or she has additional evidence, but this would impinge on the right to present a defense. If the victim is on the stand, he or she can rebut this evidence. The defense can call witnesses to talk about the victim; the State can call witnesses in rebuttal representing that the victim does not have this character trait. The person who normally does not have to take the stand is the defendant, but this would force the defendant to take the stand.

The Chair noted that all of the evidence that the State produces is intended to prejudice the defendant. The prosecution is trying to convict the defendant. Sometimes, the defendant has a choice as to whether he or she wants to rebut the evidence or let it stand. How is this different from any other evidence that the State is producing? If the defendant wants to contest it, he or she may need to testify. Mr. Zavin remarked that he thought that only a minority of the states have conformed to the amended federal rule. He saw that only 10 states changed their rules to conform to the federal rule. Some states rejected the federal amendment as a matter of common law. It has been a rule at common law for a long time that the state does not produce character evidence about the defendant. The reason is that this would be more difficult to rebut through cross-examination with

the State's witnesses. In a typical defense case, the defendant would have to take the stand to effectively rebut that evidence.

Mr. Karceski asked whether the proposed Rule requires more action by defense counsel than questioning the victim, who has testified and is now on cross-examination, with questions such as "Is it not true that you picked up a bat and came at my client?" This kind of questioning would not generate this problem. Mr. Zavin agreed, stating that what is being discussed is character evidence. Mr. Karceski remarked that it would have to be a witness at the trial who refers to a character trait. Mr. Zavin commented that it would have to be evidence of character. It would not be factual evidence as to whether the victim was the first aggressor. Mr. Karceski added that this would also be evidence that one would have to tell the State about before the case began.

Mr. Karceski inquired why Mr. Zavin believed that this violates the defendant's rights simply because of the statement that it forces the defendant to take the witness stand. Mr. Zavin replied that it may be a dilemma for the defendant to present a defense and confront the State's witnesses, but it would require the defendant to take the stand. The defendant can present a defense and confront the State's witnesses by putting in honest evidence of character, but the defendant knows that in putting on the evidence, he or she will have to take the stand. The defendant is either going to have to give up the right to present a defense or give up the right to remain silent. Mr.

Karceski asked whether this occurs in every situation when there are character witnesses if the defendant tries to go forth and introduce some character trait. Mr. Zavin noted that this would be a trait of the defendant personally.

Mr. Karceski observed that even though it may be a difficult choice, Mr. Zavin's point was that the problem exists because once the defendant and his or her counsel opt for this way to proceed, in Mr. Zavin's opinion, the defendant has decided that he or she must go forward. Mr. Zavin added that at some point, the defendant will have to go forward. Mr. Karceski noted that the defendant has the same choice not to put forward the defense. Mr. Zavin expressed the opinion that the one who stands the most to lose from the trial is the defendant. Any pressure as a result of this evidence is going to hurt the defendant.

Mr. Maloney inquired if Mr. Zavin's point was that the dilemma facing the defendant is that once he or she makes the calculated decision to bring out that the victim has been in many other fights and is aggressive, then the defendant's own history of aggression will come out, also. This is the dilemma the defendant faces. Mr. Maloney suggested that this is fair. Once the character trait of one party comes out, why should the character trait of the defendant not come out? Mr. Zavin replied that the case does not start off with a balanced playing field. It starts off with the State having the burden of proof, and the defendant not having any burden to put on any evidence or to testify.

Mr. Brault asked whether this is similar to saying that the defendant is accused of committing a crime, and now the defendant has to deny it. The defendant has lost his or her rights. Judge Norton commented that the defendant could put third-party witnesses on. Mr. Patterson added that the defendant does not have to take the stand. Mr. Zavin agreed, but he pointed out that there are other ways of forcing people in order to effectively rebut the evidence. Character evidence is the only way the defense can rebut. The victim is on the stand, and the State can question the victim about the evidence that the defendant is intending to produce, and the jury can therefore see the victim and judge the victim's credibility on the stand. The defendant does not have to get on the stand, but the only way to rebut the victim's testimony is to take the stand. This would open the door to impeachment by prior convictions and other issues.

Mr. Brault commented that the real problem that he saw looking at the defense side is specific acts. When he has had a case where character evidence has been set forth, it has been on truth, veracity, and credibility issues, and there is always a debate about whether one can put in specific instances where the person lied or did something dishonest. In the situation being discussed today, it will result with the introduction of evidence as to how many times the defendant beat someone up. Professor McLain noted that this is governed by Rule 4-505 which is only opinion and reputation on direct of a character witness. Mr.

Brault said that the defense attorney has a problem. The attorney can never say "How would you know what the defendant's reputation is?" It is a matter of specific acts.

Professor McLain responded that character evidence is not that probative. The defendant in a criminal case is given the option to introduce character evidence if the defendant thinks that it is helpful to him or her. The defense is the only one that can open up this route, and the prosecution cannot. It is restricted by what the defense can bring in. The Rule exists as an initial benefit to the defendant.

Mr. Karceski drew the Committee's attention to Rule 5-404 (b). If this is discussed, would there be a hearing as in Rule 5-608 (b) to see if enough evidence exists to go forward? This provision states that the court may permit any witness to be examined regarding the witness's own prior conduct that did not result in a conviction, but that the court finds probative of a character trait of untruthfulness. However, upon objection, the court may permit the inquiry only if the questioner, outside of the hearing of the jury, establishes a reasonable factual basis for asserting that the conduct of the witness occurred. If Rule 5-404 is going to include specific instances of conduct, is the party moving forward with this allowed to open up all of this evidence? Would there be a similar safety valve as in Rule 5-608 (b)?

Professor McLain asked whether there is a required motion in limine provided for in the recent changes to the Criminal

Discovery Rules. Mr. Karceski replied that no discovery rule provides for specific instances of conduct. There is only a provision for character witnesses. This concerns him. If the playing field is going to be leveled, some safety valve has to be added before all of this evidence crashes before the jury.

Professor McLain questioned whether Mr. Karceski was referring to section (b) of Rule 5-404. He replied affirmatively but inquired whether the Rule allows for specific instances to be admitted. Professor McLain answered that it would not. It would only be on cross-examination of the character witness by the other side. Mr. Karceski remarked that no matter who is questioning, it still troubles him. No one would know what evidence is coming in. Although this is the nature of a trial, when specific instances of conduct are being opened up, it may be a problem. Professor McLain pointed out that section (b) of Rule 5-404 pertains to substantive evidence of other wrongs or acts offered to prove that the person acted in a certain way, with knowledge or something similar. Under Rule 5-405, the cross-examiner can ask a character witness about a specific instance of the principal witness's conduct that would lead the character witness to the opposite opinion or would lead the community to the opposite reputation. That question is only asked for the limited purpose of impeaching the character witness. There is a limiting instruction for this. It is not admissible as substantive evidence at all. If there is a great risk that the jury would misuse the evidence as substantive, there should be an

objection to asking that question pursuant to Rule 5-403, Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. If the attorney knows about something in the defendant's background that might be questioned, the attorney probably would not want to call the character witness in the first place. The defense has to think about what information is out there before deciding to tactically go that route.

The Chair asked Professor McLain if she knew whether the point raised by Mr. Zavin that this change could inhibit the defendant or require the defendant to testify was considered by the federal Rules Committee or by any group. Professor McLain answered that nothing in the comments to the federal rule refers to this issue. The way to regard this is that the defense decides to call their own character witness. The defendant can be his or her own character witness if the defendant so wishes, but this is not the only route, and it is the least likely route. The same argument that it prevents the defendant from testifying can be made for impeachment by prior conviction (Rule 5-609, Impeachment by Evidence of Conviction Crime).

Mr. Brault asked if the statute as to opinion of truth and veracity refers to specific instances. Professor McLain replied that it used to be that at common law, there could only be reputation witnesses, and the statute states that there can be opinion witnesses. Mr. Brault added that it prohibits specific instances to support the opinion. Professor McLain noted that

the lines became more indistinct in *Jensen v. State*, 355 Md. 692 (1999). The court held that no one can offer specific instances, but some basis for the opinion can be shown. The case fell into the gray area. This case involved a witness favorable to the defense, and this is why the case was decided this way.

Mr. Klein referred to the example given by Professor McLain where the defense cross-examines the State's character witness and brings out specific examples of acts inconsistent with the opinion of the character witness. He asked Professor McLain if the State is then allowed to bring in specific instances to rebut this. Professor McLain replied negatively. The Vice Chair said that the discussion had addressed the defense deciding to show that the victim was very violent. As a result of putting this evidence on, the prosecution can show that the defendant is also violent. Professor McLain added that this would be shown through opinion and reputation. The Vice Chair asked if the point of this is to say that it was not likely to be self-defense or that the defendant is a bad person. Professor McLain responded that it would have to be circumstantial evidence of the defendant's behavior this time. It is what the defense opens the door to by going down this route.

The Vice Chair said that she was trying to understand the point of the evidence with respect to the defendant. Professor McLain pointed out that this is an exception to the propensity rule, which is Rule 5-404 (a). This means that the relevance of

the evidence is that it is circumstantial evidence to prove that someone acted in accordance with his or her character this time. This is why the accused can offer favorable character evidence about himself or herself as to pertinent traits, such as that someone is a choir boy and has led an unblemished life up until now. The rules give the defense this option. That is substantive evidence, and it is why it is in Rule 5-404.

The Vice Chair remarked that she did not understand the parallel between the two. If the victim had the propensity to fight, it is clear that this is some evidence that the victim started the fight with the defendant, and that it was self-defense. How does the fact that the defendant has a propensity to fight go to the issue of who started the fight or if it was self-defense? Professor McLain asked whether the Vice Chair's point was that this evidence is irrelevant. The Vice Chair said that it allows the evidence in, not for the same reason that the defendant is bringing it in. It brings in an issue. If the defense says the murder was self-defense, and the prosecution responds to this by telling the defendant that he or she has the propensity to do this, this may mean that it is more likely than not that the defendant committed the crime. It does not seem to come in for the purpose of rebutting that which the defendant was doing.

Judge Norton commented that the purpose is that the defendant is likely to have committed the crime, because of the defendant's reputation. He asked whether it is germane that the

defendant also has a reputation for violence. It seems to be related. The Chair observed that if it is pure self-defense, perfect or imperfect, it could be whether the defendant started the fight, or even if the victim started it, whether the defendant raised the level of violence beyond what was necessary.

Mr. Brault clarified that this pertains to reputation and opinion. Professor McLain agreed, adding that it is on direct examination. Mr. Brault asked if it is the same as for truth and veracity, and Professor McLain answered affirmatively. Mr. Karceski asked if the ultimate effect is that the defendant's record, if he or she has one, comes out, if this evidence about the defendant is generated, and as Mr. Zavin pointed out, the defendant has to testify or present character witnesses of his or her own. Professor McLain commented that the effect should be that if the defendant is vulnerable on the same trait which is pertinent to what happened in the case, the defendant should choose not to call character witnesses about the victim's same trait. This is not that probative, anyway.

The Chair commented that the Vice Chair's concern was what the evidence is probative of. Professor McLain told the Vice Chair that her point was that the evidence is not that probative of who started the fight this time. The defendant should think twice before throwing stones at the victim if the defendant is vulnerable on the same trait. If so, the State gets to present similar evidence about the defendant that the defendant presented about the victim.

Mr. Zavin commented that the effect on the defense is different. In effect, the State is starting to suspect that the defendant is a bad person and that the victim did nothing wrong. The defendant assaulted the victim. The State has the burden of proof, and the State is not showing that this victim is as innocent as the State has been saying. The State will then come back and say that the defendant is a bad person. The reason why character evidence about the accused is not allowed in is because the jury will decide that the defendant is a bad person. It does not matter what happened in this specific case, since the defendant is bad and violent, the jury will decide that the defendant should be convicted. This is the danger of propensity evidence, and if section (b) is an exception to this, what will happen is that the jury will consider this as propensity evidence. It is more prejudicial.

The Vice Chair questioned whether the prosecutors in the State have asked for this amendment to the Rule. Mr. Michael answered affirmatively, noting that the genesis of this change emanated from the Gang Violence Division of the Montgomery County State's Attorney's Office.

The Chair asked if there were any motions concerning the Subcommittee's proposal. The Vice Chair expressed the opinion that there may not have been enough consideration by the defense bar as to the proposed change. She asked if there had been meetings about this with the defense bar. Mr. Karceski replied that a joint meeting of the Evidence and Criminal Subcommittees

was held. The Chair said that this change went through the federal system. Professor McLain noted that it was narrowed down as it went through the federal process. The Chair said that the Federal Advisory Committee, Federal Rules Committee, U.S. Supreme Court, and Congress all approved it. The Vice Chair commented that the fact that only 10 states have conformed their rules to the federal rule concerns her. It appeared to her that it is putting a defendant in the position of choosing between trying to put forward the defense of self-defense, or not being able to. It may be taking away this defense from a defendant.

Judge Hollander remarked that Mr. Zavin had said that this is not supposed to be a level playing field. She expressed the view that the amendment was very reasonable. If the defendant chooses to inject this issue, since the defendant does have the burden, why would the evidence be left in an inaccurate state? The defendant does not only get to tarnish the reputation of the victim. The door is opened, and the State would have the right to come back and show the jury or the judge if he or she is the fact-finder, what the reality is.

Mr. Patterson disagreed that the defendant has to choose whether to put on self-defense as a defense. It has to do with the attack on the victim. Because the victim is a bad person does not mean that he or she cannot be the victim of an attack. Because a woman is a prostitute does not mean that she cannot be raped. This does not address the substance of whether the person committed the crime or not. It has to do with the broad brush

that the defendant is painting to say that the victim is a bad person, and the evenness of the Rule merely states that the defendant is a bad person also. Just because someone is a bad person does not mean that he or she committed the crime. It levels this out. Mr. Patterson added that he did not believe that the proposed change prohibits a defense or that the defendant is forced to take the witness stand. The defendant can rebut the evidence of bad character through other people.

The Vice Chair said that the defendant puts on evidence to show the defense of self-defense, not that the victim committed a crime, but that the defendant did not initiate the altercation. Mr. Karceski responded that this is not a character trait. The Vice Chair observed that the defendant puts on evidence that a victim had a history of being violent and fighting. Mr. Karceski explained that what this involves is concepts that can be compartmentalized, such as truth and veracity, peacefulness, and quietness. Mr. Brault added that it is a question of whether the victim has a reputation of being violent.

The Vice Chair remarked that the defendant puts on evidence that the victim has a reputation for being violent to prove or hope to prove self-defense. When the State puts on the same evidence with respect to the defendant, it is to prove that the defendant had the propensity to do it in the case being tried and is guilty. These are two different issues. Mr. Patterson noted that the defendant is not putting on the evidence necessarily to show self-defense, but to show that the victim deserved the

attack. It does not concern the facts of the case. It is not substantive evidence as to how the alleged crime occurred.

The Vice Chair questioned if there is some evidence that the victim took the first shot. Mr. Patterson replied that this is not necessarily the case. The victim could be the neighborhood enforcer who is drinking a beer on his front lawn, and the defendant decides to attack the victim because he is the enforcer. The character trait is that the victim was known as the enforcer, although on that particular day he was simply sitting outside. This trait has nothing to do with how the offense happened.

The Chair said that what comes back against the defendant is showing the character trait of being violent. It is the inference that the defendant was violent in this instance. Is this the whole purpose of this? Mr. Patterson answered that the whole purpose of this is to show that there are two violent individuals, and then what happened the day of the crime can be the issue. The Chair commented that the idea is that a reputation for violence can be shown. The jury is being asked to infer that the defendant acted in accordance with that trait in this instance. The point is not just that violence generally, it is that the defendant acted in accordance with the trait.

Mr. Michael pointed out that the issue of who was the aggressor is relevant, because usually the defense case is the accused saying that he or she was not the one who started the fight, it was the victim who did so. Mr. Brault remarked that

when the defense puts on evidence that the victim was violent, the State should be able to put on evidence that the victim was not violent. This Rule does not address the victim's reputation or propensity toward violence, but it allows the defendant's propensity to come in. This was the point that the Vice Chair had made. Professor McLain said that the prosecution can rebut evidence about the victim and about the defendant.

Mr. Karceski commented that this Rule is like a rape shield in reverse. A rape shield is a law that limits a defendant's ability to cross-examine a rape victim about the victim's past sexual behavior. In a rape shield case, there is nothing the defense can do. In the situation being discussed today, a back door exists. The Chair said that the defendant cannot show the reputation of the victim as a prostitute, and that statute would supersede this Rule. The reverse, which is showing the defendant as a sexual predator is not available. The Vice Chair asked if this is in a current statute in Maryland. Mr. Karceski responded that it is in Rule 5-412, Sex Offense Cases; Relevance of Victim's Past Behavior. Professor McLain noted that subsection (a)(2)(B) of Rule 5-404, entitled "Character of Victim," begins with the language: "[s]ubject to the limitations in Rule 5-412 ... ." Mr. Karceski added that this excludes the admissibility of evidence relating to the victim's sexual history in certain sex offense cases.

Judge Norton moved that the Rule be approved. The Chair said that no motion is necessary to approve a Subcommittee

recommendation. A motion is only necessary to alter, amend, or reject the recommendation. The Vice Chair remarked that she was still not sure how the proposal to change the Rule came about. The Chair replied that its origin was conformance with the change to the federal rule. The Vice Chair inquired if there has been sufficient public input on this proposed change. The information in the meeting materials indicated that it was suggested by Professor McLain, who agreed that she had asked for the change.

The Chair asked when the federal rule was amended. Professor McLain replied that it was amended in 2000, adding that there had been no adverse experience or comments about this change so far. Because of the increasing gang activity and gang prosecutions throughout Maryland, particularly in Montgomery County, the motivation for the proposed change had already been noted by Shawn Michael, who worked for Mr. Delpino in the Montgomery County State's Attorney's Office. The change had originated in the federal system because of gang prosecutions.

Mr. Bowen pointed out that the Reporter's note indicates that Rule 5-404 retains the subheadings "Character of Accused" and "Character of Victim," which is different from the federal rule. He expressed the opinion that this was not a good reason for doing this. The Style Subcommittee will review this later. The Chair acknowledged that this was redundant. It may be helpful to look at the structure of the federal rule. This is a matter of style. Mr. Bowen suggested that to eliminate the repetitive language, subsection (a)(2)(A)(i) would become

subsection (a)(2)(A), and subsection (a)(2)(A)(ii) could be deleted. Then the Reporter's note could be modified. The Chair said that the repetition appears to be in both subsections (a)(2)(A)(i) and (ii). Mr. Bowen commented that this can be stated once.

The Chair added that if the defendant raises the issue of character, the State can take two actions. It can rebut the evidence and also show that the defendant is just as bad. The Chair noted that subsection (a)(2)(B) is subject to Rule 5-412. The Rule is duplicative because of what is in subsection (a)(2)(B). Professor McLain said that subsection (a)(2)(A)(i) is not duplicative, because it addresses the character of the accused. Mr. Bowen observed that subsection (a)(2)(A) concerns the character of the accused, but subsection (a)(2)(A)(ii) is the character of a crime victim.

The Chair inquired if anyone objected to restyling the Rule as discussed. No one objected. The Vice Chair moved to defer the Rule for consideration at the next meeting to ensure that notice has been given to all of the local public defenders and the defense associations. The Reporter pointed out that the Committee always notifies a wide variety of people and organizations. The Chair stated that the Rule had been sent to the Office of the Public Defender.

Mr. Karceski asked if there had been any consideration given to limiting the proposed change to the Rule to gang case crimes similar to the way Rule 5-412 is limited to crimes involving sex

offenses. Even the Reporter's note provides that the change came about because of gang prosecutions. The Chair said that the same concerns would apply to any defendant and not only gang defendants. Mr. Karceski responded that the Reporter's note should be changed. Professor McLain pointed out that the Reporter's note disappears later in the rule drafting process. The Vice Chair said that it had been 10 years since the federal rule was changed, and no problems seem to have occurred. Mr. Karceski said that the only murder case that he could think of that a U.S. District Court in Maryland has prosecuted was a gang case. Mr. Maloney added that there has been another case involving a triple murder. Professor McLain remarked that there are similar cases involving Indian reservations and army bases.

The Chair asked if there was a second to the Vice Chair's motion to defer the Rule. The motion was seconded, and it failed on a vote of four in favor. By consensus, the Committee approved Rule 5-404 subject to restyling.

Agenda Item 3. Consideration of proposed amendments to Rule 5-804 (Hearsay Exceptions; Declarant Unavailable)

Mr. Michael presented Rule 5-804, Hearsay Exceptions; Declarant Unavailable, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 800 - HEARSAY

AMEND Rule 5-804 (b)(3) by deleting the language “to exculpate the accused” and adding the language “in a criminal case,” as follows:

Rule 5-804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) Definition of Unavailability

"Unavailability as a witness" includes situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(2) refuses to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(3) testifies to a lack of memory of the subject matter of the declarant's statement;

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4) of this Rule, the declarant's attendance or testimony) by process or other reasonable means.
A statement will not qualify under section (b) of this Rule if the unavailability is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay Exceptions

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony

Testimony given as a witness in any action or proceeding or in a deposition taken in compliance with law in the course of any action or proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement Under Belief of Impending Death

In a prosecution for an offense based upon an unlawful homicide, attempted homicide, or assault with intent to commit a homicide or in any civil action, a statement made by a declarant, while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death.

(3) Statement Against Interest

A statement which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest, so tended to subject the declarant to civil or criminal liability, or so tended to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered ~~to exculpate the accused~~ in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Cross reference: See Code, Courts Article, §10-920, distinguishing expressions of regret or apology by health care providers from admissions of liability or fault.

(4) Statement of Personal or Family History

(A) A statement concerning the declarant's own birth; adoption; marriage; divorce; legitimacy; ancestry; relationship by blood, adoption, or marriage; or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated.

(B) A statement concerning the death of, or any of the facts listed in subsection (4)(A) about another person, if the declarant was related to the other person by blood, adoption, or marriage or was so intimately associated with the other person's family as to be likely to have accurate information concerning the matter declared.

(5) Witness Unavailable Because of Party's Wrongdoing

(A) Civil Actions

In civil actions in which a witness is unavailable because of a party's wrongdoing, a statement that (i) was (a) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (b) reduced to writing and was signed by the declarant; or (c) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement, and (ii) is offered against a party who has engaged in, directed, or conspired to commit wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness, provided however the statement may not be admitted unless, as soon as practicable after the proponent of the statement learns that the declarant will be unavailable, the proponent makes known to the adverse party the intention to offer the statement and the particulars of it.

Committee note: A "party" referred to in subsection (b)(5)(A) also includes an agent of the government.

(B) Criminal Causes

In criminal causes in which a witness is unavailable because of a party's wrongdoing, admission of the witness's statement under this exception is governed by Code, Courts Article, §10-901.

Committee note: Subsection (b)(5) of this Rule does not affect the law of spoliation, "guilty knowledge," or unexplained failure to produce a witness to whom one has superior access. See *Washington v. State*, 293 Md. 465, 468 n. 1 (1982); *Breeding v. State*, 220 Md. 193, 197 (1959); *Shpak v. Schertle*, 97 Md. App. 207, 222-27 (1993); *Meyer v. McDonnell*, 40 Md. App. 524, 533, (1978), rev'dd on other grounds, 301 Md. 426 (1984); *Larsen v. Romeo*, 254 Md. 220, 228 (1969); *Hoverter v. Director of Patuxent Inst.*, 231 Md. 608, 609 (1963); and *DiLeo v. Nugent*, 88 Md. App. 59, 69-72 (1991). The hearsay exception set forth in subsection (b)(5)(B) is not available in criminal causes other than those listed in Code, Courts Article, §10-901 (a).

Cross reference: For the residual hearsay exception applicable regardless of the availability of the declarant, see Rule 5-803 (b)(24).

Source: This Rule is derived from F.R.Ev. 804.

Rule 5-804 was accompanied by the following Reporter's Note.

The Criminal Subcommittee recommends a change to Rule 5-804 (b)(3). This was requested by the Office of the Public Defender, and it is based on an amendment to Fed.R.Ev. 804 (b)(3) that will go into effect December, 2010. The proposed amendment would require both sides in a criminal case to show corroborating circumstances as a condition for admission of an unavailable declarant's statement against pecuniary or proprietary interest. Currently, the Rule requires only the defendant to make this showing. The Office of the Public Defender points out that

> under the current Rule, there is a risk of wrongful convictions based on unreliable statements against interest by unavailable witnesses who cannot be cross-examined. Unavailable State's witnesses' testimony should be subject to the same requirement of corroboration as that of defense witnesses.

Mr. Michael explained that the change to subsection (b)(3) of Rule 5-804 was proposed to conform to the change to Rule 5-404. The words "in a criminal case" are being proposed in place of the words "to exculpate the accused." This expands the exception that would permit this type of evidence to apply not only to the accused, but also to the victim consistent with the change to Rule 5-404. There was no discussion of the proposed change.

The Chair asked Professor McLain about the restyling of the Evidence Rules that she had referred to earlier in the meeting. Professor McLain responded that the restyling changes had not yet been approved. The revisions to Fed.R.Ev. 404 have been approved and will go into effect on December 1, 2010. The proposed change to Fed.R.Ev. 404 and Rule 5-404 is a substantive change to make the playing field the same for defendants as it is for prosecutors. It was previously tipped toward the defense.

Mr. Maloney referred to the statement against interest in Rule 5-804 (b)(3). The last sentence reads as follows: "A statement tending to expose the declarant to criminal liability and offered ~~to exculpate the accused~~ in a criminal case is not admissible unless corroborating circumstances clearly indicate

the trustworthiness of the statement." In a Court of Appeals case, *Gray v. State*, 368 Md. 529 (2002), the Honorable Dale Cathell clearly rejected the position of this last sentence. He said that this standard would apply if it were referring to a witness in a State case, but not to a hearsay statement that would tend to exculpate the accused and indicate criminal liability of another. Mr. Maloney read from page 545 of the opinion as follows: "In a jury trial, it is generally not the court's function to assess that type of credibility." He suggested that the Committee take a look at *Gray* and then look at the last sentence of subsection (b)(3) of Rule 5-804 to consider its deletion.

The Chair noted that the declarant could be on either side. This should be limited to prosecution witnesses. Mr. Maloney agreed, commenting that if it is so limited, it should be taken out. It is no longer the law in this State since *Gray* that when the defense is calling the witness to exculpate the accused, there must be a credibility assessment, because this is not what the case held. Professor McLain observed that there have to be corroborating circumstances. Mr. Maloney responded that *Gray* discusses the corroborating circumstances, but then it provides that in a jury trial, it is generally not the court's function to assess that type of credibility.

Judge Hollander inquired if the issue was whether the witness could testify. Mr. Maloney answered negatively, noting

that it was whether, in that case, the witness could say that she heard the declarant in *Gray*, Brian Gatton, say "I killed another person." Professor McLain commented that *Matusky v. State*, 105 Md. App. 389 (1995), made it very difficult for the State to get any evidence in under this exception. It is already very hard for the State to get anything in. This amendment arguably makes it even harder for the State to get evidence admitted. She expressed some doubt as to whether it makes much difference, since it already is so difficult to get evidence admitted. The fact is that the State is already required to make a good showing with a statement against interest of a third person that tends to inculpate the accused. The accused statement would come in under admission of a party opponent, so the only way that this is needed is that someone else, who is unavailable, says, "The defendant and I committed x crime."

Mr. Maloney said that his objection was to a different issue. It is not to the Rule change being presented. He explained that he was looking at the last sentence of Rule 5-804 (b)(3) with respect to the defense's ability to put in a statement exculpating the accused that is not admissible unless corroborating circumstances clearly indicate its trustworthiness. Since *Gray*, this is no longer the law in this State as far as the defense introduction of the hearsay statement. Professor McLain expressed the view that it is still the law.

Mr. Zavin remarked that what is being discussed is the

trustworthiness of the statement versus the trustworthiness of the declarant. Under the Fifth Amendment, assessing the defendant's credibility is not allowed. Mr. Maloney noted that *Gray* concerned two issues. One was the Fifth Amendment issue as to whether the witness could be called to the stand and take the Fifth Amendment in front of the jury. A second issue was as to whether the person who articulated a hearsay statement was allowed to testify as to the hearsay statement. In response to this, the court held that in a jury trial it is ordinarily not the job of the court to assess the trustworthiness and credibility of a witness. Mr. Maloney added that the analysis of this does not have to be made now, but before the Rule is sent to the Court of Appeals, the Committee should review carefully the last sentence of subsection (b)(3) in light of *Gray v. State*.

The Chair pointed out that the Subcommittee did not consider the implications of *Gray*. If Mr. Maloney is correct that this has been changed, it should be considered. He asked the Committee if they were in agreement that the discussion of Rule 5-804 should be deferred. Professor McLain inquired if the proposed changes were being adopted. Mr. Maloney noted that the conflict is that *Gray* suggests that there is not a test that there must be corroborating circumstances indicating trustworthiness. The issue is whether that threshold test still exists.

Mr. Michael inquired if there are two separate issues. Mr.

Maloney answered that it is totally separate from the issues raised by Professor McLain. The Chair said that a threshold finding would have to be made by the court to allow this in against a hearsay objection. Mr. Maloney remarked that the *Gray* opinion analyzed what the trustworthiness is. The question as framed by Judge Cathell is whether a trustworthiness standard remains for these type of hearsay statements. The Chair commented that he could not see a down side to deferring this issue for a month to read *Gray*.

Agenda Item 4. Consideration of proposed Rules changes concerning the term "newspaper of general circulation" - Amendments to: Rule 1-202 (Definitions), Rule 6-208 (Form of Register's Order), Rule 9-107 (Objection), Rule 14-210 (Notice Prior to Sale), Rule 15-901 (Action for Change of Name) and Conforming amendments to: Rule 2-131 (Appearance), Rule 2-221 (Interpleader), Rule 3-131 (Appearance), Rule 3-221 (Interpleader), Rule 9-202 (Pleading), and Rule 16-401 (Proscribed Activities - Gratuities, Etc.)

The Vice Chair presented Rule 1-202, Definitions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 200 - CONSTRUCTION, INTERPRETATION,

AND DEFINITIONS

AMEND Rule 1-202 to add a definition of "newspaper of general circulation" and to make stylistic changes, as follows:

Rule 1-202. DEFINITIONS

. . .

(r) Newspaper of General Circulation

"Newspaper of general circulation" means a newspaper as defined in Code, Article 1, §28.

~~(r)~~ (s) Original Pleading

"Original pleading" means the first pleading filed in an action against a defendant and includes a third-party complaint.

~~(s)~~ (t) Person

"Person" includes any individual, general or limited partnership, joint stock company, unincorporated association or society, municipal or other corporation, incorporated associations, limited liability partnership, limited liability company, the State, its agencies or political subdivisions, any court, or any other governmental entity.

~~(t)~~ (u) Pleading

"Pleading" means a complaint, a counterclaim, a cross-claim, a third-party complaint, an answer, an answer to a counterclaim, cross-claim, or third-party complaint, a reply to an answer, or a charging document as used in Title 4.

~~(u)~~ (v) Proceeding

"Proceeding" means any part of an action.

~~(v)~~ (w) Process

"Process" means any written order issued by a court to secure compliance with its commands or to require action by any person and includes a summons, subpoena, an order of publication, a commission or other writ.

~~(w)~~ (x) Property

"Property" includes real, personal, mixed, tangible or intangible property of every kind.

~~(x)~~ (y) Return

"Return" means a report of action taken to serve or effectuate process.

~~(y)~~ (z) Sheriff

"Sheriff " means the sheriff or a deputy sheriff of the county in which the proceedings are taken, any elisor appointed to perform the duties of the sheriff, and, with respect to the District Court, any court constable.

~~(z)~~ (aa) Subpoena

"Subpoena" means a written order or writ directed to a person and requiring attendance at a particular time and place to take the action specified therein.

~~(aa)~~ (bb) Summons

"Summons" means a writ notifying the person named in the summons that (1) an action against that person has been commenced in the court from which the summons is issued and (2) in a civil action, failure to answer the complaint may result in entry of judgment against that person and, in a criminal action, failure to attend may result in issuance of a warrant for that person's arrest.

~~(bb)~~ (cc) Writ

"Writ" means a written order issued by a court and addressed to a sheriff or other person whose action the court desires to command to require performance of a specified act or to give authority to have the act done.

Source: This Rule is derived as follows:

. . .

Section (r) is new.

Section ~~(r)~~ (s) is derived from the last sentence of former Rule 5 v.

Section ~~(s)~~ (t) is derived from former Rule 5 q.

Section ~~(t)~~ (u) is new and adopts the concept of federal practice set forth in the 1963 version of Fed. R. Civ. P. 7 (a).

Section ~~(u)~~ (v) is derived from former Rule 5 w.

Section ~~(v)~~ (w) is derived from former Rule 5 y.

Section ~~(w)~~ (x) is derived from former Rule 5 z.

Section ~~(x)~~ (y) is new.

Section ~~(y)~~ (z) is derived from former Rule 5 cc.

Section ~~(z)~~ (aa) is derived from former Rule 5 ee.

Section ~~(aa)~~ (bb) is new.

Section ~~(bb)~~ (cc) is derived from former Rule 5 ff.

Rule 1-202 was accompanied by the following Reporter's Note.

The issue of defining the term "newspaper of general circulation" arose in the context of Rule 14-210, Notice Prior to Sale, addressing publication of a notice in a foreclosure action. In order to clarify the meaning of the term, the General Provisions Subcommittee recommends (1) adding to Rule 1-202 a definition of the term "newspaper of general circulation," which refers to the definition in Code, Article 1, §28, and (2) amending Rules 6-208, 9-107, and 15-901 to either conform to this term or to clarify the location of circulation of the newspaper that is referred to in the Rule. With the addition of the definition, the Committee note in Rule 14-210 after section (a) is no longer necessary and is proposed to be deleted. Amendments to Rules 2-131, 2-221, 3-131, 3-221, 9-202, and 16-401 conform cross references in those Rules to the re-lettering of Rule 1-202.

The Vice Chair told the Committee that this issue arose because of the many revisions that have been made to the Foreclosure Rules. In former Rule 14-206, Procedure Prior to Sale, there was a special definition of the term "newspaper of general circulation" for the kind of publication in which foreclosure notices would be published. After major objections from the foreclosure bar, the definition was moved to a Committee note in section (a) of Rule 14-210, Notice Prior to Sale. The issue arose as to why the term "newspaper of general circulation" would have one meaning for one purpose and a different meaning for another purpose. The General Provisions Subcommittee had looked at the definition of "newspaper of general circulation" in the State law, Code, Article 1, §28, Publications, and this was included in the meeting materials. This term does have another meaning in Prince George's County, but generally in the other counties, section (a) of the statute applies as to what a "newspaper of general circulation" is. Instead of drafting a definition that would necessarily be different from State law, the Subcommittee recommended that the definition in Code, Article 1, §28 be incorporated, and then conforming changes could be made to the rest of the Rules where the term "newspaper of general circulation" appears.

The Chair noted that this would pick up the Prince George's County exception. Mr. Maloney explained that this exception refers to the Prince George's County Post, which has virtually nothing in it but legal advertisements. By consensus, the

Committee approved the change to Rule 1-202 as presented.

The Vice Chair presented Rule 6-208, Form of Register's Order, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 6 - SETTLEMENT OF DECEDENTS' ESTATES

CHAPTER 200 - SMALL ESTATE

AMEND Rule 6-208 to add the words "of appointment" to paragraph 5 of the register's order for a small estate, as follows":

Rule 6-208. FORM OF REGISTER'S ORDER

The order entered by the register shall be in the following form:

[CAPTION]

ORDER FOR SMALL ESTATE

Upon the foregoing Petition, it is this ___ day of _____, (month)

_____, by the Register of Wills ordered that:
(year)

1. The estate of _____ shall be administered as a small estate.

2. _____ shall serve as personal representative.

3. The personal representative shall pay fees due the register, expenses of administration, allowable funeral expenses, and statutory family allowances, and, if necessary, sell property of the decedent in order to pay them.

4. The will dated _____ (including codicils, if any, dated _____) accompanying the petition is:

[ ] admitted to probate; or

[ ] retained on file only.

5. Publication is:

[ ] not required; or

[ ] required and Notice of Appointment shall be published once in a **newspaper of general circulation** in the county of appointment.

6. When publication is required, the personal representative shall, subject to the statutory order of priorities and the resolution of disputed claims by the parties or by the court: (a) pay all proper claims, expenses, and allowances not previously paid; (b) if necessary, sell property of the estate in order to do so; and (c) distribute the remaining property of the estate in accordance with the will or, if none, with the intestacy laws of this State.

_____
Register of Wills

THIS ORDER DOES NOT CONSTITUTE LETTERS OF ADMINISTRATION AND DOES NOT AUTHORIZE THE TRANSFER OF ASSETS.

Certificate of Service

I hereby certify that on this ___ day of _____ (month), _____ (year), I delivered or mailed, postage prepaid, a copy of the foregoing Order to _____ (name and address), Personal Representative.

_____
Register of Wills

Rule 6-208 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 1-202.

The Vice Chair pointed out that in Paragraph 5. of the form, Order for Small Estate, the words "of appointment" are added. The county was never identified, but it is clear from the context that it refers to the county of appointment. By consensus, the Committee approved Rule 6-208 as presented.

The Vice Chair presented Rule 9-107, Objection, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 100 - ADOPTION; GUARDIANSHIP

TERMINATING PARENTAL RIGHTS

AMEND Rule 9-107 (b)(4) to add the language "of general circulation" after the word "newspaper," as follows:

Rule 9-107. OBJECTION

(a) In General

Any person having a right to participate in a proceeding for adoption or guardianship may file a notice of objection to the adoption or guardianship. The notice may include a statement of the reasons for the objection and a request for the appointment of an attorney.

Cross reference: See Rule 9-105 for Form of Notice of Objection.

(b) Time for Filing Objection

(1) In General

Except as provided by subsections (b)(2) and (b)(3) of this Rule, any notice of objection to an adoption or guardianship shall be filed within 30 days after the show cause order is served.

(2) Service Outside of the State

If the show cause order is served outside the State but within the United States, the time for filing a notice of objection shall be within 60 days after service.

(3) Service Outside of the United States

If the show cause order is served outside the United States, the time for filing a notice of objection shall be within 90 days after service.

(4) Service by Publication in a Newspaper and on Website

If the court orders service by publication, the deadline for filing a notice of objection shall be not less than 30 days from the later of (A) the date that the notice is published in a **newspaper <u>of general circulation</u>** or (B) the last day that the notice is published on the Maryland Department of Human Resources website.

(c) Service

The clerk shall serve a copy of any notice of objection on all parties in the manner provided by Rule 1-321.

(d) Response

Within 10 days after being served with a notice of objection, any party may file a

response challenging the standing of the person to file the notice or the timeliness of the filing of the notice.

(e) Hearing

If any party files a response, the court shall hold a hearing promptly on the issues raised in the response.

(f) Access to Records

If the court determines that the person filing the notice of objection has standing to do so and that the notice is timely filed, it shall enter an order permitting the person to inspect the papers filed in the proceeding subject to reasonable conditions imposed in the order.

Source: This Rule is derived in part from former Rule D76 and is in part new.

Rule 9–107 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 1-202.

The Vice Chair said that a reference to the word "newspaper" was in subsection (b)(4), but the words "of general circulation" had been left out. The Subcommittee recommended adding them in. By consensus, the Committee approved Rule 9-107 as presented.

The Vice Chair presented Rule 14-210, Notice Prior to Sale, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-210 to delete the Committee note following section (a), as

follows:

Rule 14-210. NOTICE PRIOR TO SALE

(a) By Publication

Before selling property in an action to foreclose a lien, the individual authorized to make the sale shall publish notice of the time, place, and terms of the sale in a **newspaper of general circulation** in the county in which the action is pending. Notice of the sale of an interest in real property shall be published at least once a week for three successive weeks, the first publication to be not less than 15 days before the sale and the last publication to be not more than one week before the sale. Notice of the sale of personal property shall be published not less than five days nor more than 12 days before the sale.

~~Committee note: In this Rule, "newspaper of general circulation" is intended to mean a newspaper satisfying the criteria set forth in Code, Article 1, Section 28. A newspaper circulating to a substantial number of subscribers in a county and customarily containing legal notices with respect to property in the county shall be regarded as a newspaper of general circulation in the county, notwithstanding that (1) its readership is not uniform throughout the county, or (2) its content is not directed at all segments of the population.~~

. . .

Rule 14-210 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 1-202.

The Vice Chair told the Committee that the Subcommittee recommended deletion of the Committee note that has the special

definition in foreclosure cases. By consensus, the Committee approved Rule 14-210 as presented.

The Vice Chair presented Rule 15-901, Action for Change of Name, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 - OTHER SPECIAL PROCEEDINGS

CHAPTER 900 - NAME - CHANGE OF

AMEND Rule 15-901 (e)(2) to add the language "in which the action was pending," as follows:

Rule 15-901. ACTION FOR CHANGE OF NAME

(a) Applicability

This Rule applies to actions for change of name other than in connection with an adoption or divorce.

(b) Venue

An action for change of name shall be brought in the county where the person whose name is sought to be changed resides.

(c) Petition

(1) Contents

The action for change of name shall be commenced by filing a petition captioned "In the Matter of . . ." [stating the name of the person whose name is sought to be changed] "for change of name to . . ." [stating the change of name desired]. The petition shall be under oath and shall contain at least the following information:

(A) the name, address, and date and place of birth of the person whose name is

sought to be changed;

(B) whether the person whose name is sought to be changed has ever been known by any other name and, if so, the name or names and the circumstances under which they were used;

(C) the change of name desired;

(D) all reasons for the requested change;

(E) a certification that the petitioner is not requesting the name change for any illegal or fraudulent purpose;

(F) if the person whose name is sought to be changed is a minor, the names and addresses of that person's parents and any guardian or custodian; and

(G) whether the person whose name is sought to be changed has ever registered as a sexual offender and, if so, the full name(s) (including suffixes) under which the person was registered.

Cross reference: See Code, Criminal Procedure Article, §11-705, which requires a registered sexual offender whose name has been changed by order of court to send written notice of the change to the Department of Public Safety and Correctional Services within seven days after the order is entered.

(2) Documents to be Attached to Petition

The petitioner shall attach to the petition a copy of a birth certificate or other documentary evidence from which the court can find that the current name of the person whose name is sought to be changed is as alleged.

(d) Service of Petition - When Required

If the person whose name is sought to be changed is a minor, a copy of the petition, any attachments, and the notice

issued pursuant to section (e) of this Rule shall be served upon that person's parents and any guardian or custodian in the manner provided by Rule 2-121. When proof is made by affidavit that good faith efforts to serve a parent, guardian, or custodian pursuant to Rule 2-121 (a) have not succeeded and that Rule 2-121 (b) is inapplicable or that service pursuant to that Rule is impracticable, the court may order that service may be made by (1) the publication required by subsection (e)(2) of this Rule and (2) mailing a copy of the petition, any attachments, and notice by first class mail to the last known address of the parent, guardian, or custodian to be served.

(e) Notice

(1) Issued by Clerk

Upon the filing of the petition, the clerk shall sign and issue a notice that (A) includes the caption of the action, (B) describes the substance of the petition and the relief sought, and (C) states the latest date by which an objection to the petition may be filed.

(2) Publication

Unless the court on motion of the petitioner orders otherwise, the notice shall be published one time in a **newspaper of general circulation** in the county <u>in which the action was pending</u> at least fifteen days before the date specified in the notice for filing an objection to the petition. The petitioner shall thereafter file a certificate of publication.

(f) Objection to Petition

Any person may file an objection to the petition. The objection shall be filed within the time specified in the notice and shall be supported by an affidavit which sets forth the reasons for the objection. The affidavit shall be made on personal knowledge, shall set forth facts that would be admissible in evidence, and shall show

affirmatively that the affiant is competent to testify to the matters stated in the affidavit. The objection and affidavit shall be served upon the petitioner in accordance with Rule 1-321. The petitioner may file a response within 15 days after being served with the objection and affidavit. A person desiring a hearing shall so request in the objection or response under the heading "Request for Hearing."

(g) Action by Court

After the time for filing objections and responses has expired, the court may hold a hearing or may rule on the petition without a hearing and shall enter an appropriate order, except that the court shall not deny the petition without a hearing if one was requested by the petitioner.

Source: This Rule is derived in part from former Rules BH70 through BH75 and is in part new.

Rule 15-901 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 1-202.

The Vice Chair explained that the proposed change clarifies that the "newspaper" to which the Rule refers in subsection (e)(2) is one in the county in which the action was pending. By consensus, the Committee approved Rule 15-901 as presented.

The Vice Chair presented Rules 2-131, Appearance; 2-221, Interpleader; 3-131; 9-202, Pleading; Appearance, 3-221, Interpleader Action, 9-202, Pleading; Rule 16-401, Proscribed Activities - Gratuities, Etc. for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 100 - COMMENCEMENT OF ACTION AND PROCESS

AMEND Rule 2-131, as follows:

Rule 2-131. APPEARANCE

. . .

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

Source: This Rule is derived from former Rule 124.

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

See the Reporter's note to Rule 1-202.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 200 - PARTIES

AMEND Rule 2-221, as follows:

Rule 2-221. INTERPLEADER

(a) Interpleader Action

. . .

Cross reference: For the definition of property, see Rule 1-202 ~~(w)~~ (x).

. . .

Rule 2-221 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 1-202.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 100 - COMMENCEMENT OF ACTION AND PROCESS

AMEND Rule 3-131, as follows:

Rule 3-131. APPEARANCE

. . .

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

Source: This Rule is derived from former Rule 124.

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

See the Reporter's note to Rule 1-202.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 200 - PARTIES

AMEND Rule 3-221, as follows:

Rule 3-221. Interpleader.

(a) Interpleader Action

. . .

Cross reference: For the definition of property, see Rule 1-202 ~~(w)~~ (x).

. . .

Rule 3-221 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 1-202.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 200 - DIVORCE, ANNULMENT, ALIMONY,

CHILD SUPPORT, AND CHILD CUSTODY

AMEND Rule 9-202, as follows:

Rule 9-202. PLEADING

(a) Signing-telephone Number

A party shall personally sign each pleading filed by that party and, if the party is not represented by an attorney,

shall state in the pleading a telephone number at which the party may be reached during ordinary business hours.

Cross reference: See Rule 1-202 ~~(t)~~ (u).

. . .

Rule 9-202 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 1-202.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 400 - ATTORNEYS, OFFICERS OF COURT, AND OTHER PERSONS

AMEND Rule 16-401, as follows:

Rule 16-401. PROSCRIBED ACTIVITIES - GRATUITIES, ETC.

. . .

b. Receiving Prohibited

No officer or employee of any court, or of any office serving a court, shall accept a gratuity or gift, either directly or indirectly, from a litigant, an attorney or any person regularly doing business with the court, or any compensation related to such officer's or employee's official duties and not expressly authorized by rule or law.

Cross reference: For definition of "person," see Rule 1-202 ~~(s)~~ (t).

. . .

Rule 16-401 was accompanied by the following Reporer's

Note.

See the Reporter's note to Rule 1-202.

The Vice Chair said that these Rules conform to the change made to Rule 1-202. By consensus, the Committee approved the Rules as presented.

Agenda Item 5. Reconsideration of proposed Rules changes concerning attorneys' fee-shifting - New Rule 2-603.1 (Attorneys' Fees and Related Expenses) - Amendments to: Rule 1-341 (Bad Faith - Unjustified Proceeding), Rule 2-433 (Sanctions), and New Appendix: Guidelines Regarding Compensable and Non-Compensable Attorneys' Fees and Related Expenses

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Mr. Brault presented Rule 2-603.1, Attorneys' Fees and Related Expenses, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 600 - JUDGMENT

ADD new Rule 2-603.1, as follows:

Rule 2-603.1. ATTORNEYS' FEES AND RELATED EXPENSES

Alternative 1

(a) Scope

This Rule applies **only** to actions in which a **prevailing** party **is or** may be entitled, by law or contract, to reasonable attorneys' fees and related expenses, except that the Rule does not apply to an action in which a statute or contract authorizes attorneys' fees based on a fixed percentage

or other formula. **This Rule does not apply to** an action in which attorneys' fees and related expenses constitute an element of damages that must be proved at trial or otherwise in the underlying action as part of the party's claim

Alternative 2

(a) Scope

This Rule applies **only** to actions in which a **prevailing** party **is or** may be entitled, by law or contract, to reasonable attorneys' fees and related expenses. **This** Rule does not apply to:

(1) an action in which a statute or contract authorizes attorneys' fees based on a fixed percentage or other formula; **or**

(2) an action in which attorneys' fees and related expenses constitute an element of damages that must be proved PRIOR TO JUDGMENT ~~at trial or otherwise in the underlying action~~ as part of the party's claim.

(**b**) Time for Filing Motion

(1) Fees and Expenses Incurred Prior to Judgment in the Trial Court

Unless otherwise provided by law or court order, a motion requesting an award of attorneys' fees and related expenses shall be filed within **15** ~~30~~ days after the entry of judgment, unless (A) a motion under Rule 2-532, 2-533, or 2-534 is filed, in which **event** the motion may be filed or supplemented within 15 days after entry of an order disposing of the post-judgment motion or (B) a motion for bifurcation is filed pursuant to section (f) of this Rule, in which event the motion shall be filed or supplemented within **15** ~~30~~ days after the motion for bifurcation is decided.

(2) Fees and Expenses Incurred in Connection with Appellate Proceedings

Unless otherwise provided by law or court order, a motion requesting an award of attorneys' fees and related expenses incurred in connection with an appeal, application for leave to appeal, or petition for certiorari shall be filed within **15** ~~30~~ days after entry of the mandate or order disposing of the appeal, application, or petition.

Committee note: "Related expenses" are those related to the provision of legal services. See, e.g., Guideline (b) of the Guidelines Regarding Compensable and Non-Compensable Attorneys' Fees and Related Expenses contained in the Appendix to these Rules. "Related expenses" are not expenses that must be proved as part of the underlying action itself, such as the expenses of sale in a foreclosure action.

(3) Effect of Failure to Timely File

Unless the court, for good cause shown, excuses a failure to comply with the time requirements of this section, the court shall deny a motion that is not timely filed.

(c) Memorandum

(1) Time for Filing

A motion filed pursuant to section (b) of this Rule shall be supported by a memorandum. Unless otherwise provided by court order, the memorandum shall be filed within 30 days after the motion is filed or, if a motion for bifurcation is filed pursuant to section (**f**) of this Rule, **within** ~~no later than~~ 30 days after that motion is decided. Unless the court, for good cause shown, excuses a failure to comply with the time requirement of this subsection, the court shall deny the motion if the memorandum is not timely filed.

(2) Contents

Except as provided in section**s** (d) **and (f)** of this Rule or by order of court, the memorandum shall set forth:

(A) the nature of the case;

(B) the legal basis for recovery of attorneys' fees and related nontaxable expenses;

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

(D) the claims permitting fee-shifting as to which the moving party did not prevail;

(E) the claims not permitting fee-shifting;

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

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

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

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

(I) the customary fee prevailing in the attorney's legal community for similar legal services;

(J) the fee customarily charged for

similar legal services in the county where the action is pending;

(K) a listing of any **related expenses** for which reimbursement is sought;

(L) any additional factors that are required by the case law; and

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

(**d**) ADDITIONAL REQUIREMENTS IN COMPLEX CASES ~~Additional Contents for Memorandum **When Ordered by the Court**~~

(1) IN A CASE IN WHICH A CLAIM FOR ATTORNEYS' FEES AND RELATED EXPENSES SUBJECT TO THIS RULE HAS BEEN MADE AND IN WHICH, DUE TO THE COMPLEX NATURE OF THE CASE, THAT CLAIM LIKELY WILL BE SUBSTANTIAL AND WILL COVER A SIGNIFICANT PERIOD OF TIME, A PARTY MAY MOVE FOR AN ORDER THAT (A) ANY MEMORANDUM IN SUPPORT OF A MOTION UNDER SECTION (b)OF THIS RULE COMPLY WITH THE REQUIREMENTS OF PARAGRAPH (2) OF THIS SECTION, AND (B)QUARTERLY STATEMENTS PURSUANT TO PARAGRAPH (3) OF THIS SECTION BE REQUIRED. THE MOTION SHALL BE FILED WITHIN 30 DAYS AFTER THE PARTY FILES AN ANSWER TO THE COMPLAINT OR AMENDED COMPLAINT IN WHICH THE CLAIM FOR ATTORNEYS' FEES AND RELATED EXPENSES IS MADE.
COMMITTEE NOTE: THE DETAIL REQUIRED BY PARAGRAPH (2) AND THE QUARTERLY REPORTS REQUIRED BY PARAGRAPH (3) SHOULD BE RESERVED FOR THE MORE COMPLEX CASES IN WHICH A CLAIM FOR ATTORNEYS' FEES AND RELATED EXPENSES IS LIKELY TO BE SUBSTANTIAL OR WILL COVER AN EXPENDED PERIOD OF TIME. IN THOSE CASES, IT IS IMPORTANT THAT COUNSEL KNOW IN ADVANCE THE WHAT WILL BE REQUIRED IN ORDER TO CONFORM THEIR RECORD-KEEPING. WHERE PRACTICABLE, AN ORDER UNDER THIS SECTION SHOULD BE PART OF A SCHEDULING ORDER ENTERED UNDER RULE 2-504.

(2) IF SO ORDERED BY THE COURT, ~~**After a motion filed by a party as soon as practicable, but before the date of trial the court may order that**~~ **a** memorandum in support

of a motion for—attorneys' fees and related expenses shall be accompanied by time records that are recorded by specific task and attorney, paralegal, or other professional performing the task. The records shall be submitted in the following format organized by litigation phase, referred to as the "litigation phase format":

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

(B) preparing pleadings;

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

(D) preparing for and attending depositions;

(E) preparing and responding to **pretrial** motions;

(F) attending court hearings;

(G) preparing for and participating in Alternative Dispute Resolution proceedings;

(H) preparing for trial;

(I) attending trial;

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

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

(L) attending post-trial motion hearings.

Committee note: In general, preparation time and travel time should be reported under the category to which they relate. For example,

time spent preparing for and traveling to and from a court hearing should be recorded under the category "court hearings." Factual investigation should also be listed under the specific category to which it relates. For example, time spent with a witness to obtain an affidavit for a summary judgment motion or opposition should be included under the category "motions practice." Similarly, a telephone conversation or a meeting with a client held for the purpose of preparing interrogatory answers should be included under the category "interrogatories, document production**,** and other written discovery." Of course, each of these tasks must be separately recorded in the back-up documentation in accordance with subsection (**c**)(5) of this Rule.

(3) IF SO ORDERED BY THE COURT, counsel for a party intending to seek fees **in accordance with section (d) of this Rule** shall submit to the opposing party quarterly statements showing the amount of time spent on the case and the total value of that time. These statements need not be in the litigation phase format or otherwise reflect how time has been spent. The first statement is due at the end of the first quarter in which the action is filed. Failure to submit the quarterly statements may result in a denial or reduction of fees.

(**e**) Response to Motion FOR ATTORNEYS' FEES

Any response to a motion for attorneys' fees **and related expenses** shall be filed no later than 15 days after service of the motion and memorandum.

(f) Bifurcation of Issues

On motion or on its own initiative, the court may bifurcate the issues of the entitlement to attorneys' fees **and related expenses** and the amount of fees and expenses to be awarded and may direct that the initial memorandum address only the issue of entitlement, subject to being supplemented upon resolution of that issue in favor of the

moving party.

(g) Stay Pending Appeal

Upon the filing of an appeal of the underlying cause of action, the court may stay the issuance of a judgment as to the award of attorneys' fees **and related expenses** until the appeal is concluded.

(**h**) Guidelines

In deciding a motion under this Rule, the court MAY ~~should~~ consider the Guidelines Regarding Compensable and Non-compensable Attorneys' Fees and Related Expenses contained in the Appendix to these Rules.

Source: This Rule is new and is derived in part from the 2008 version of Fed. R. Civ. P. 54 and L.R. 109 of the U.S. District Court for the District of Maryland.

Rule 2-603.1 was accompanied by the following Reporter's Note.

A circuit court judge suggested that there should be a rule providing guidance for judges on setting attorneys' fees. To address this, the Rules Committee recommends new Rule 2-603.1, which borrows concepts and language primarily from Fed. R. Civ. P. 54 and Local Rule 109 of the United States District Court for the District of Maryland.

Section (a) delineates the types of claims to which the Rule does and does not apply.

Subsection (b)(1) is derived from Fed. R. Civ. P. 54 (d)(2)(B) and L. R. 109 2. a. For consistency with Maryland procedure, the time for filing the motion for attorneys' fees is changed from 14 to 30 days after the entry of a judgment, with a delayed filing or a supplement to the motion allowed within 15 days after entry of an order disposing of certain post-judgment proceedings or within 30 days after a motion for bifurcation has

been decided.

In subsection (b)(2), the procedure for requesting attorneys' fees in connection with an appeal, application for leave to appeal, or petition for certiorari also is modified for consistency with appellate procedure in Maryland.

In subsection (b)(3), the "waiver" language of L. R. 109 2. a. is replaced by a provision allowing the court to deny a motion that was not timely filed unless the late filing is excused for good cause shown.

Subsection (c)(1) is derived from L. R. 109 2. b. The time for filing the memorandum is changed from 35 to 30 days to be consistent with Maryland procedure. Late filing may be excused for good cause shown.

In subsection (c)(2), the Committee recommends expansion of the contents of the memorandum to include designating the legal basis for the recovery of attorneys' fees, the claims not permitting fee-shifting, the amount or rate charged or agreed to in the retainer, and the fee customarily charged for similar legal work in the county where the action is pending.

Section (d) is derived from the federal Appendix B, Rules and Guidelines for Determining Attorneys' Fees in Certain Cases. The Committee's view was that on a motion filed by a party, the court should have the discretion to order that the memorandum in support of a motion for attorneys' fees and related expenses is to be accompanied by time records organized in litigation phase format. This would be helpful in civil rights and discrimination cases as well as in cases with multiple claims.

Section (e) is derived from L. R. 109 2. a., except that the time period to file the response to the motion for attorneys' fees is changed from 14 to 15 days to be consistent with Maryland procedure.

> Section (f) is derived from Fed. R. Civ. P. 54 (d)(2)(C), which permits bifurcation of the issues of entitlement to attorneys' fees and the amount of fees and expenses to be awarded.
>
> Section (g) is added to comply with Maryland procedure.
>
> Section (h) is derived from L.R. 109 2 b, but the Committee has expanded the reference to the Guidelines to apply to all cases filed under Rule 2-603.1.
>
> Section (i) is derived from the federal Appendix B, Rules and Guidelines for Determining Attorneys' Fees in Certain Cases, which provides for submission of quarterly statements showing the amount of time spent on a case and the total value of that time. The Committee's view is that when a judge has ordered records to be in litigation phase format in accordance with section (d) of Rule 2-603.1, the party seeking fees should submit the same type of quarterly statements as the federal Guidelines require.

Mr. Brault explained that Rule 2-603.1 had been before the Committee many times. It had been approved in principle two or three times. Each time it had been approved, changes in language had been suggested. This is a final draft. Section (a) has two alternatives as to how to address to what the Rule applies and does not apply. In Alternative 1, the word "only" has been added to make sure that this is not being used in other circumstances. It applies only to actions in which a prevailing party is or may be entitled by law or contract. The words "prevailing," "is," and "or" have been added. This Rule does not apply to an action in which attorneys' fees and related expenses constitute an element of damages. An example of this is a suit against an

insurance company for failure to defend. The cost of defense, attorneys' fees, and expenses has been incurred, and the insurer is being sued for the cost of defense. Mr. Brault said that Alternative 2 applies the same way as Alternative 1. The Chair pointed out that the two alternatives are the same except for style.

Turning to section (b), Mr. Brault noted that the time period of 30 days was changed in subsections (b)(1) and (b)(2) to 15 days for filing a motion for attorneys' fees. The Chair noted that section (b) is captioned "Time for Filing Motion," and the text addresses this. He did not see in the Rule an affirmative obligation to make this request by motion. Should section (b) start off with a statement that a request for an award of attorneys' fees and related expenses is to be made by motion? Then, the Rule can address when the motion is to be filed. There seems to be no language requiring a motion. Mr. Michael commented that if it is not a part of the case, a motion has to be filed. Mr. Sykes suggested that the Rule could state that a request for attorneys' fees should be made by a motion filed within 15 days after entry of judgment in subsection (1) or entry of the mandate or order disposing of the appeal, application, or petition in subsection (b)(2).

Mr. Brault remarked that he had looked at Rule 2-603, Costs, which Rule 2-603.1 was partially based. The Chair inquired if Rule 2-603 had a statement requiring the filing of a motion, and Mr. Brault replied negatively. The Chair expressed the view that

it would not hurt to add this in. Mr. Brault agreed. He remarked that Rule 2-603 does not require a motion, but the Chair explained that the reason is because the clerk assesses the costs which are obvious. Rule 2-603.1 is different.

Mr. Brault commented that when the Rules were originally drafted, the cost factor after judgment was allocated in three categories. Costs were only those that were assessed by the court. Expenses were those such as transcripts, expert fees, and other related fees to put on the case. The third category was attorneys' fees. The word "costs" in Rule 2-603 refers only to court costs which are assessed by the court automatically.

Mr. Brault expressed the view that a motion to request attorneys' fees is required. The Chair inquired how this would work in a wage payment and collection case. Attorneys' fees are allowed but only on one condition and that is subject to the court's discretion. Someone is only allowed attorneys' fees if the court finds that wages were not withheld as a result of a genuine dispute. The court must make that finding before someone is entitled to the fees. If the court makes this finding, the statute, Code, Labor and Employment Article, §3-507.1, provides that the award can be made at the discretion of the court. Is this an entitlement to attorneys' fees? The case of *Friolo v. Frankel*, 373 Md. 501 (2003) raised some of these issues.

Mr. Patterson noted that section (a) of Rule 2-603.1 states that the Rule "applies only to actions in which a prevailing

party **is or may be** [emphasis added] entitled...". The Chair commented that the party may not be entitled at all to the fees, since it is discretionary on the part of the judge. If someone meets the threshold that it is not a genuine dispute, only then would the fees be awarded. The court may award the fees, but the court is not required to do so. Mr. Brault said that section (c) of Rule 2-603 states as follows: "On motion of a party and after hearing, if requested, the court may assess as costs any reasonable and necessary expenses, to the extent permitted by rule or law." A similar sentence should be added to Rule 2-603.1, which would read as follows: "On motion of a party and after a hearing, if requested, the court may assess attorneys' fees as permitted by rule or law." This would go into a new section (a). The Chair pointed out that in section (a), Scope, the Rule provides that it applies only to actions in which a prevailing party is or may be entitled. Would it be more accurate to state that the Rule applies to actions in which reasonable attorneys' fees and related expenses by contract or statute are available and may be awarded? The Vice Chair commented that there is a statutory provision that may give someone the right to attorneys's fees. The Chair stated that it is the concept of "may permit the court to award the attorneys' fees." He was not certain that someone is entitled to them. It is purely discretionary. Someone may not be entitled to the fees until a judge decides that the person gets them.

Mr. Michael questioned whether the problem can be cured by adding language to the Rule such as: "On motion of a party and, if appropriate,...". The Vice Chair inquired if the first sentence could be changed to state that it applies to an action in which a party claims reasonable attorneys' fees and related expenses, pursuant to law or contract. The Chair said that he would prefer that the Rule not be based on entitlement. An argument could be made that the Rule would not apply to actions under 42 U.S.C. §1983 where the amount is discretionary. The Vice Chair suggested that when the Rule is styled by the Style Subcommittee, they look at it to take out the issue of entitlement. The Chair agreed. Mr. Michael remarked that if Mr. Brault's suggested language is adopted, the issues will be addressed.

Judge Pierson questioned whether the Rule intends to provide that there has to be a hearing if one is requested. Mr. Brault replied affirmatively. In general, these situations give rise to a disagreement, and a hearing is required. Judge Pierson noted that there may be a certain class of these cases which involve de minimus amounts of money. Mr. Brault responded that the cases in which he had been involved were not de minimus. He was usually an expert in these cases and would have to review all of the documents in the case. In some instances, there was testimony. A party would challenge the hourly rate, the number of hours spent, and to which issues one is entitled.

The Chair asked whether the fees could be awarded if there

is a claim for attorneys' fees, and it is clear as a matter of law that there is no statute or contract that permits the fees. Mr. Brault answered that the Rule would not apply. This could be handled by the court which finds that no allowance exists and denies the award. The Vice Chair commented that this is arguably an order that discloses a claim or defense that would require a hearing on the motion. She pointed out that there are Rules Committee meeting minutes from many years ago in which Mr. Sykes stated that if someone has to pay out money, a hearing is required.

In Rule 2-433, Sanctions, which is in the meeting materials, subsection (a)(3) reads as follows: "Instead of any order or in addition thereto, the court, after opportunity for hearing, shall require the failing party or the attorney...to pay the reasonable costs and expenses, including attorneys' fees...". When the Rule provides for "an opportunity for a hearing," an issue which the Vice Chair has previously litigated, either a party has to ask for a hearing, or the court has to award one in every single case. She pointed out that one gets a hearing under Rule 2-433.

Judge Hollander observed that someone would get a hearing, if one is requested, and if the court is going to assess the fees. However, if the court decides summarily that this Rule does not apply, then a hearing would not be required. The Vice Chair expressed the opinion that a hearing should be required to deny the request for fees. Judge Hollander explained that the suggested language of the Rule, "on motion of a party and, after

a hearing, if requested,...” indicates that the court cannot assess the fees without a hearing, but this does not mean that the court could not deny the request. Judge Pierson agreed.

The Vice Chair remarked that she was not sure that the language in Rule 2-603 is necessarily appropriate in Rule 2-603.1, because Rule 2-603 is referring to costs. She did not know any other cost, other than the usual ones, such as sheriff’s fees, that the court would assess. Mr. Michael pointed out that the definition of “costs” is different depending on the jurisdiction. In the District of Columbia, the word “costs” also includes deposition costs. Mr. Brault added that in D.C., no hearing is given. The judge may issue an order assessing thousands of dollars without a hearing. Briefs may have been filed, but not necessarily.

The Chair stated that this Rule could apply in a case that originated in the circuit court, then went to the Court of Special Appeals, then to the Court of Appeals. The case could have then been sent back to the circuit court. Attorneys’ fees would be requested for the appellate cases, and those costs would be significant. There are costs for the record extract and the transcript.

Mr. Sykes commented that the original draft of Rule 2-603.1 had a provision for 30 days to respond to a motion for attorneys’ fees. Then language was added stating that it applies to complicated cases which have many details that counsel has to go through. The time limit of 15 days may be too restrictive. The

attorney has to hire an expert to review the case and to prepare for it in order to make an intelligent response. The Vice Chair noted that all of that information is required in the memorandum and not in the motion itself, so that is why the memorandum is filed later than the motion. The Chair said that the motion is supposed to be "bare bones."

Mr. Sykes questioned when the response to the memorandum is required. The Vice Chair responded that the memorandum is due within thirty days after the motion is filed. Mr. Sykes asked about the opposition to the request for attorney's fees. The Vice Chair answered that it has to be filed within 15 days, or 18, if it is served by mail. Mr. Sykes inquired if this is enough time. The Vice Chair replied that she was not sure. Mr. Sykes noted that there is a great amount of detail required. Mr. Michael asked if there was an option to petition the court to extend the deadline. Mr. Sykes answered that the extra work involved to do so is not necessary. Mr. Brault said that the Subcommittee did not want to extend the deadline beyond the appeal time. Part of the problem was that the attorney had 30 days, and the appeal time coincided with the motion, and it could end up that the motion would be filed after the appeal.

The Vice Chair inquired as to why the party opposing the motion should get only 15 days to respond if 30 days is the time period for filing the memorandum. Mr. Brault explained that the concept was that the motion should be directed at the right to the fees itself. The memorandum is directed at the time and all

of the other details. The details do not have to be in the motion.

The Vice Chair inquired about the response time. Mr. Sykes had noted that it is only 15 days, not allowing for much time for the person responding. The person who is seeking the fees had 30 days to get the motion together and then another 30 days to do the memorandum. The opposing party gets 15 or 18 days to try to oppose what is being requested. Mr. Sykes remarked that the Rule provides for two different notices. The court could stay the petition for attorneys' fees until the appeal comes down. The Chair noted that this is provided for in section (g). Mr. Sykes said that the Rule provides for a mandatory 15-day time period for replying to the memorandum. This would add to the difficulties with the practice of law.

The Vice Chair remarked that she did not disagree with Mr. Sykes. Generally, the Committee has tried to stay with 15-day and 30-day time frames in the Rules, so people would not have to guess what the many time frames are. This is varied with respect to the notice of deposition which is 10 days, and this process is being varied by requiring a motion and then a memorandum later. This is not provided for in any other rule. Since the scheme of this Rule is different than the usual scheme, there would be no reason not to give the opponent 30 days to respond.

Mr. Brault commented that he read the Rule to provide 15 days to file the motion for attorneys' fees, 30 days to file the memorandum, and then 15 days to answer both. This is a total of

45 days for the motion and 15 more days. This is two months, and it is a large amount of time. Judge Pierson pointed out that the party would have the motion but not the detailed information in the memorandum. The proponent had 30 days to put this together, but the opponent would only have 15 days to respond to that.

Mr. Brault noted that the problem of the time for responding can be solved by the party asking for an extension of time. The Rules call for discovery. Someone should not suddenly be confronted with a motion for attorneys' fees. This should have been known as the case was progressing, and there was the opportunity for discovery as to how much the fees were. The attorney was in the case and knew what was going on. Mr. Brault added that he could not see how anyone in the case would be coming at this blind. The Chair pointed out that it may not be clear as to who the prevailing party is until the case is over. Mr. Brault said that he was involved in a lengthy case where everyone was asking for attorneys' fees, because the case involved the development of a real estate major project that is a partnership. All of the parties were suing each other, claiming wrongful actions. The partnership called for attorneys' fees for the prevailing party. The defense asked for attorneys' fees in the complaint. His side asked for attorneys' fees in the answer and counterclaim. He had told the attorneys about the Rule that is being planned in terms of how to go about figuring out the fees in a case such as this one. Theoretically, all of the parties are going to know what is going on with the case.

Ms. Gardner told the Committee that she was with the Public Justice Center. She remarked that she wanted to bolster in several respects what Mr. Brault had said. One is that the meat of the response to the memorandum and the time to prepare that response probably more frequently than not would require the extension he had referred to. Fifteen days to respond is not adequate. Civil rights and wage dispute cases would require the request for the extension. She remarked that she had just noticed an ambiguity in the Rule in section (e), which states that the response is to be filed no later than 15 days after service of the motion and memorandum. These are going to be at two different times. Someone filing a response may not be sure when the response is due. The person may have to file a response to the motion and also a separate response to the memorandum. This is an ambiguity.

The Chair commented that it had been determined previously that the motion was "bare bones" just to get on the table the fact that someone had a claim for attorneys' fees. The response to that motion would be simply that the person asking for the fees is not entitled to them. The memorandum would set forth the details. In those situations, the moving party can move to bifurcate, so that the court can resolve the motion before any memoranda would have to be filed. If the other side alleges no entitlement to attorneys' fees, the court can resolve this before the memorandum is filed. That was the design, especially in complex cases, and the motion and answer can be quick. The Vice

Chair noted that this contemplates a response to the motion and then a response to the memorandum. The Chair responded that the decision had been made for the movant to be able to ask the court to bifurcate, so that the time for filing the memorandum is deferred. The movant should not have to go through this lengthy process if he or she is not entitled to the attorneys' fees.

Judge Pierson pointed out that this is handled by the Rule, because the bifurcation, which can be on motion of either party gives the party opposing the fees the opportunity to file for bifurcation in response to the initial motion and get the issue resolved. The Chair said that at least the opposing party should answer the motion to set the issue before the court. The Vice Chair observed that section (e) should be revised as follows: "Any response to a motion for attorneys' fees and related expenses shall be filed no later than 15 days after service of the motion. Any response to the memorandum shall be filed no later than 15 days after service of the memorandum." Ms. Ogletree expressed the opinion that the time for response to the memorandum should be longer. The Vice Chair agreed, suggesting that there be 15 days to respond to the motion and 30 days to respond to the memorandum. This is how long the claiming party had to file the motion and the memorandum.

Judge Pierson commented that there may not necessarily be a ruling on the motion. He remarked that the way the Rule is styled now, if an opponent wants the court to decide the issue of entitlement, the attorneys can ask for more detailed information,

or they can wait until the memorandum is filed. The Chair pointed out that section (f) provides that the initial memorandum would address only entitlement, which is a legal issue, and would not get into how much work the attorneys did. This memorandum could be relatively short. Mr. Sykes suggested that the finding could be automatic. The Chair responded that bifurcation may not be needed unless a substantial issue of entitlement exists. The Vice Chair added that another issue is who prevailed. The Chair responded that addressing entitlement would encompass that.

Ms. Gardner said that she had another question about the Rule. The issues that are to be decided on the motion as to whether one is entitled to the attorneys' fees are typically going to be whether there was an absence of a bonafide dispute and whether someone is the prevailing party. The Chair added that another would be if a right exists under the statute. Ms. Gardner remarked that she would not file this motion without a memorandum in support. Legal arguments are associated with that set of issues that would need to be put in front of the court. The regular motions rule, Rule 2-311, Motions, requires grounds and authorities for a motion, but Rule 2-603.1 is less clear as currently drafted as to whether that would be permissible or somehow prohibited. It certainly should not be. The court will need to decide the motion as a threshold matter.

The Chair stated that this is what is contemplated in the Rule. If there is a serious challenge to the right to attorneys' fees, there is no reason to get into the evidence. Ms. Gardner

observed that if a question exists as to whether someone is the prevailing party, the person will want to put a legal argument in front of the court along with the motion. The Chair noted that the other side will want to respond with their legal argument.

The Vice Chair pointed out that the Rule appears to state that unless someone has a court order which provides something to the contrary, the memorandum cannot be filed with the motion. The Rule states: "Unless otherwise provided by court order, the memorandum shall be filed within 30 days after the motion is filed...". The Chair said that there may well be cases in which both the motion and the memorandum would be filed together without the need to bifurcate. This is why it is discretionary for the court to order bifurcation.

Judge Pierson commented that an entirely new stage will be added to this, and it will lengthen the process. The entitlement issue may not be as clear cut as the fact that one is not entitled to the fees at all, but there may be circumstances and factors that the court can consider where entitlement may shade into many other issues. Entitlement cannot always be completely separated from all of the facts related to what the attorney did and how much he or she spent, etc. The Chair responded that this is why the court has discretion as to whether to bifurcate.

Mr. Brault expressed the view that it would be appropriate to change the time limit for the response to the motion from 15 to 30 days. This may have been the original time limit, but it changed after it was discussed at a prior meeting.

After the lunch break, the Chair had to leave the meeting, and the Vice Chair took over running the meeting. Mr. Brault said that Rule 2-603.1 fairly well parallels the federal rules. The language is not much different. He thought that he recalled that in the original draft, a time period of 15 days had been added to Rule 2-603, because now no time limit exists within Rule 2-603. The Vice Chair pointed out that Rule 2-603.1 was brought back for reconsideration for several reasons. One was to choose between Alternative 1 and 2 in section (a). Mr. Brault responded that he recalled that the Chair preferred that the Style Subcommittee make this determination. The Vice Chair commented that the Chair had asked that the portion of both alternatives pertaining to "entitlement" should be deleted. However, the choice still remains between Alternative 1 and 2 as to how the scope section should read.

Mr. Klein pointed out a difference in subsection (a)(2) of Alternative 2, the addition of the language "prior to judgment." Ms. Potter expressed the opinion that the language "proved at trial" is preferable. Someone could argue that the judgment should not be filed yet, because the person still wants to put on evidence. Ms. Ogletree explained that this applies in a divorce case where someone gets attorneys' fees as part of the action. At that point, the attorney has to put on the evidence before any judgment is entered.

Mr. Klein asked why the two alternatives were suggested. The Vice Chair said that she had argued that she had preferred

Alternative 1, because of the language that provides that the Rule applies only to actions in which the prevailing party is entitled to attorneys' fees. This necessarily means that it will not be the kind of case in which one must prove the attorneys' fees. Mr. Klein responded that he understood this point. His question was why one version had the language "prior to judgment," while the other one states "at trial or otherwise in the underlying action."

Judge Pierson remarked that he had not participated in the previous discussion of the Rule. He pointed out two recent cases authored by the Honorable Arrie Davis of the Court of Special Appeals, *Monarc Constr., Inc. v. Aris Corp.*, 188 Md. App. 377 (2009) and *AccuBid Excavation, Inc. v. Kennedy Contrs., Inc.*, 188 Md. 214 (2009), which held that it is a splitting or res judicata issue where attorneys' fees had not been sought prior to judgment, and they were denied on the grounds of some aspect of res judicata or claims-splitting, because once the action had gone to judgment, attorneys' fees could no longer be sought. The language "prior to judgment" seems to apply to any stage of the case at which one could raise a claim as part of the merits. Once the case goes to judgment, someone is foreclosed at trial or otherwise. This is one recent context at which this issue came up.

Mr. Brault remarked that he did not remember what had happened at the last meeting at which Rule 2-603.1 was discussed.

One of the problems that he had brought to the attention of the Subcommittee was an issue in *Carolina Power and Light Co. v. Dynegy Marketing and Trade,* 415 F. 3rd 354 (4th Cir. N.C., 2005), a case involving a huge amount of money pertaining to a stock transaction in North Carolina. The appeals court held that the judgment was not final, because the attorneys' fees were an element of damages, and the court dismissed the appeal and remanded it for a trial on the element of damages. The language that appears in Alternative 1 of Rule 2-603.1 is the language of the federal rule, Fed. R. Civ. Pro. 54. He read subsection (d)(2) of the federal rule: "A claim for attorneys' fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages." Mr. Klein expressed the opinion that the Maryland Rule should be the same as the federal rule.

Judge Pierson noted that *Federal Agriculture Mortgage Corp. v. It's a Jungle Out There, Inc.,* 2006 WL 1305212, 2006 U.S. Dist. LEXIS 31648 (N.D. Cal May 9, 2006) held that if one did not bring in his or her proof at trial, the person was barred from seeking it after trial. Mr. Brault added that he had been counsel in a case in the U.S. District Court in Greenbelt, Maryland. In that case, no attorneys' fees were requested until after the trial. Mr. Brault's position was that the attorneys' fees should have been part of the element of damages. It is a good idea to use the federal language in the proposed Rule

because of the federal case law interpreting it.

Mr. Klein moved that the language of Alternative 1 should be adopted. The motion was seconded, and it carried unanimously. The Vice Chair asked if it would be worded exactly as it appears in the Rule. Mr. Klein responded that the word "entitled" has to be changed. The Reporter inquired if the equivalent of the last sentence in section (c) of Rule 2-603 should be added to section (a) of proposed Rule 2-603.1. The Vice Chair answered that it should not go into the scope section of the new Rule.

The Vice Chair asked Mr. Brault if he had suggested that a new section (b) should be added to Rule 2-603.1, which would provide that the court can make the award on motion and after a hearing on attorneys' fees pursuant to this Rule. Mr. Brault replied that he was proposing a new lead paragraph indicating that the request for attorneys' fees had to be effected by motion. The Vice Chair inquired as to where this language should go in the Rule. Mr. Michael commented that his understanding was that Mr. Brault's proposed new language would be in a new section (b).

The Vice Chair expressed the view that the language in Rule 2-603 may not be worded appropriately. The Reporter clarified that this language is in section (b) of Rule 2-603. Mr. Brault read from Rule 2-603: "On motion of a party and after a hearing, if requested, the court may assess as costs any reasonable and necessary expenses, to the extent permitted by rule or law." Mr. Sykes suggested that the heading be changed to "Motion; Time

for Filing." Subsection (1) would read: "A request for attorneys' fees shall be made by motion which shall be filed within 15 days after the entry of judgment...". The Vice Chair remarked that she liked the idea of referring to a hearing. Mr. Brault said that the language "after a hearing, if requested" could be added to subsection (1).

The Vice Chair referred to the language in Rule 2-603 (d) and suggested that the new language could be "[o]n motion of a party and after a hearing, if requested, the court may assess attorneys' fees and related expenses, to the extent permitted by rule or law." Mr. Sykes asked about the 15-day time period. The Vice Chair responded that this would be in subsection (b)(1), and subsection (b)(2) would be what is already in the Rule. This is a matter of style. She asked the Committee if they agreed with the concept of having a section that provides that the court does this by motion and with a hearing. By consensus, the Committee approved this approach. Mr. Brault noted that the original time period had been 30 days, and this was shortened to 15 days at the last meeting.

Master Mahasa asked if the language "if requested" should be "if ordered." The Vice Chair answered that the appropriate word is "requested."

Mr. Brault drew the Committee's attention to subsection (b)(3). He pointed out that the draconian federal approach is that if the motion is not filed on time, the movant is not entitled to any attorneys' fees. Subsection (b)(3) was put in so

that anyone who was late due to excusable neglect would not lose the right to the fees. The Vice Chair commented that this provision addresses the motion itself, and she asked what would happen if the memorandum were filed late. Ms. Potter answered that the same language appears in the last sentence of subsection (c)(1) pertaining to a late-filed memorandum. She questioned whether the court always has the inherent authority to deny the motion, or if it is necessary to state this in the Rule. Judge Pierson remarked that he preferred that the Rule state this, so that there is no doubt as to whether the court has the power to excuse non-compliance. Mr. Brault added that this language has to be in the Rule, because it distinguishes it from the federal approach.

The Vice Chair said that she did not hear any objections to the new language. By consensus, the suggested changes to section (b) were approved. She noted that the two concepts could be combined, but this could be handled by the Style Subcommittee. The Reporter asked to which concepts she was referring. The Vice Chair answered that it was the bolded language in subsection (b)(3) and the language in subsection (c)(1).

The Vice Chair observed that previously the Committee had discussed how this Rule is written with an eye towards a “bare bones” motion and then a memorandum, but there would be situations where this scheme will not work. If a motion is filed stating that someone is entitled to attorneys’ fees, and it includes the reasons why, and the movant feels that the motion

will be disputed, he or she will file a full-blown memorandum. Mr. Brault remarked that it was Mr. Klein's idea to bifurcate the motion and the memorandum. Mr. Klein responded that this was in the context of the discovery rules, and it ended up in Rule 2-603.1.

The Vice Chair expressed the opinion that bifurcation is a good idea when a true question about entitlement as a matter of law exists. It may not be written in a way that accommodates a full-fledged motion. In her law practice, she personally always does her memorandum as part of her motion, not separately. Because the Rule separates the motion and memorandum into two separate documents, it appears to not allow someone to file a complete motion and memorandum together. If this could be done, the time frames for the filing of the memorandum do not work any more. Mr. Klein commented that he had thought that the idea was to save all of the mathematics for the memorandum, but the legal aspects would be put up front. It is the difference between the entitlement piece of the memorandum and the mathematical part. The Vice Chair agreed with this statement.

Ms. Gardner said that she wanted to clarify that the potential for two memoranda exists. One is the legal argument in support of the motion. Even if this had to be done, an attorney would need a separate 30-day time frame for the memorandum showing the work the attorney did. The Vice Chair commented that this is not referred to in the Rule, and it is something that would not be easy to draft. Judge Pierson noted that it is

referred to in section (f), which reads as follows: "...the court may bifurcate the issues ... and may direct that the initial memorandum address only the issue of entitlement, subject to being supplemented upon resolution of that issue...". The Vice Chair agreed that this language was intended to allow for two memoranda, but the sections pertaining to motions and memoranda standing alone do not incorporate this concept. This is a drafting issue.

Mr. Brault noted that something is missing at the end of section (f). The current language is "...the court may direct that the initial memorandum...". It would be better to add the words "and reply" after the word "memorandum." The Vice Chair said that the word "reply" should be "response." Mr. Brault added that the court would have to direct both sides to file a pleading. The wording would be that the court would direct that the initial memorandum and any response address only the issue of entitlement. The Vice Chair pointed out that there will be two responses. The first would be the initial response that would address only the issue of entitlement, because the next response will address whatever was in the memorandum. Mr. Brault questioned whether the response is required. The Vice Chair answered that it is not, so the wording should be "any response."

Ms. Gardner commented that Judge Pierson was correct in his reading of section (f). This leads to another practical question. Does this mean that if someone is filing a motion with a legal memorandum on entitlement, the person has 30 days to

submit that memorandum after the person has submitted his or her motion? This is the way the Rule reads now. Mr. Klein explained that the structure of the Rule is that the only item that has to be filed is a statement that the person is entitled to attorneys' fees. It does not have to be supported by case law until 30 days later when the person files a memorandum addressing why he or she is entitled and includes the mathematics, or in the meantime, someone has moved to bifurcate the math from the entitlement. The Vice Chair pointed out that subsection (c)(2) does not state this. Ms. Gardner said that the person would have to file a motion claiming entitlement to attorneys' fees and a motion to bifurcate. Mr. Klein noted that the only way to split the mathematics from the entitlement is to bifurcate.

The Vice Chair commented that the way this would work is that someone files a motion alleging entitlement to attorneys' fees. If the person wanted to file a memorandum supporting entitlement to attorneys' fees, the Rule would give the person 30 days to file this memorandum. Mr. Klein agreed. He remarked that bifurcation is an option, not a requirement. Ms. Ogletree added that the case is always bifurcated, unless an objection is filed. The Vice Chair said that the motion and memorandum sections only work if there is no bifurcation. Mr. Klein did not agree, noting that subsection (c)(2) provides that unless the case is bifurcated pursuant to section (f), all the documentation has to be included.

The Vice Chair observed that what the memorandum contains in

the event of bifurcation is set forth in section (f). If there is a bifurcated procedure, it appears that the motion for bifurcation is to be filed within 10 days. To do authorities and support, would one first have to get an order bifurcating the case? How would the person get the order to bifurcate if he or she knows within 30 days whether, except as provided in sections (d) and (f) of this Rule, the memorandum shall set forth what is listed in the Rule? Judge Pierson responded that subsection (c)(1) of the Rule states that the court can bifurcate, and if so, then the memorandum is filed 30 days after the order of bifurcation or non-bifurcation. One would file a motion to bifurcate, and this in essence gives the person an extension of time to file the memorandum until the court decides whether the case should be bifurcated.

Ms. Ogletree inquired if the order of the Rule should be rearranged, so that it flows logically. Mr. Brault said that subsection (c)(1) covers the bifurcation issue. The Rule is logically ordered as long as the words “and any response to that memorandum” are added in section (f) after the words “initial memorandum.” Section (g) addresses any appeal, and section (h) refers to the Guidelines Regarding Compensable and Non-compensable Attorneys’ Fees and Related Expenses.

Judge Hollander said that she had a question about section (g). If someone has a contractual claim for attorneys’ fees, one of the cases in which the Court of Appeals held that an appeal was premature because attorneys’s fees were based on a contract

was *G-C Partnership v. Schaefer*, 358 Md. 485 (2000). Judge Pierson pointed out that by definition, the Rule only applies to prevailing party awards, and those are collateral. Judge Hollander disagreed, noting that in *G-C Partnership*, after the underlying claim was resolved, the prevailing party had claimed and sought to pursue a claim for attorneys' fees pursuant to the contract that was an issue in the case. The appeal went up before the issue of attorneys' fees was resolved, and the Court of Appeals held that the appeal was premature.

Judge Pierson acknowledged what Judge Hollander had said, and he added that in the statutory cases, the courts hold that the claims are collateral, and in the contract cases, the courts hold that they are not collateral. Judge Hollander remarked that if the court were to stay the case, and it is based on this contract claim, any appeal would be premature. The Vice Chair asked if the appeal is premature if it is based on a contract, but not premature if it is based on a statute. Judge Pierson pointed out that there are many collateral cases. The distinction the courts have drawn is that in statutory cases, it is collateral, but in contract cases, it is not collateral. Judge Hollander said that if it is not collateral, the case cannot be appealed until all of the issues have been decided. Judge Pierson said that Judge Hollander may have identified a problem in section (g). Ms. Ogletree observed that the fees are an element of the underlying claim. Until that issue is decided,

there cannot be a final judgment.

Judge Hollander remarked that in *G-C Partnership,* the Court of Special Appeals had previously said in an unreported opinion that Rule 2-602, Judgments Not Disposing of Entire Action, where one can certify a judgment that is not final, would not allow an appeal of a case where all of the issues have not been resolved. Judge Pierson commented that one issue has not yet been decided by the Maryland appellate courts but has been in federal appellate case law, because in some contracts, the Fourth Circuit has drawn a distinction between some contractual attorneys' fees claims that must be proved at trial and others that need not be proved at trial. This concept may be in *Carolina Power* which, in an opinion by the Honorable Paul Niemeyer, Circuit Judge for the United States Court of Appeals for the Fourth Circuit, holds that certain types of contracts are part of the merits and certain contractual attorneys' fees claims, typically the prevailing-party attorneys' fees claims, are not part of the merits. This further complicates the issue of what is and is not final, and what is and is not collateral.

The Vice Chair inquired if there is any logic to the idea that it would be collateral if there is a statutory right to attorneys' fees after someone prevails. She expressed the view that section (g) is wrong.

The Reporter asked about the additional attorneys' fees that are being generated by the processing of that appeal. What

happens next? The Vice Chair said that she previously thought that all of those fees were collateral. Ms. Gardner remarked that this issue is covered in subsection (b)(2). The Reporter inquired as to what changes should be made to section (g). The Vice Chair responded that she thought that it required more study. The issue is that section (g) may not be accurate, because one may not be able to stay the issuance of a judgment as to the award of attorneys' fees. Judge Pierson suggested that this should not be addressed in the Rule, and the provision should be deleted. Mr. Brault noted that the federal rule provides that in the event of an appeal, the time for filing is 14 days after the mandate issued.

The Vice Chair commented that it had just been pointed out that the issue of attorneys' fees in connection with an appeal has already been covered. The problem with section (g) is that it provides that when someone appeals, the court may stay the issuance of a judgment as to the award of attorneys' fees until the appeal is concluded, which is not correct with respect to those situations under which the attorneys' fees must be determined before any judgment can be entered. Mr. Leahy noted that at those times, someone would not be able to take an appeal anyway, because the judgment is not final. The Vice Chair remarked that it would be misleading to give authority to the lower court to stay a case that should not be stayed. Ms. Ogletree reiterated that section (g) should be taken out.

Ms. Gardner asked if the meaning of section (a) is that the

Rule does not apply to cases where the fees have to be proven before judgment. She had thought that contract cases were specifically excluded from the scope of the Rule. The Vice Chair observed that there is more than one type of contract case pertaining to attorneys' fees. Ms. Ogletree added that there are real estate contracts that provide that the prevailing party will be entitled to attorneys' fees, but no fixed rate is involved; the fee is whatever was spent. Judge Hollander noted that it would not be determined until someone prevails. Ms. Ogletree pointed out that it is who prevails on the underlying claim.

Judge Hollander explained that her point was that all of this is not contemporaneous. Ms. Ogletree commented that it can be contemporaneous. Judge Hollander responded that there can be other contract cases in which someone is not entitled to attorneys' fees solely because someone prevails, and the person is just entitled to attorneys' fees. Judge Pierson added that this would be true in indemnification cases.

Mr. Brault referred to the issue of appeals. The way that section (b) was drafted, there is a motion for the trial court, and then a separate paragraph for filing a second proceeding for expenses related to an appeal. The federal procedure is to eliminate the trial court motion and provide that the time to file a motion for both is after the appeal is over. Because the Subcommittee created a different procedure for Maryland, section (g) was added to allow the court to stay the trial court ruling pending the outcome of the appeal. The appeal might reverse the

entitlement by virtue of prevailing.

The Vice Chair pointed out that if there is no judgment because the attorneys' fees have not been decided, the case may not be able to proceed. The issue is if circumstances exist when there is a prevailing party where the attorneys' fees post-judgment must be determined before an appeal can be taken. There appears to be case law that provides that if the fees are based on a contract, this has to be decided before the case can be appealed. Mr. Leahy noted that this would be the last part of section (a), which provides that the Rule does not apply to an action in which attorneys' fees and related expenses constitute an element of damages that must be proved at trial or otherwise in the underlying action as part of the party's claim. Judge Pierson responded that this may not be correct. There may be Maryland case law that holds that a case is not final where there is a contractual claim for attorneys' fees regardless of whether it would be within the scope of the element of damages in the underlying claim. He did not think that there was a Maryland case pertaining to the application of the last sentence of section (a) stating that attorneys' fees constitute an element of the damages. Part of this has yet to be decided. There is some lack of clarity here.

Mr. Brault stated that the problem is that if the fees are an element of damages, no judgment exists in the trial. The Vice Chair noted that the Rule does not apply to this. Mr. Brault asked whether the appealability of the judgment is precluded if

the trial has ended, and the plaintiff recovers a judgment against the defendant for a certain amount of money, and there is a post-judgment proceeding. It is not final for appeal purposes. No case law exists on this point. The Vice Chair said that Judge Hollander had stated that there is case law on this issue. Judge Hollander reiterated that *G-C Partnership* is one case where the claim for attorneys' fees was pursuant to a contract at issue in the case, and the appeal was taken before the court ruled on the attorneys' fees aspect. The Vice Chair inquired whether the prevailing party was entitled to the fees in that case. Judge Hollander replied that she did not remember. The Vice Chair remarked that this would make a difference in how the case would be handled.

Mr. Brault commented that what this means is that the judgment is final in terms of determining liability, but it is not for purposes of appealability. It cannot be appealed until there is a post-judgment ruling on attorneys' fees. The Vice Chair expressed the view that some research may need to be done on this issue. Ms. Gardner observed that the problem with the solution of deleting section (g) is that it then forces the trial court to go forward as to proceedings that may be mooted by it. This is wasteful for the parties and wasteful for the trial judge. This is probably not the correct solution.

The Vice Chair asked what requires the court to go forward with the case. Ms. Gardner answered that a motion is filed 15

days after the entry of judgment that is before the time for an appeal has run. A memorandum has to be filed, and if the Rule does not provide that the court can stay pending the outcome of an appeal, then the award of attorneys' fees from the trial court proceeding cannot be stayed. The Vice Chair remarked that it is her experience that courts regularly stay whatever they wish to stay with or without a sentence in the Rule.

Ms. Gardner noted that she thought that the way that the federal rule solved this problem is that the original motion is due within ___ number of days after the judgment is final, so it is evident that an appeal has been noted, and if not, there are ____ number of days after the final judgment has been entered. The analog would be that in Maryland, it is 30 days after the judgment is enrolled if no appeal has been noted. The motion for attorneys' fees would be due within ___ number of days after the enrollment. But if an appeal had been filed, then it would be due within ___ number of days after the appeal had been resolved. This would take care of the problem.

Judge Pierson remarked that the local federal rule, Rule 109, Post-trial Proceedings, requires the motion within 15 days, because the Honorable J. Frederick Motz, Judge of the U.S. District Court for the District of Maryland, thought that the fact that there would be attorneys' fees should be known in order to decide whether to appeal. The Vice Chair stated that the Committee has two choices. One is to eliminate section (g) and assume that the court will stay a case if it chooses to. She had

been counsel in a case involving an appeal from an injunction, and the court did not address this even though it could have. The other choice is to draft it based on a very good understanding of the case law as to whether and when it is collateral.

Mr. Brault pointed out that the problem is the use of the word "judgment." Subsection (b)(2) has the language: "...15 days after entry of judgment...". By definition, the word "judgment" means that it is final. Therefore, the assumption is that the case is appealable. Section (g) was added on the theory that the court can then stay the judgment if the appeal would moot it.

The Vice Chair stated that section (g) should be left in the Rule, but the staff of the Rules Committee should be asked to research the supporting case law. Judge Pierson responded that he has a collection of cases on this issue. Mr. Leahy remarked that there could be a Committee note clarifying that in certain cases, the attorneys' fees are part of the judgment. Judge Pierson noted that the problem with this approach is the difference between the rule-making power and the substantive law. The Court of Appeals by exercising its rule-making power cannot set forth a rule as to what is final or not final; this is a matter of substantive law. The Rule has to be drafted to detour around this problem of what is final or not.

The Vice Chair said that if the *G-C Partnership* case to

which Judge Hollander had referred involved the award of attorneys' fees to the prevailing party, it is a problem. If it did not, then it is simply a matter of indemnification or other reasons to award the fees. Ms. Ogletree pointed out that every real estate contract in Maryland provides this. Judge Pierson noted that there is more than one case on the issue of what is collateral and not collateral in contract cases. The Vice Chair asked Judge Pierson if he would send the cases that he has on point by e-mail. Judge Pierson answered affirmatively.

The Vice Chair asked if section (d), which is in all capital print, is new. The Reporter replied that she had not capitalized the language. Mr. Brault remarked that this had been approved at the last meeting. He recalled that the Vice Chair had raised the issue that there should not be discovery in every case. The Vice Chair noted that the federal rule provides that this is applied very narrowly. Mr. Brault pointed out that the language of section (d) grew out of that discussion. It provides that in a case of a complex nature, the claim for attorneys' fees will likely be substantial. The nature of the discovery and the report had been discussed. Mr. Klein inquired if the bolded language is new. The Vice Chair said that she thought that the Chair had drafted this. Mr. Brault expressed the opinion that the new language caused no problems. The Rule has been discussed many times, and it is difficult to know what was added when.

The Vice Chair told the Committee that she had spoken against this concept at the meeting when this was last discussed.

Her opinion was that what has to be put into the memorandum creates more and more attorneys' fees. The arguments will arise as to whether the case is complex, and the claims are substantial. Her preference would be to know with certainty which kind of cases would require this kind of detail. Mr. Brault pointed out that the language of the Rule is that a party may move for an order that a memorandum be filed and that quarterly statements be required. The Vice Chair said that it may result in someone being required to do this in one county, but not in another. It is not definitive enough.

Master Mahasa asked when it is evident that the attorneys' fees are final. She agreed that as the attorney performs all of the tasks required by the Rule, more attorneys' fees are being accumulated. Mr. Michael remarked that in a domestic case, the attorney can apply for the appeal fees. Mr. Brault added that the quarterly statements have to be ordered by the court. Many of the concerns expressed have been addressed in the Rule. Section (d) does not apply generally, it only applies when, as the Committee note states, an order pertaining to a complex case is covered in the scheduling order. Attorneys need to know how to prepare these motions. In *Henriquez v. Henriquez*, 413 Md. 287 (2010), the Court of Appeals affirmed a decision by the trial court to award the same $5000 in attorneys' fees to both the husband and wife's attorney in a family law case. The only gauge the court used was a sense of fairness. If that is the guide,

someone will ask for a huge amount of attorneys' fees based on fairness. Or the attorney will state that he or she is entitled to know what fees were paid to the attorney for the other side.

The Vice Chair stated that Rule 2-603.1 is approved as amended subject to confirming that section (g) is accurate. By consensus, the Committee agreed. The Reporter asked Judge Pierson to e-mail his research. She also inquired if he thought that section (g) was drafted correctly. He replied that he would look at it. He agreed with the question posed by the Vice Chair as to cases where the prevailing party was awarded the attorneys' fees.

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

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-433 to add to sections (a) and (d) the words "costs and" before the word "expenses," to add language to the tagline of section (d), to change section (d) by adding a reference to Rule 2-434, changing the word "shall" to "may," deleting certain language at the end of the first paragraph, adding the words "on motion" to the second paragraph, and deleting certain language at the end of the second paragraph, to add a new section (e) pertaining to a memorandum regarding costs and expenses, and attorneys' fees, to add a new section (f) referring to the Guidelines Regarding Compensable and Non-compensable Attorneys' Fees and Related Expenses, and to make stylistic changes, 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 <u>costs and</u>

expenses, including attorneys' fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of costs and 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 Attorneys' 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~~ may 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 attorneys' 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, on motion after opportunity for hearing, ~~shall~~ may 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~~ attorneys' 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) Memorandum Regarding Costs and Expenses, Including Attorneys' Fees

A motion requesting an award of costs and expenses, including attorneys' fees, shall be supported by a memorandum that sets forth the information required in subsections (e)(1) and (e)(2) of this Rule, as applicable; however, the moving party may defer the filing of the memorandum until 15 days after the court determines the party's entitlement to costs and expenses, including attorneys' fees.

(1) Costs and Expenses Other Than Attorneys' Fees

The memorandum in support of a motion for costs and expenses other than attorneys' fees shall itemize the type and amount of the costs and expenses requested and include any available documentation of either.

(2) Attorneys' Fees

Except as otherwise provided by order of court, the memorandum in support of a motion for attorneys' fees shall set forth:

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

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

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

(D) the customary fee prevailing in the attorney's legal community for similar legal services;

(E) the fee customarily charged for similar legal services in the county where the action is pending; and

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

(f) Guidelines

In deciding a motion under this Rule in which attorneys' fees and related expenses are sought, the court may consider the Guidelines Regarding Compensable and Non-compensable Attorneys' Fees and Related Expenses contained in the Appendix to these Rules.

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.
Section (f) is new.

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

Because of the proposed addition of Rule 2-603.1, Attorneys' Fees and Related Expenses, the Committee recommends amending Rule 2-433 so that it applies to an award of attorneys' fees as a sanction.

Section (e) has been proposed to be

added to conform to the memorandum in support of a motion for attorneys' fees and related expenses provided for in new Rule 2-603.1. However, section (e) is not consistent with section (d) when the award of attorneys' fees is to be made to the person who opposed the motion for sanctions. To address this, the Committee proposes amending section (d) so that it no longer mandates that the court must order the party whose conduct necessitated the motion for sanctions to pay to the moving party the reasonable costs and expenses incurred in obtaining an order and so that it no longer has the language providing the exception to the award of sanctions when the motion was justified or other circumstances make an award of costs and expenses unjust. The Committee suggests adding section (f) because of the proposed addition of the Guidelines Regarding Compensable and Non-compensable Attorneys' Fees and Related Expenses. For the same reason, a similar provision is suggested for Rule 1-341.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

AMEND Rule 1-341 to make a stylistic change, to add a sentence pertaining to a memorandum in support of a motion, and to add a sentence referring to the Guidelines Regarding Compensable and Non-compensable Attorneys' Fees and Related Expenses, 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~~ attorneys' fees, incurred by the adverse party in opposing it. A memorandum in support of a motion filed for an award of costs and expenses shall comply with Rule 2-433 (e). In deciding a motion under this Rule, the court may consider the Guidelines Regarding Compensable and Non-compensable Attorneys' Fees and Related Expenses contained in the Appendix to these Rules.

Source: This Rule is derived in part from former Rule 604 b and is in part new.

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

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

Mr. Klein commented that he had thought that the Rules concerning bad faith and discovery had been approved already. The Reporter said that everything had been approved, but the Rules continue to be discussed. Mr. Brault pointed out that no important changes had been made to Rule 1-341. By consensus, the Committee approved Rules 2-433 and 1-341 as presented.

Mr. Brault presented the Appendix: Guidelines Regarding Compensable and Non-compensable Attorneys' Fees and Related Expenses, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX: GUIDELINES REGARDING COMPENSABLE

AND NON-COMPENSABLE ATTORNEYS' FEES AND

RELATED EXPENSES

ADD a new Appendix, as follows:

APPENDIX: GUIDELINES REGARDING COMPENSABLE AND NON-COMPENSABLE ATTORNEYS' FEES AND RELATED EXPENSES

(a) Guidelines Regarding Compensable and Non-compensable Attorneys' Fees

(1) Lead Attorney

If different attorneys represent plaintiffs with both common and conflicting interests, there should be a lead attorney for each task, such as preparing for and speaking at depositions on issues of common interest and preparing pleadings, motions, and memoranda. Attorneys other than the lead attorney should be compensated if they provide input into an activity that is directly related to their own client's interests.

(2) Deposition Attendance

Ordinarily, only one attorney for each separately represented party should be compensated for attending depositions. Committee note: Departure from this subsection is appropriate upon a showing of a valid reason for having two attorneys at the deposition. For example, a less senior attorney's presence may be necessary because that attorney organized numerous documents important to the deposition, but the deposition is of a critical witness whom the more senior attorney should properly depose.

(3) Hearings Other Than Trial

Ordinarily, only one attorney for each party should be compensated for attending hearings other than trial.

Committee note: The same considerations discussed in the last Committee note concerning attendance by more than one attorney at a deposition apply to attendance by more than one attorney at a hearing.

There is no guideline as to whether more than one attorney for each party should be compensated for attending trial. This must depend upon the complexity of the case and the role that each attorney is playing.

(4) Conferences

Ordinarily, only one attorney should be compensated for client, third party, and intra-office conferences, although if only one attorney is compensated, the time may be charged at the rate of the more senior attorney. Compensation may be paid for the attendance of more than one attorney if justified for specific purposes, such as periodic conferences of defined duration held for the purpose of work organization, strategy, and delegation of tasks when the conferences are reasonably necessary for the proper management of the litigation.

(5) Travel

(A) Substantive Work During Travel Time

Whenever possible, time spent in traveling should be devoted to doing substantive work for a client and should be billed at the usual rate to that client. If the travel time is devoted to work for a client other than the matter for which fees are sought, the travel time should not be included in any fee request. If the travel time is devoted to substantive work for the client whose representation is the subject of the fee request, the time should be billed for the substantive work, not travel time.

(B) No Substantive Work During Travel Time

Up to three hours of travel time each way and each day to and from a court appearance, deposition, witness interview, or similar proceeding or event that cannot be devoted to substantive work should ordinarily be charged at the attorney’s hourly rate. Time spent above the three-hour limit should ordinarily be charged at one-half of the attorney’s hourly rate.

(b) Guidelines Regarding Expenses Related to Attorneys' Fees

(1) Out-of-Pocket Expenses

Ordinarily, reasonable out-of-pocket expenses, including long-distance telephone calls, express and overnight delivery services, computerized on-line research, and faxes, are compensable at actual cost.

(2) Mileage

Mileage should be compensable at the rate of reimbursement for official State of Maryland government travel in effect at the time the expense was incurred.

(3) Copy Work

Copy work should be compensable at a reasonable commercial rate.

Ms. Gardner said that she had a question about the Appendix. As compared to the federal version, virtually everything has been incorporated in one form or another, except for the presumptive fee schedule which has been intentionally left out in the Maryland Appendix. One other piece of the federal Appendix was left out of the Maryland one, and she asked the Committee to consider adding it back in to the Committee note after subsection (a)(2). It would be the language from footnote 4 of the federal document that reads: "Departure from the guideline also may be appropriate upon a showing that more than one retained attorney representing the defendant attended the deposition and charged the time for her attendance." Ms. Gardner remarked that this is relevant and expressed the concern that the party opposing the motion for attorneys' fees will tell the other party that two or

three attorneys were not needed at the deposition or at the hearing, yet the party making this statement also had several attorneys present.

The Vice Chair asked why the word "defendant" is used. Ms. Ogletree inquired why the sentence refers to "her attendance." Master Mahasa questioned as to why this would not apply to the plaintiff or to the defendant. Ms. Gardner responded that the language is that departure from the guideline may be appropriate. For example, there could be a less senior person present, or another example in the federal document is where the party making the challenge to the other party for having more than one attorney actually had more than one attorney present, also. This language states that this is a relevant consideration. This sentence is missing from the proposed Maryland Appendix, and it is a very common issue. She was concerned that people would imply from the fact that the language is missing is that it is not a relevant consideration.

The Vice Chair expressed the view that Ms. Gardner's suggestion was appropriate. By consensus, the Committee approved the addition of the sentence from the federal Appendix. By consensus, the Committee approved the Appendix as amended.

Agenda Item 6. Consideration of a "housekeeping" amendment to Bar Admission Rule 13 (Out-of-State Attorneys)

The Reporter presented Rule 13, Out-of-State Attorneys, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

RULES GOVERNING ADMISSION TO THE BAR OF MARYLAND

AMEND Bar Admission Rule 13 to correct an internal reference, as follows:

Rule 13. OUT-OF-STATE ATTORNEYS

. . .

(c) Practitioner of Law

(1) Subject to paragraphs (2)~~,~~ and (3)~~, and (4)~~ of this section, a practitioner of law is a person who has regularly engaged in the authorized practice of law

(A) in a state;

(B) as the principal means of earning a livelihood; and

(C) whose professional experience and responsibilities have been sufficient to satisfy the Board that the petitioner should be admitted under this Rule.

(2) As evidence of the requisite professional experience, for purposes of subsection (c)(1)(C) of this Rule, the Board may consider, among other things:

(A) the extent of the petitioner's experience in general practice;

(B) the petitioner's professional duties and responsibilities, the extent of contacts with and responsibility to clients or other beneficiaries of the petitioner's professional skills, the extent of professional contacts with practicing lawyers and judges, and the petitioner's professional reputation among those lawyers and judges; and

(C) if the petitioner is or has been a specialist, the extent of the petitioner's

> experience and reputation for competence in such specialty, and any professional articles or treatises that the petitioner has written.
>
> (3) The Board may consider as the equivalent of practice of law in a state practice outside the United States if the Board concludes that the nature of the practice makes it the functional equivalent of practice within a state.
>
> . . .

Bar Admission Rule 13 was accompanied by the following Reporter's Note.

> The Secretary of the State Board of Law Examiners observed a reference in subsection (c)(1) to a non-existent paragraph. The proposed amendment to Rule 13 deletes this reference.

The Reporter explained that the Secretary of the Maryland State Board of Law Examiners had pointed out that subsection (c)(1) contained a reference to paragraph (4) of section (c) that does not exist. This needs to be deleted. By consensus, the Committee approved the deletion of the reference to the non-existent paragraph in Bar Admission Rule 13.

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