COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 of the Judicial Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland on June 16, 2011.

Members present:

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

Albert D. Brault, Esq.
John B. Howard, Esq.
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Hon. Thomas J. Love
Zakia Mahasa, Esq.
Timothy F. Maloney, Esq.
Robert R. Michael, Esq.
Hon. John L. Norton, III
Scott G. Patterson, Esq.
Hon. W. Michel Pierson
Debbie L. Potter, Esq.
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
Hon. Julia B. Weatherly
Hon. Robert A. Zarnoch

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Kara M. Kiminsky, Esq., Assistant Reporter
Debbie Tall, Maryland State Board of Victim Services
Breann Birkenbud, Intern
Leah Gaines, Intern
Ms. Amy Womaski
Jason Weber, Esq.
Susan Affleck Bauer, Esq.
Neal J. Markowitz, Esq.
Jonathan S. Rosenthal
Mala Malhotra-Ortiz, Esq.
David A. Simison, Esq.
Professor Roger Wolf
Craig T. Distelhorst, Esq.
Julia Braaten, Esq.
Hon. Dorothy Wilson
Barbara Blake Williams, Maryland Council for Dispute Resolution
Anne Litecky, GOCCP, State Board of Victim Services
W. Thomas Lawrie, Esq., Assistant Attorney General, Department of Labor, Licensing & Regulation

Roberta Roper, Chair, State Board of Victim Services
Paul Ethridge, Esq., Maryland State Bar Association
Deanna Hackworth, Esq., Portfolio Recovery
Craig Kennedy, Esq., Peroutka Law Firm
Prabir Chakrabarty, Esq., Counsel, Mariner Finance, LLC
Scott Whiteman, Esq., Peroutka & Peroutka
Sean Daly, Esq.
Maryanne Flanigan, Esq.
Hon. Norman R. Stone, II
Ronald S. Canter, Esq.
Cortney Fisher, Criminal Injuries Comp.
Rea Goldfinger, MSBVS
Michael Lagana, Pasadena Receivables, Inc.
Shawn Kennedy, Esq., Peroutka & Peroutka
Michele Gagnon, Esq.
Anne Norton, Esq., Deputy Commissioner of Financial Regulation, DLLR
Frank Laws, Esq.
Kevin Arthur, Esq.
Jane Santoni, Esq.
Lindsay Warnes, Esq., Legal Aid Bureau, Inc.
Cheryl Hystad, Esq.
Rachel Wohl, Esq., MACRO
Bob Rhudy, Esq., Office of Mediation, Court of Special Appeals
Bonnita Spikes, State Board of Victim Services
Christopher Moylan, Esq.
Bradley A. Kukuk, Esq., Maryland Family Law News
David Durfee, Esq., Executive Director, Legal Affairs, Administrative Office of the Courts
Sharon Harvey, Esq., Administrative Office of the Courts
Janet Moss, Client Protection Fund
Melvin Hirshman, Esq.
Jonathan Harris, Esq., Public Justice Center

The Chair convened the meeting. He said that the agenda for the meeting was full. He announced that the Court of Appeals had held hearings on the 168th and 170th Reports on June 6, 2011. The 170th Report, which was the Rules Committee's response to the inquiry regarding comparative fault, was accepted by the Court with thanks to the Committee, and there had been no discussion on it. The 168th Report was lengthy with 11 categories of rules. All of the proposals, with the exception of two, were adopted by

the Court. The Court had no conceptual problem with Rule 4-332, Petition for a Writ of Innocence, but they wanted some modifications to the language pertaining to what has to be in the petition. A number of people present at the hearing and some of the judges had expressed the concern that too much had been included in the petition section of the Rule. The disagreement was not substantive, but the Court wanted what was unnecessary to be removed from the Rule. They preferred that the Rule come back to them very quickly, because the statute is already in effect. Because the Court would like the Rule back soon, the Chair proposed arranging a meeting of the stakeholders, who were representatives from the Office of the Attorney General, State's Attorneys' Office, and the Office of the Public Defender (OPD) and who had participated in the development of the Rule. They had all been represented at the hearing and knew what the Court wished to change in the Rule. Assuming an agreement would be reached, the Chair would send the agreed-upon changes to the Committee by e-mail, so that anyone could comment on it.

The Chair commented that the other Rule that the Court did not fully adopt at the hearing on June 6, 2011 was Rule 4-281, Motion Relating to Death Penalty Notice, which had been one of the two death penalty Rules in the 168th Report. One was an amendment to Rule 4-263, Discovery in Circuit Court, and the Court had no objection to that Rule. When the State produces discovery in a death penalty case, it will have to state whether it has the required evidence to proceed with a death penalty

case, and if so, what the evidence is. Rule 4-281 followed on the heels of Rule 4-263. The new Rule permits the defendant to move to strike a death penalty notice or to preclude the State from filing one if it had not already done so and allow a judge to rule on the motion as a matter of law whether the State has the required evidence or does not have it. The court would not get into factual issues. Section (c) of proposed Rule 4-281 permitted an appeal by the State under the collateral order doctrine if such a motion were granted. The Court deleted section (c). This had been discussed at the Rules Committee, and it was somewhat expected that this might happen. The Chair's view was that this was not necessarily because the Court did not think that the collateral order doctrine would apply. The Court did not express their thoughts on this. The Court did not want to apply this doctrine by rule. It is a common law doctrine. If a trial judge strikes a death notice, presumably the State would take an appeal. The State may or may not succeed. The Court struck section (c) but adopted the rest of Rule 4-281.

The Chair said that Rule 4-312, Jury Selection, would take effect on September 1, 2011. The Court wanted to give some leeway for the trial judges and counsel to know that it is there and get familiar with it. All of the other Rules adopted will take effect on July 1, 2011. The Committee had been very successful as the Court had adopted so many of the Rules in the 168th Report. There is one housekeeping glitch that the Court is aware of and the Committee will address when Rule 4-332 is sent

back to the Court. That Rule and several other Rules provided that notice would be sent to the Office of the Public Defender (OPD) to see if they wanted to get into the cases involving DNA. Originally, the Rules specified that the notice would go to the Collateral Review Division of the OPD. The thought was that this division existed as part of the internal administrative structure of the OPD, and it could change. The OPD agreed that the notice be sent to "the Office of the Public Defender," and this is what the Committee put into the Rule. Paul DeWolfe, Esq., the Public Defender, changed his mind and asked that the Rules provide that the notice be sent to "the Inmate Services Division," because otherwise employees in the OPD mail room might not know where to send the notice. The Court approved of the change back to the original wording. When Rule 4-332 is sent back, all of the Rules that require notice to the OPD will be changed.

The Chair told the Committee that they had been given a revised agenda in part because there are two new proposals that had been requested by the Court. This had not been known until after the agenda was prepared. The other reason is that the major items for discussion for which most people were in attendance were originally the Alternative Dispute Resolution Rules (ADR) and Rules pertaining to judgments on affidavit. There will have to be plenty of time for discussion of those Rules. The other Rules on the agenda that are to be discussed today would be the first items considered.

Agenda Item 1. Consideration of a proposed amendment to Rule 16-714 (Disciplinary Fund)

The Chair presented Rule 16-714, Disciplinary Fund, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

AMEND Rule 16-714 to add clarifying and descriptive language concerning the creation, administration, contents, and purposes of the Disciplinary Fund, as follows:

Rule 16-714. DISCIPLINARY FUND

(a) Payment by Attorneys

There is a Disciplinary Fund. As a condition precedent to the practice of law, each attorney shall pay annually to the Fund the sum that the Court of Appeals prescribes. The sum shall be paid in addition to and by the same date as other sums required to be paid pursuant to Rule 16-811. <u>The Disciplinary Fund is created and administered pursuant to the Constitutional authority of the Court of Appeals to regulate the practice of law in the State of Maryland and to implement and enforce the Maryland Lawyers' Rules of Professional Conduct adopted by the Court. The Fund consists of contributions made by lawyers as a condition of their right to practice law in Maryland and income from those contributions. It is dedicated entirely to the purposes established by the Rules in this Title.</u>

(b) Collection and Disbursement of Disciplinary Fund

The treasurer of the Client Protection Fund of the Bar of Maryland shall collect and remit to the Commission the sums paid by attorneys to the Disciplinary Fund.

(c) Audit

There shall be an independent annual audit of the Disciplinary Fund. The expense of the audit shall be paid out of the Fund.

(d) Enforcement

Enforcement of payment of annual assessments of attorneys pursuant to this Rule is governed by the provisions of Rule 16-811 (g).

Source: This Rule is derived from former Rule 16-702 d (BV2 d) and 16-703 b (vii) (BV3 b (vii)).

The Chair explained that the Disciplinary Fund was created entirely by rule. It funds two operations that are part of the judicial branch, the Client Protection Fund (CPF) and the Attorney Grievance Commission (AGC). The CPF was created by statute, Code, Business Occupations Article, §10-311, but it was implemented by Rule 16-811, Client Protection Fund of the Bar of Maryland. Attorneys are required to pay $20 a year to the Client Protection Fund. This money goes to pay claims made against the Fund for monetary losses due to defalcations by attorneys. The AGC, the other agency funded by the Disciplinary Fund, was created entirely by Rule 16-711, Attorney Grievance Commission. Attorneys pay an annual fee that is set by the Court of Appeals to finance the operations of the AGC. This fee is currently

$125. The attorneys have to pay the entire $145 to the CPF each year. The CPF gets the money, keeps their $20, and sends the rest to the AGC.

The Chair said that an issue arose in the last session of the legislature, which had been the renewal of an issue that has been around for decades. This is whether funds for the AGC, which was created solely by rule, can be appropriated by the General Assembly. The latest attempt was prompted by a desire, mostly instigated by the Department of Legislative Services, to seize a temporary surplus accumulated by the AGC to help balance the State budget. This move was resisted by the Judiciary, and as with every other attempt that had been made to do this, failed. The Court had noted that the Fund consists entirely of contributions by attorneys pursuant to court rule, and it needs to be under the control of the Judiciary under its inherent constitutional power to regulate the practice of law and the conduct of attorneys. The Court felt that the current provision is probably not sufficiently clear as to the nature and purpose of the Disciplinary Fund. The Court would like this additional language to clarify the nature of the Fund. It also would allow some flexibility to support the CPF when from time to time claims deplete the available funds. The Court has indicated that it wants to consider this at its August conference. This is before the Committee as Agenda Item 1.

The Vice Chair remarked that she had been completely in favor of this when she had read that the General Assembly was

thinking about appropriating this money. She asked about the last two sentences of the proposed language in section (a) and how they work. Should it read as follows: " ...and income from those contributions is dedicated..."? The Chair noted that it consists of the contributions and the income. The Vice Chair acknowledged this and said that she had not understood it. She commented that people who work with budgets often use the language "dedicated exclusively to a particular purpose." She inquired if this should be the language used in the Rule. Mr. Sykes pointed out that the proposed language was more like a treatise or an argument than a rule. It was not the kind of language that is usually seen when judicial proceedings are regulated. The Chair said that this is probably under the Court's inherent authority to regulate the practice of law rather than under the provisions of Article IV, §18 of the Constitution.

The Vice Chair agreed with Mr. Sykes that the proposed language was unusual, but she expressed the opinion that the language was appropriate, because the General Assembly should not be taking money from this type of fund. Any surplus should be given back to the attorneys. Mr. Sykes agreed but added that the Rule seemed to be more like an exposition rather than a rule. The Reporter said that the Rule could be restyled. All of the Title 16 Rules will be revised within the coming year, and this Rule could be restyled then. The Chair noted that this version of the Rule is what the Court of Appeals had requested. Mr. Sykes stated that he agrees with the substance of the proposed

new language, but he would prefer that it be in a Committee note. The text of a Rule should be prescriptive. Language that is descriptive or argumentative should be in a Committee note, rather than in the Rule itself.

Mr. Brault questioned as to what would be done with the surplus, which is quite substantial. The Chair answered that although he was not sure, it might be that the annual contribution by attorneys would be reduced, so that over time, the surplus is diminished. What was being proposed was to do an expanded audit of both the CPF and the AGC to see what they need. The Court can control the contribution to the AGC entirely by rule. The statute that pertains to the CPF provides that the contribution is limited to not more than $20. It also provides that the CPF can find other revenues if it is able to do so. Mr. Michael inquired if some of the money were going toward the course on professionalism, which is now run by the Court of Appeals, instead of the Maryland State Bar Association, pursuant to Rule 11, Required Course on Professionalism. The Chair was not certain if any of the money was being used for the course.

Judge Zarnoch remarked that he was not opposed to the Rule, but he pointed out that under the Maryland Constitution, the General Assembly controls funds. The Rule seems to be enshrining the legal argument in support of the Court's view, which is against the General Assembly's view. There is no harm in wording the Rule this way. Ultimately, the General Assembly has control over the State's funds. The Chair said that the Attorney General

had taken this position. Mr. Michael moved to adopt the changes to Rule 16-714, the motion was seconded, and it carried with one abstention.

Agenda Item 2. Consideration of a proposed amendment to section b. of Rule 16-101 (Administrative Responsibility)

The Chair presented Rule 16-101 b., Administrative Responsibility, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

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

AMEND Rule 16-101 b. to make the provisions of the Rule applicable to the senior judge present in the Court of Specials Appeals in the absence of the Chief Judge of that Court, as follows:

Rule 16-101. ADMINISTRATIVE RESPONSIBILITY

. . .

b. Chief Judge of the Court of Special Appeals

The Chief Judge of the Court of Special Appeals shall, subject to the direction of the Chief Judge of the Court of Appeals, and pursuant to the provisions of this Title, be responsible for the administration of the Court of Special Appeals. With respect to the administration of the Court of Special Appeals, and to the extent applicable, the Chief Judge of the Court of Special Appeals shall possess the authority granted to a

> County Administrative Judge in section d of this Rule. In the absence of the Chief Judge of the Court of Special Appeals, the provisions of this Rule shall be applicable to the senior judge present in the Court of Special Appeals.
>
> . . .

Rule 16-101 was accompanied by the following Reporter's Note.

> If the Chief Judge of the Court of Special Appeals becomes temporarily unable to perform the administrative duties and functions of Chief Judge, he or she may delegate those functions. See Rule 16-101 b. and d. 3. Rule 16-101 contains no provisions concerning performance of those functions if the Chief Judge can neither perform not delegate them.
>
> Using language borrowed from Article IV, Section 18 (b)(5) of the Maryland Constitution that is applicable to the absence of the Chief Judge of the Court of Appeals, the proposed amendment to Rule 16-101 b. fills the gap in the Rule by making the provisions of the Rule applicable to the senior judge present in the Court of Special Appeals in the absence of the Chief Judge of that Court.

The Chair said that Rule 16-101 b. addresses the Chief Judge of the Court of Special Appeals. Code, Constitution, Article IV, §18 uses language, which concerns what happens when the Chief Judge of the Court of Appeals is unable to perform his or her duties, similar to the language being suggested for Rule 16-101 b. All of the powers that are listed in the Constitution for the Chief Judge apply to the senior judge present in the Court of Appeals as part 5 of Article IV, §18 of the Constitution

provides. There is nothing in the Constitution regarding the administration of the Court of Special Appeals other than an authorization in Constitution, Article IV, §14A for the General Assembly to create one or more intermediate appellate courts. The Court of Special Appeals was created by statute. Nothing is said in the Constitution or the statute that creates the Court of Special Appeals about the general duties of the Chief Judge. The administrative duties of the Chief Judge of the Court of Special Appeals are provided solely by Rule 16-101 b. Nothing in that provision addresses what happens if the Chief Judge becomes disabled.

This situation actually occurred a year or two ago, and it had occurred years before when the Honorable Richard J. Gilbert, then Chief Judge of the Court of Special Appeals, had been incapacitated but not sufficiently incapacitated that he could not keep up with most of the duties of the Chief Judge. He did delegate some of those duties to other judges. The Court of Appeals would like to close that gap by using exactly the same language as is in the Constitution applying to the Chief Judge of the Court of Appeals. They had the choice of being more specific or more clear than the language of the Constitution. They felt that the language of the Constitution that applies to the Chief Judge of the Court of Appeals ought to apply to the Chief Judge of the Court of Special Appeals.

Mr. Michael moved to approve the proposed language in Rule 16-101 b., the motion was seconded, and it carried unanimously.

Agenda Item 3. Consideration of proposed amendments to: Rule 4-353 (Costs) and Rule 4-354 (Enforcement of Money Judgment)

Mr. Karceski presented Rules 4-353, Costs, and 4-354, Enforcement of Money Judgment, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-353 to add a new section (b) regarding indigency and the waiver of court costs assessed pursuant to Code, Courts Article, §7-409, to add a Committee note stating that costs assessed pursuant to that statute should be assessed separately and should only be waived in extraordinary circumstances, to add a cross reference at the end of section (b), and to make stylistic changes, as follows:

Rule 4-353. COSTS

(a) Generally

A judgment of conviction or a disposition by probation before judgment or an accepted plea of nolo contendere shall include an assessment of court costs against the defendant unless otherwise ordered by the court.

(b) Special Costs

Costs assessed pursuant to Code, Courts Article, §7-409 shall be assessed separately from other costs and shall not be waived by the court except upon a finding, based on evidence, that the defendant is not likely to be able to pay any significant part of those costs within the succeeding twelve years.

Committee note: This Rule requires the court to consider a defendant's ability to pay court costs assessed pursuant to Code, Courts Article §7-409, separately from the defendant's ability to pay all other court costs. In doing so, the court must make clear whether it is waiving costs under subsection (a) of this Rule, subsection (b) of this Rule, or both.

There is a lower threshold for establishing indigency for the purposes of waiver of prepayment of the filing fee pursuant to Rule 1-325 and eligibility for the services of the Public Defender than for costs assessed pursuant to Code, Courts Article § 7-409.

Rule 1-325 provides for the waiver of filing fees and other costs required to be prepaid if the person can establish an inability to pay them due to indigency. In that context, indigency must be determined as of the time the costs otherwise would be payable in light of the amount of the costs.

In the context of eligibility for the services of the Public Defender, indigency – the inability of the defendant "without undue financial hardship [to] provide the full payment of an attorney and all other necessary expenses of representation" in the proceeding – must, of necessity, be determined before trial in light of what it would cost to obtain private counsel. *See* Code, Criminal Procedure Article, §16-210 (b).

In the context of the costs assessed pursuant to Code, Courts Article, §7-409, indigency is a more fluid concept. The assessed costs, which are only $45 in the circuit court and $35 in the District Court, are not part of the penalty, *see* Code, Courts Article, §7-505 (b), and, unless otherwise ordered by the court, they are not required to be paid at the time of sentencing. Unless payment is made a condition of probation, they are a civil liability and may be collected in the same manner as judgments in

civil cases, *see* Code, Courts Article, §7-505 (a), or pursuant to statutory or administrative procedures for the collection of debts due to the State. The mere fact that the defendant is self-represented or is represented by the Office of the Public Defender does not warrant a waiver of costs assessed under Code, Courts Article, §7-409, and the court should not waive those costs except in those extraordinary circumstances when the evidence establishes that the defendant is, and for a significant period will remain, unable to pay them due to indigency.

Cross reference: *See* Code, Courts Article, §7-405.

Source: This Rule is derived from former Rule 764 and former M.D.R. 764.

Rule 4-353 was accompanied by the following Reporter's Note.

The proposed amendment stems from correspondence from the Governor's Office of Crime Control and Prevention (GCCP), the State Board of Victim Services, and a meeting with judicial and executive branch officials.

Code, Courts Article, §7-409 requires the assessment of a special cost to be paid by persons convicted of certain crimes. The cost is $45 in Circuit Court, $35 in District Court, and $3 for certain traffic offenses. These costs are allocated to victim services funds and the Criminal Injuries Compensation Fund, pursuant to statute.

Evidence supplied by the GCCP shows that there is no uniformity in the criteria used by judges in deciding whether to waive these costs. It appears that judges may be improperly waiving these costs (1) when the defendant is represented by the Public Defender, (2) when the defendant appears to be indigent and is placed on probation, (3) when the judge sentences the defendant to incarceration, (4) when all costs are waived generally (which may approach $200), or (5)

when the defendant or counsel requests a waiver. Many judges are unaware that these costs are not part of the sentence, are modest in amount, support victim services, and do not have to be waived if other costs are waived. The purpose of the proposed amendment is to eliminate what may be an unknowing frustration of the legislative purpose.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-354 to add to section (a) provisions regarding payment of court costs, to add subsections (a)(1) and (2) that provide the circumstances under which referral to the State Central Collection Unit is required, and to add a cross reference at the end of section (a), as follows:

Rule 4-354. ENFORCEMENT OF MONEY JUDGMENT

(a) Generally

A money judgment or other order for payment of a sum certain entered in a criminal action in favor of the State, including court costs, imposition of a fine, forfeiture of an appearance bond, and adjudication of a lien pursuant to Code, ~~Article 27A, §7~~ Criminal Procedure Article, §16-212, may be enforced in the same manner as a money judgment entered in a civil action or in accordance with statutory procedures for the collection of debts due to the State or State agencies. Unless

(1) payment of court costs is made a

condition of probation, or

(2) otherwise ordered by the court: the clerk shall refer to the State Central Collection Unit, in accordance with procedures adopted by that unit or the Administrative Office of the Courts, costs assessed under Code, Courts Article, §7-409 that remain unpaid after 90 days from the assessment.

Cross reference: *See* Code, Courts Article, §7-505 and Code, State Finance and Procurement Article, §§3-301 through 3-307.

(b) Judgment of Restitution

A judgment of restitution may be enforced in the same manner as a money judgment entered in a civil action.
Cross reference: See Code, Criminal Procedure Article, §11-613 (d) and *Grey v. Allstate Insurance Company*, 363 Md. 445 (2001).

Source: This Rule is derived in part from former M.D.R. 620 a and in part new.

Rule 4-354 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 4-354 is directed at the collection of costs assessed pursuant to Code, Courts and Judicial Proceedings Article, §7-409. Evidence supplied by the Governor's Office of Crime Control shows that there is no uniformity in the procedures used by the clerks to collect those costs. Pursuant to an agreement between the Administrative Office of the Courts and the State Central Collection Unit (CCU), CCU is authorized to collect unpaid court costs. The Director of CCU has expressed the belief that, if the clerks cannot collect these costs within 90 days and assign them to CCU along with adequate identification information, CCU might be able to collect them. The aim of the proposed amendment is to utilize the expertise of CCU instead of the clerks having to act as

judicial collection agencies.

Mr. Karceski told the Committee that Rule 4-353 addressed the assessment of costs, and Rule 4-354 addressed the collection of costs in a criminal case. There are two separate types of costs in a criminal case. Unfortunately, the two different types of costs seem to fall into the same pot, because there is no separation in the assessment of the costs. There are court costs that are assessed at the conclusion of each case where a criminal defendant is found guilty of a crime. The costs are usually around $100 or $120. There are also costs that pertain to a special assessment or an additional assessment under Code, Courts Article, §7-409. The costs are very minimal, and they are $45 in the circuit court in addition to the costs normally assessed. In the District Court, the costs are $35. These costs are dedicated to three separate funds, the State Victims of Crime Fund, the Victim and Witness Protection and Relocation Fund, and the Criminal Injury Compensation Fund.

Mr. Karceski said that by statute - Code, Courts Article, §7-405 - these costs may not be waived unless the defendant who has been convicted establishes his or her indigency as provided by the Maryland Rules. What has been reported is that the judges generally waive costs for a defendant who appears before them and is represented by the OPD. There are other reasons, such as that the court does not want to set the defendant up for failure in a period of probation, but representation by the OPD is the major reason that costs are waived. The judges see that the defendant

is represented by the OPD and assume that the defendant is indigent. There is a difference in the indigency decision-making policy on matters that are pretrial as opposed to post-trial. When a person applies to be represented by the OPD, the person has to show that he or she is not able to pay the full cost of a private attorney. The person has to do this before the trial begins. Certain fees and costs have to be prepaid immediately. Many people qualify for representation by the OPD. A difference exists in the costs assessment under Code, Courts Article, §7-409. The costs should be uniformly assessed. There is a lack of uniformity. In some counties, the assessment process is good, and in others, the process is not so good.

Mr. Karceski commented that the term "indigency" has not been defined. Rule 1-325, Filing Fees and Costs – Indigency, addresses indigency in a pretrial situation and not the situation being discussed today. He told the Committee to look at Code, Courts Article, §§7-405, 7-409, and 7-505. The waiver provision, Code, Courts Article, §7-405, states that these costs may not be waived unless the defendant establishes indigency as provided by the Maryland Rules. After the trial and conviction, the situation should be more fluid with assessments of $45 or $35 as opposed to the cost of hiring an attorney to represent someone for the entire trial. Code, Courts Article, §7-505 states that these costs are not part of the penalty, and the defendant may not be imprisoned for failure to pay the costs.

The Criminal Subcommittee has proposed a new section (b) for

Rule 4-353, which would provide that the costs assessed pursuant to Code, Courts Article, §7-409 be assessed separately from other costs. This language was proposed to be added, because it seems that the clerks are not separating the costs out at the time of sentencing. The costs should not be waived except upon a finding based on evidence that the defendant is not likely to be able to pay any significant part of the costs within the succeeding 12 years. This is the period of time that a civil judgment would remain viable. In most every instance, the Subcommittee believes that a person would be able to pay a significant part of that $35 or $45. Situations may exist where this never happens, and in those situations, the Subcommittee's view is that the costs would never be assessed. If someone's prison sentence is longer than the 12 years, costs may not even be assessed.

Mr. Karceski pointed out that the Committee note after section (b) of Rule 4-353 covers his explanation of the purpose of changing the Rule. The note discusses the lower threshold in assessing the costs. It compares it to the eligibility of the pretrial filing fees that are required. The Committee note also refers to Rule 1-325, which addresses the prepayment of costs. The Subcommittee believed that the proposed changes to Rule 4-353 would result in the judges making this special assessment pursuant to Code, Courts Article, §7-409, so that in most cases, it would not be waived. If the money is not collectible within a period of time, Rule 4-354 addresses the collection aspect of this. In section (a) of Rule 4-354, the Subcommittee proposes to

add the words “court costs,” because in the current Rule, the enforcement provision does not address court costs. An exception would be where the payment of court costs is made a condition of probation. The judge could assess the $45 and make it part of a probation before judgment. If the money is not paid, the statute provides that the person is not able to be incarcerated. Mr. Karceski was not sure that this could ever be a violation of probation. It could result in the person not necessarily being imprisoned but being stripped of the probationary period before judgment if he or she had the ability to pay but chose not to pay.

Mr. Karceski remarked that the changes to the Rule were trying to relieve the clerk’s office from being the collection agency in these matters. The Subcommittee had been advised by the Central Collection Unit (CCU) of the State that it believes it would be able to collect this money in many instances. If the money is not paid within a 90-day period after the costs are assessed, the case is referred to the CCU, which had indicated that they would use their means of collecting the money. The purposes of the change in the two Rules are (1) to effectively assess these two costs which the Subcommittee feels are not being properly assessed, and more often being waived and (2) as importantly, once the costs are assessed, to effectively collect the costs, because they are designed to be used for very good purposes. If the costs are not collected, the money is not going into the State Victims of Crime Fund, the Victim and Witness

Protection and Relocation Fund, and the Criminal Injury Compensation Fund. Those organizations are prevented from carrying out their intended purpose.

Judge Norton said that he had recently heard a number of cases where people had not paid their fines and costs. In a drunk-driving case, fines and costs may be $500. The defendant may have made payments, but the Department of Parole and Probation (P&P) is part of a hierarchy where they collect their multiple fees first. The defendant may have paid $1100 or $1200 while he or she is on probation, and none of this goes into the costs being discussed today. Judge Norton remarked that the intent of the Rule is to detach the clerks from having to deal with this, but if he orders fines and costs, he would like the defendants to pay them. He had been detaching these cases from the P&P. He wanted to be sure that the defendants were paying these costs, instead of the judges getting a report from the P&P that they took all of the money. He had been seeing a counter-push to make the collection of the fees part of the court's function, because if it is paid through the P&P, the court will never see it.

The Chair acknowledged Judge Norton's point. The collection of these costs is a serious problem. When the legislature provided for these costs, it meant for the costs to be collected. They are a separate cost, $35 or $45, or $3 for traffic cases. Code, Courts Article, §7-405 provides that the court should not waive these costs. The meeting materials contain a list of how

much money the county circuit courts collect for the Victims of Crime fund. There is no rational explanation for the discrepancies. For example, Cecil County collects more money than Montgomery and Howard Counties. In 2005, Baltimore City collected almost $20,000, and now they are down to just over $5700. Harford County collects 70% more than Montgomery County. Baltimore County collects 240% more than Montgomery County. Wicomico County collects twice what Howard County collects. Cecil County collects five times the amount that Howard County collects. These statistics are difficult to justify. The statistics in the District Court reflect the same disparities.

The Chair commented that this was brought to the attention of the Committee by a letter from Roberta Roper, who chairs the Maryland State Board of Victim Services, and Kristen Mahoney, who is the Executive Director of the Governor's Office of Crime Control and Prevention. The Chair added that he had met with them. He agreed with Judge Norton that this is in part a judicial problem of judges waiving the costs when they should not be doing so, thinking that these costs are part of all of the rest of the costs, and if those costs are going to be waived, the costs being discussed today should be waived as well. The judges are not realizing that these are separate costs that are dedicated to specific funds. Judge Norton explained that his point was that the costs should be a higher priority on the P&P hierarchy. For example, restitution comes first on the hierarchy. Then the Department's fees come next. The court fees

could be elevated to second in line.

The Chair noted that all of this was pointed out at the meeting with Ms. Mahoney, Ms. Roper, a representative from the P&P, and the head of the CCU. To some extent, this is a problem within the executive branch agency, P&P, which is not a judicial agency. Any change to the Rules can address what judges can do. They should not be waiving these costs, simply because someone is represented by the OPD. They should not use Rule 1-325, which pertains to prepaid costs, to apply to these costs which are not prepaid. This is what Rule 4-353 attempts to do.

The Chair observed that one problem is waiving the assessment. If it is waived, the clerks have nothing to collect. The first Rule deals with this. Rule 4-354 addresses how the costs are collected, assuming that these costs are assessed. Ms. Smith, a court clerk who is on the Rules Committee but is not present at today's meeting, had asked her colleagues in other counties how this was handled. No two counties are doing this the same way. The view of most of the clerks is that they are not a collection agency. They have other work to do besides sending out dunning notices. Are they supposed to then send someone out to knock on the doors of the people who owe money? The CCU statute, Code, State Finance and Procurement Article, §3-302, provides that they cannot collect court costs unless by agreement of the Secretary of Budget and Management. There is an agreement between the Administrative Office of the Courts and the Department of Budget and Management that permits CCU to do this.

That is the agency that was created by the legislature to collect all State debts amounting to more than $30.

Judge Weatherly remarked that she would be less likely to waive these costs, if there were a separated cost, entitled the "Victim's Assessment" fee as opposed to the other costs. The form that is used in Prince George's County has only one box for fees that are either assessed or waived. Judge Norton responded that he had been referring to the costs that were imposed, not the costs that were waived. He agreed that if the judge saw a notation with the word "victim" on it, the judge would be less likely to waive the costs.

The Chair commented that this issue had been discussed at the meeting to which he had referred. The decision had been to change that box to indicate that the costs are separate. Judge Pierson disagreed with this. In jurisdictions where judges handle a high volume of cases on a daily basis, this would create confusion. If these costs are going to be referred to the CCU, he did not know why all of the costs would not be referred. Creating the distinction in the costs would only confuse people. The same principle applies to Rule 4-354. Judges would have to apply one standard for waiving the $45 and a different standard to the balance of $120. What evidence is different to ascertain whether someone is able to pay $45 within 12 years as opposed to whether someone is able to pay $120 within 12 years? He had no idea of the distinction between this part of the costs and the other part of the costs. The Chair responded that this is part

of the problem that was identified. Judges look at costs as all costs. If costs total $200, the judge may feel that the defendant could not pay them. If the costs go to the general fund anyway, the judge just waives them. The judge may not realize that the $45 is much less, it does not have to be paid right away, and it is dedicated to a specific purpose.

Judge Pierson said that he realized that this is collecting money for a noble purpose. Funding the operation of the courts is worthwhile, too. Why not make the defendant pay all of the costs? The clerks would have to juggle the money to pay for the various funds. The Chair noted that if the court does not waive any of the costs, then the clerk would have a debt that is close to $200, and the clerk can send that to the CCU. Some clerks are already doing this, but not all of them are.

Judge Pierson expressed the opinion that all of this should be the same. It is as easy to send the $120 debt to the CCU as it is to send the $45 debt. The Chair pointed out that the clerks can refer the case to the CCU. Judge Pierson suggested that it be automatic for all uncollected costs to be sent to the CCU, not just these special costs. The only distinction between the two is in Rule 4-353. Judge Pierson said that subsection (a)(2) of Rule 4-354 reads, as follows: “Unless ...otherwise ordered by the court, the clerk shall refer to the State Central Collection Unit...costs assessed under Code, Courts Article, §7-409.” The Chair reiterated that the clerk can send any costs not paid to the CCU and can do so now. Judge Pierson suggested that

the Rule should require that all of the costs are to be sent to the CCU. The Chair suggested that Judge Pierson propose an amendment. Judge Pierson responded that he had an amendment to propose for Rule 4-353, also. He moved to amend Rule 4-354. The motion was seconded.

The Vice Chair asked Judge Pierson if his amendment was to provide that all costs that remain unpaid after 90 days from the assessment should be referred to the CCU, rather than only costs assessed under Code, Courts Article, §7-409. Judge Pierson replied affirmatively. The Vice Chair inquired if there is any reason not to do this. The need for an agreement for this to happen had been mentioned earlier, and she questioned if there is such an agreement. The Chair answered that there is an agreement. The clerks will not take any money owed that is less than $30 to the CCU but any amounts more than that are being sent by some clerks, and others are not sending them. Some clerks are sending them after 90 days, and some are not.

Mr. Karceski commented that one of the problems is with costs other than costs assessed under Code, Courts Article, §7-409. He did not remember judges actually saying what the dollar amount of the costs would be. The clerk makes the computations. Mr. Karceski's recollection was that these costs, unless specifically stated to be paid within a certain number of days, can be paid over the course of the probationary period. They can be paid on the day of the sentencing or over a period of five years. The court costs are subject to a violation of probation

or at least, a show cause hearing that could result in some damage to the defendant. The only damage the other costs might cause is that a person could lose his or her status of probation before judgment and be found guilty if that is what a judge feels is appropriate. The statute provides that the defendant cannot be imprisoned for failure to pay this.

Judge Pierson remarked that as to the first point, the first year he sat in criminal court, he imposed costs in every case. It was an inordinate amount of work for him and P&P when someone did not pay the $120. There seems to be an inconsistency, because the finding the judge is supposed to make is that the defendant pay the costs within 12 years, but the debt would be sent to the CCU within 90 days of the assessment. Judge Norton inquired if the date should be 90 days from the due date and not from the date the assessment is imposed. If the defendant is given six months to pay, why would the debt be sent to the CCU after 90 days? The Chair replied that the 90 days was an arbitrary number.

Judge Norton remarked that there could be $500 fines and costs of $100 a month for five years. The Chair noted that the number was chosen, because the Director of the CCU said that if the assessments are referred early enough, and the CCU is given proper identification of the person, there is a better opportunity for collection. He wanted the referral as early as possible.

One aspect of this topic involves procedures of P&P, which

cannot be set up by rule, because P&P is an executive agency. What the executive branch should be looking at is that even if these costs are made payable through a probation order, P&P could send them off to the CCU. P&P does not have to collect the costs themselves, although they could, and they now do, but there is no reason why they could not send them off to the CCU as well. Not every defendant goes to prison. The case could be in District Court, and not everyone is imprisoned in a circuit court case. That is why the number was chosen.

Senator Stone commented that if a defendant is given six months to pay the costs, the debt should not be sent to the CCU until after a default. The Chair responded that the Rule could provide for that, or it could state that the clerk will send the uncollected costs either after 90 days or at such other time as directed by the court. Judge Norton said that if the defendant has not paid within the time stated, then the clerk can send the matter off to the CCU, but it should not be sent off prematurely. The defendant's fear of incarceration for a violation of probation is much more of an attention-getter than the CCU.

The Chair referred to the point Judge Norton had raised earlier about the priority of these costs when the defendant does produce some money. The law is not uniform on this. In Code, Correctional Services Article, §3-804 pertaining to defendants on work release, spousal or child support is to be paid before money for restitution is to be paid. The Vice Chair questioned who chooses the priority order, and the Chair replied that the

legislature chooses it. It is done by statute. The Vice Chair inquired why the laws are so inconsistent. The Chair replied that this is probably done by local bills.

Judge Pierson referred to the fine issued in the District Court, which if not paid by the defendant, then he or she can be put in jail, but the failure to pay costs cannot result in imprisonment. He asked Judge Norton why the costs debt cannot go automatically to the CCU and not be part of the P&P, anyway. Judge Norton answered that this relates to whether the original language should be put back in the Rule and provide that specialized costs, which do not allow for incarceration, can be collected. Since the defendant cannot be incarcerated, why not let the CCU collect the outstanding costs?

Mr. Patterson drew the Committee's attention to Code, Courts Article, §7-505 (b), which reads as follows: "Costs are not part of the penalty, and a defendant may not be imprisoned under this subtitle for failure to pay costs." Judge Pierson commented that this refers to all costs. Mr. Patterson remarked that if the costs are not part of the penalty, then they should not be part of P&P and can be sent to the CCU for collection right away. The Chair commented that he did not know the answer to whether this supersedes the ability to put someone on probation. Mr. Maloney inquired if there is anything in the statute that gives the P & P the authority to put their supervision fees ahead of costs. The Chair responded that he did not know. There are many fees, including the supervision fee; a requirement in the statute that

if the defendant is represented by the OPD, the defendant must reimburse OPD for the cost of defense; the costs; and restitution.

Mr. Maloney expressed the concern that the supervision fee had gotten to be so high that P&P had an institutional interest in putting itself first. The court costs may never be satisfied in many of these cases. P&P is essentially carrying out a judicial function as an executive branch agent of the Judiciary. Its authority to collect is statutory, but it is carrying out a court-ordered function. He suggested that the Rule could provide that prior to satisfying any other costs other than restitution, the court costs should be satisfied. The fees of P&P should be lower. The Vice Chair asked how payment of child support would fit in. The Chair noted that this would not be included as costs. Mr. Karceski added that if the defendant pays $40 or $45 a month, it would go to the supervision fee, and nothing goes to the costs. Mr. Maloney noted that this is what is happening now.

Mr. Patterson inquired if this is a matter of judicial education and procedural mandate. It is not uncommon for a judge to impose a fine and waive supervision fees while putting someone on probation. If judges can do this, why can they not be instructed by the people who teach judges that when the judge enters an order for the defendant to pay restitution and to pay a fine of a certain amount of money, the order would provide that the supervision fee is to be paid after the rest of those amounts are paid? The Chair replied that he did not know the answer to

Mr. Patterson's question, whether the court by rule can direct what an executive agency can do. To some extent, this can be done, because it is a court order. Almost every year, the Honorable Robert M. Bell, Chief Judge of the Court of Appeals, sends a letter to all of the judges about not waiving the $45 and $35 costs, but the problem persists.

The Chair said that he and Ms. Roper had spoken with some of the judges. In fairness to them, many of them do not understand that these are separate costs that are dedicated. They believe that anyone represented by the OPD is unable to pay these costs due to indigence. Judge Norton observed that if the judges understood where the money from the costs paid was going, it would be difficult for them to refuse to support Ms. Roper's organization.

Mr. Maloney proposed that the Rule could provide that all payments, except for restitution, shall be first credited to court costs and then thereafter to the other fees, unless otherwise provided by law. The Vice Chair asked where the fees for the State Victims of Crime Fund fit in. The Chair answered that they are a court cost. Judge Norton remarked that he was not sure what authority P&P has and whether this is an internal P&P matter. The Chair commented that he would not object to Mr. Maloney's proposal, but he was not sure whether there is authority to make that change. It is broader than the current proposed change. He suggested that the change suggested by Mr. Maloney be considered separately. Mr. Maloney responded that it

could be considered at the next meeting, and anyone who was opposed could object to it. The Chair observed that the OPD may object to it. To ensure that the costs being discussed today are assessed and there is some uniform collection of them, the Committee has to decide on the proposed changes before them today, because collection of the costs is a problem.

Judge Pierson said that he was withdrawing his proposed amendment to Rule 4-354. The 90-day period after assessment proposed in subsection (a)(2) could be retained, but the money cannot be all costs. The 90-day period should only apply to the court costs. The Chair remarked that the costs are not only assessed separately, but the money goes different places. General court costs, if collected, go to the general funds of the State, but these costs do not. Mr. Karceski inquired if it would create a problem if instead of stating in subsection (a)(2) "...90 days from the assessment," a specific due date was added. Even though the amount may only be $45, if the defendant is sent to jail, he or she may not have an ability to pay the amount until he or she gets out of jail. The case may be sent to the CCU before it should be. The Chair cautioned that this should not be left totally open-ended. Mr. Karceski said that the time could run from the due date, but the Chair pointed out that the due date could be 12 years from now. Mr. Karceski remarked that no judge would set it up that way. The costs are assessed as long as there is a reasonable chance that this money can be paid within that time. If it is not paid before the date that it is

due, the CCU gets into the case to try to get all of what is due at one time. If the CCU cannot get all of the money owed, they try to work a plan for repayment. The Chair commented that if this is entered as a civil judgment, the defendant has 12 years to pay it. The CCU charges debts off, also. The only problem with the due date is the problem that exists now with judges setting due dates inconsistently.

The Reporter suggested that the language of subsection (a)(2) of Rule 4-354 could be "...that remain unpaid after 90 days from the later of (1) the date of the assessment or (2) the due date if different." The Vice Chair commented that this sounds like it would be very difficult for the clerk's office. How do they keep track of all of this? Do they have a reminder system? The Chair answered that when electronic record-keeping is in place, there will be a reminder system. Even now, if the Rule is uniform, it is not that difficult to have a tickler system.

Judge Weatherly told the Committee that Ms. Smith had said that in her smaller county, the clerk's office works with people to arrange for payment. The Chair pointed out that Ms. Smith had stated that she sends these cases to the CCU. Judge Weatherly noted that those are the cases where the defendant pays nothing, but she added that Ms. Smith had talked about some people who do come to the clerk's office and pay on the debt. Ms. Smith had said that she was not necessarily in favor of an automatic referral to the CCU. Judge Weatherly expressed the view that the

Committee may not have enough information regarding directing these payments and prioritizing them. If these costs were separated out, it would be helpful. This may require changing the daily sheets, for example. Currently, the sheets have only one box to check for all costs. To clarify this might encourage the judges to collect these costs.

The Chair pointed out that the two Rules before the Committee address different issues. Rule 4-353 addresses only the assessment of the costs. He asked if anyone had an objection to Rule 4-353. Judge Pierson responded that he understood that the idea of the proposed changes is to tell judges that they should not waive these costs. Nevertheless, he did not like the phrase in section (b) of Rule 4-353 that reads "...based on evidence...". He could imagine evidentiary hearings on the issue of whether the defendant has the ability to pay $45 within 12 years. What does the language "based on evidence" mean? Does it have to be written evidence or testimonial evidence? He expressed the opinion that the phrase "based on evidence" should be deleted. The Chair noted that Code, Courts Article, §7-405 provides that the costs cannot be waived "unless the defendant establishes indigency as provided in the Maryland Rules." Judge Pierson said that language was appropriate. The Chair inquired how the defendant would do this. Judge Pierson replied that judges make their decisions based on evidence. It does not need to be stated separately. Judge Weatherly remarked that she had never held an evidentiary hearing on this.

Mr. Patterson asked when the clerk collects the costs. If the matter has been referred to the CCU, will they get the money? Judge Weatherly responded that she had never referred these type of cases to the CCU. The costs are assessed when the person is not incarcerated. If the person is incarcerated, the judges usually assess costs to be paid during the period of probation. It could be seven years of incarceration and then three years of supervisory probation. Mr. Patterson remarked that when someone comes into the clerk's office and pays money to the clerk, the clerk has to send the money somewhere. Judge Weatherly commented that she did not know where the money is sent.

Mr. Patterson observed that if the money has to be sent somewhere, then someone has to be notified that the costs have been paid. Whether the CCU is involved or not, the clerk can accept the money and tell the CCU that the debt should be marked as paid. The Chair noted that the clerks are audited, and they send costs to the general funds of the State, except for the costs being discussed today. The Vice Chair commented that it seems that there would be the potential for the situation where the clerk accepts the money and sends it to the State but does not tell the CCU. This may create unfavorable issues for the defendant.

Judge Pierson suggested that section (b) of Rule 4-353 could read as follows: "...shall not be waived by the court except upon an express finding that the defendant is not likely to be able to pay...". The Vice Chair seconded the motion. Judge Pierson

added that this would require the judge to state the finding on the record. The Chair asked Judge Pierson if he wanted to add language to the Rule requiring the finding to be stated on the record. Judge Pierson said that he agreed with the language "...an express finding stated on the record...". This amendment was seconded, and the motion passed unanimously.

The Vice Chair said that she had a comment on the Committee note at the end of Rule 4-353. The last paragraph of the note refers to the "$45" and "$35." Is someone going to keep up with these amounts when they change? Can this be written so that it does not have to be this specific? The Chair responded that it could be. He pointed out that there was a bill in the last legislative session to raise these fees, but the bill did not pass. Mr. Karceski remarked that an important aspect of this is that without those amounts specified, it may be that the neon sign does not go on letting the judge know that these amounts are really minimal. Even if the amounts change, it is not hard to change the Rule. The Reporter added that it would be appropriate to leave the specific amounts in. As the Rules Committee staff looks through the bills that passed in every session, they can pick up any change.

The Chair asked Ms. Roper if she knew whether the organizations supporting victims of crime were planning to resubmit the bill, which would raise the amounts of costs, in the legislature for next session. Ms. Roper answered that the bill had been proposed by the Department of Safety and Correctional

Services, and they were planning to file that bill again in 2012. The Chair inquired if the specific dollar amounts should be changed to read "minimal amounts." The Vice Chair said that this issue could be left for the Style Subcommittee to address. Mr. Michael suggested that the phrase that reads "...which are only $45 in the circuit court and $35 in the District Court..." could be taken out. The Vice Chair reiterated that the Style Subcommittee can determine how this should read.

By consensus, the Committee approved Rule 4-353 as amended.

The Chair asked the Committee whether they wanted to approve Rule 4-354. The Vice Chair moved to defer this Rule until information about the priorities and more input from the clerk's office could be obtained. She was troubled by the fact that the court costs can be made a condition of probation, but in this Rule, the court can order otherwise. Is this intended to mean that the clerk does not refer it out if the court decides that it can never be done? The Chair asked the Vice Chair if she were amenable to deferring the last part of the Rule beginning with the word "[u]nless" in section (a). The change allowing the court costs to be entered as civil judgments would be left in. The changes allowed would end with the words "State Agencies." The Vice Chair replied that she was in agreement with the language in that part. Judge Kaplan moved to not consider the rest of the proposed changes, and the motion was seconded. The Vice Chair said that the remainder of the proposed changes would be temporarily deferred until it is further studied. The

Reporter asked if the cross reference at the end of section (a) would stay in.

Mr. Karceski said that he had a question about the amendment that would cut off the consideration of the changes beginning with the word “unless.” What if the payment of court costs is made a condition of probation? Would that change the meaning of the Rule? The Chair replied that it would not, because the Rule provides that the costs that are assessed are entered as a civil judgment, and they can be enforced in the same manner as any other judgment, which in the case of the State, can be a referral to the CCU. The objection was only to the 90-day time period in subsection (b)(2). Mr. Karceski inquired if the objection were to the 90-day time period or to all of the language after the word “agencies.” The Reporter answered that there were two separate objections to the 90 days and to the specification of the amounts. Mr. Karceski noted that the second one was withdrawn. He asked the Vice Chair what her objection was to the remainder of the changed language. She had previously mentioned the lack of prioritization, and Mr. Karceski remarked that this issue may never be resolved. There are so many entities, including the counties and Baltimore City, and no uniformity.

Mr. Karceski pointed out that the Vice Chair had said that she wanted to get input from the clerks as to how this is being assessed. The Vice Chair responded that this was not what she meant. She expressed the opinion that the Rule would place a major burden on the clerks’ offices, and since Ms. Smith, who

represents the clerks, was not present today, it was one of the reasons for potentially deferring the rest of the changes to the Rule. Mr. Karceski noted that Ms. Smith had been present at the Criminal Subcommittee meeting when this Rule was discussed.

The Chair said that a motion that had been seconded was on the floor. It was to not consider the new language after the word "agencies." Mr. Karceski asked what the purpose of the deferral was. The Chair commented that at the meeting of the Subcommittee in May, it was pointed out that some attention needed to be paid to the priorities. This included not only the P&P fee, but all of the fees. This is a problem. It was decided that this is an executive branch issue. Ms. Mahoney from the Governor's Office of Crime Control had taken charge of this matter. As to the deferral of the rest of the Rule for further study, the Chair commented that he would like to be able to send Rule 4-353 and the first part of Rule 4-354 to the Court of Appeals, so that they could discuss it in September. Whatever is deferred would not be discussed by the Committee again until September, which would mean that the Rule would not get to the Court until winter. The agencies that would benefit would like for the Judiciary to act quickly, so that these costs can be collected.

Mr. Karceski remarked that before the costs can be collected, they have to be assessed, which is taken care of by Rule 4-353. The various groups that are going to get this money may not be happy about where this Rule is left. If there is no

collection now, what would change? The Chair responded that the changes to Rule 4-354 would allow the court costs to be entered as a judgment. The Vice Chair added that it would allow the costs to be entered separately. The Chair observed that the representative from the CCU, who was at the Subcommittee meeting, said that to the extent that the CCU is getting these debts to collect, it was important that they be entered separately as a judgment.

Mr. Sykes questioned whether the language in subsection (b)(2) of Rule 4-354 that reads "the clerk shall refer to the State Central Collection Unit..." is going to be left in or left out. The Chair replied that according to the motion, that language would come out. He reiterated that the clerks can refer the cases to the CCU now. The language proposed for addition to the Rule would require the clerk to refer to the CCU. The intent was to have uniformity. The Vice Chair said that she had a question to ask with no opinion on the issue. If the judges are encouraged to refer these costs cases to the CCU, and if the language is left out, does it not allow the courts to do this when it is appropriate? This may be very different in various cases, such as depending on whether the defendant was incarcerated. What happens if the case is referred out to the CCU, and the defendant comes in and makes a payment directly to the clerk? The Chair responded that if the language is left out, the clerk can probably make the referral to the CCU anyway, because they are doing so now. The only point of amending the

Rule was to provide some statewide uniformity. Some clerks will send it, and others will not.

The Vice Chair asked if the Chief Judge of the Court of Appeals could inform the administrative judges in each of the circuits about the need for the judges to assess the costs and refer the unpaid cost cases to the CCU. The Chair clarified that the clerk, not the judge, refers these cases to the CCU. Senator Stone remarked that his experience with the CCU is that they are the collector of last resort. Usually the departments try to collect the unpaid debts, and if they are unable to, the matter is referred to the CCU. The Chair agreed that the State agency has to make some effort to collect the costs owed, before the matter is sent over to the CCU. Mr. Patterson commented that the essence of this is that the costs should not be considered with anything else for enforcement. Unlike restitution or a fine, the court has no teeth to enforce the collection of costs. If all of the other money owed is paid, but the defendant has not paid the court costs, the court cannot do anything about it. The Chair responded that he was not sure about that. Mr. Patterson pointed out that the judge cannot send the defendant to jail. Judge Weatherly added that the court cannot do so just because of the $45 debt.

The Chair noted that Code, Courts Article, §7-405 refers to all court costs. He was not sure if the money that goes to the P&P supersedes that. Mr. Patterson said that a rule pertaining to enforcement of money judgments needs two categories: one for

costs and one for everything else. It would be simple to provide that costs need to be paid to the clerk or sent to the CCU. The reference to the P&P could be left out. Then there would no need to address the priorities of payment and whether the P&P gets the money first or second or third. It is really not a probation issue.

The Chair remarked that he would assume that putting payment of costs in probation orders is almost routine. It is in the form. Judge Pierson said that he and the other judges close probation and refer the unpaid costs to the CCU. There is a form for referral to the CCU when the probation is closed. The Chair commented that this could be five years later. Mr. Karceski said that this usually happens when the defendant violates his or her probation and is sent to jail. The Chair noted that the ability to collect at that point is limited. Mr. Patterson commented that he understood the Chair's wish to get this to the Court of Appeals quickly, but a rule that will affect the way these costs are collected may need more than just eliminating some of the language. The Chair responded that given the uncertainties, one possibility is to see if a meeting could be set up with members of the executive branch to discuss the options. This may require legislation or COMAR (Code of Maryland Regulations) regulations. The goal of the rule change is to do as much as possible at this time to encourage collection of the costs.

The Chair asked if there was any more discussion on the motion to end section (a) of the rule with the words "State

agencies." The motion carried with three opposed. By consensus, the Committee approved Rule 4-354 as amended.

Agenda Item 4. Consideration of proposed amendments to: Bar Admission Rule 14 (Special Admission of Out-of-State Attorneys), Form RGAB-14/M (Motion for Special Admission of Out-of-State Attorney Under Rule 14 of the Rules Governing Admission to the Bar of Maryland), and Form RGAB-14/O (Order)

Mr. Brault presented Rule 14, Special Admission of Out-of-State Attorneys; Form RGAB-14/M, Motion for Special Admission of Out-of-State Attorney under Rule 14 of the Rules Governing Admission to the Bar of Maryland; and Form RGAB-14/O, Order, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

RULES GOVERNING ADMISSION TO THE BAR

OF MARYLAND

AMEND Bar Admission Rule 14 to add a cross reference following section (a) referencing Forms RGAB-14/M and RGAB-14/O as follows:

Rule 14. SPECIAL ADMISSION OF OUT-OF-STATE ATTORNEYS

(a) Motion for Special Admission

A member of the Bar of this State who is an attorney of record in an action pending in any court of this State, or before an administrative agency of this State or any of its political subdivisions, or representing a client in an arbitration taking place in this State involving the application of Maryland law, may move, in writing, that an attorney who is a member in good standing of the Bar of another state be admitted to practice in

this State for the limited purpose of appearing and participating in the action as co-counsel with the movant. If the action is pending in a court, the motion shall be filed in that court. If the action is pending before an administrative agency or arbitration panel, the motion shall be filed in the circuit court for the county in which the principal office of the agency is located or in which the arbitration hearing is located or in any other circuit to which the action may be appealed and shall include the movant's signed certification that copies of the motion have been furnished to the agency or the arbitration panel, and to all parties of record.

Cross reference: For the definition of "arbitration," see Rule 17-102 (b). See Forms RGAB-14/M and RGAB/14-O for motion and order for Special Admission of out-of-state attorney.

(b) Certification by Out-of-State Attorney

The attorney whose special admission is moved shall certify in writing the number of times the attorney has been specially admitted during the twelve months immediately preceding the filing of the motion. The certification may be filed as a separate paper or may be included in the motion under an appropriate heading.

(c) Order

The court by order may admit specially or deny the special admission of an attorney. In either case, the clerk shall forward a copy of the order to the State Court Administrator, who shall maintain a docket of all attorneys granted or denied special admission. When the order grants or denies the special admission of an attorney in an action pending before an administrative agency, the clerk also shall forward a copy of the order to the agency.

(d) Limitations on Out-of-State Attorney's Practice

An attorney specially admitted may act only as co-counsel for a party represented by an attorney of record in the action who is admitted to practice in this State. The specially admitted attorney may participate in the court or administrative proceedings only when accompanied by the Maryland attorney, unless the latter's presence is waived by the judge or administrative hearing officer presiding over the action. Any out-of-state attorney so admitted is subject to the Maryland Lawyers' Rules of Professional Conduct.

Cross reference: See Code, Business Occupations and Professions Article, §10-215.

Committee note: The Committee has not recommended a numerical limitation on the number of appearances pro hac vice to be allowed any attorney. Specialized expertise of out-of-state attorneys or other special circumstances may be important factors to be considered by judges in assessing whether Maryland litigants have access to effective representation. This Rule is not intended, however, to permit extensive or systematic practice by attorneys not licensed in Maryland. The Committee is concerned primarily with ensuring professional responsibility of attorneys in Maryland by avoiding circumvention of Rule 13 (Out-of-State Attorneys) or *Kemp Pontiac Cadillac, Inc. et al v. S & M Construction Co., Inc.*, 33 Md. App. 516 (1976). The Committee also noted that payment to the Client Protection Fund of the Bar of Maryland by an attorney admitted specially for the purposes of an action is not required by existing statute or rule of court.

Source: This Rule is derived from former Rule 20.

Bar Admission Rule 14 was accompanied by the following Reporter's note.

Chapter 129, Laws of 2011 (HB 523) was

enacted during the last legislative session. The legislation requires the State Court Administrator to assess a $100 fee for the special admission of an out-of-state attorney, $75 of which shall be paid to the Janet L. Hoffman Loan Assistance Repayment Program. See Code, Courts and Judicial Proceedings Article, §7-202 (e).

The proposed amendment to Bar Admission Rule 14 adds a cross reference to Forms RGAB-14/M and RGAB-14/O for convenience. A conforming proposed amendment, referencing Code, Courts and Judicial Proceedings Article, §7-202 (e)and adding the dollar amount of the fee, was made to Form RGAB-14/M. A conforming proposed amendment was also made to Form RGAB-14/O, directing the Clerk to return any fee paid if the court denies the Special Admission.

MARYLAND RULES OF PROCEDURE

FORMS OF SPECIAL ADMISSION OF OUT-OF-STATE

ATTORNEY

AMEND Form RGAB-14/M to add a new paragraph requiring the fee required by Code, Judicial Proceedings Article, §7-202 (e) to be attached to the motion, and to include the amount of the fee as follows:

Form RGAB-14/M. MOTION FOR SPECIAL ADMISSION OF OUT-OF-STATE ATTORNEY UNDER RULE 14 OF THE RULES GOVERNING ADMISSION TO THE BAR OF MARYLAND.

(Caption)

MOTION FOR SPECIAL ADMISSION OF OUT-OF-STATE ATTORNEY

UNDER RULE 14 OF THE RULES GOVERNING

ADMISSION TO THE BAR OF MARYLAND

I, ..., attorney of record in this case, move that the court admit, ... of
(Name)

....., an
(Address)

out-of-state attorney who is a member in good standing of the Bar of ....., for the limited purpose of appearing and participating in this case as co-counsel with me.

Unless the court has granted a motion for reduction or waiver, the $100.00 fee required by Code, Courts and Judicial Proceedings Article, §7-202 (e) is attached to this motion.

I [ ] do [ ] do not request that my presence be waived under Rule 14 (d) of the Rules Governing Admission to the Bar of Maryland.

.....
Signature of Moving Attorney

.....
Name

.....
Address

.....
Telephone

Attorney for .....

CERTIFICATE AS TO SPECIAL ADMISSIONS

I, ..., certify on this ..... day of ....., ..., that during the preceding twelve months, I have been specially admitted in the State of Maryland ..... times.

.....
Signature of Out-of-State Attorney

.....
Name

.....
Address

.....
Telephone

(Certificate of Service)

Form RGAB-14/M was accompanied by the following Reporter's Note.

See Reporter's note to Rule 14 of the Rules Governing Admission to the Bar of Maryland.

MARYLAND RULES OF PROCEDURE

FORMS OF SPECIAL ADMISSION OF OUT-OF-STATE ATTORNEYS

AMEND Form RGAB-14/O to add a clause instructing the Clerk to return any fee paid for the Special Admission if the court denies

the Special Admission, as follows:

Form RGAB-14-O. ORDER

(Caption)

ORDER

ORDERED, this ..... day of ....., ..., by the ..... Court for ....., Maryland, that

[ ] ..... is admitted specially for the limited purpose of appearing and participating in this case as co-counsel for ..... The presence of the Maryland lawyer [ ] is [ ] is not waived.

[ ] That the Special Admission of ..... is denied for the following reasons: .... and the Clerk shall return any fee paid for the Special Admission and it is further

ORDERED, that the Clerk forward a true copy of the Motion and of this Order to the State Court Administrator.

.....
Judge

Form RGAB-14/O was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 14 of the Rules Governing Admission to the Bar of Maryland.

Mr. Brault said that Chapter 129, Laws of 2011 (HB 523) provides that the fee charged for *pro hac vice* admission to the bar was increased from $25 to $100, and that $75 of this is to be paid to the Janet L. Hoffman Loan Assistance Repayment Program. The fund is to be used to provide loan assistance repayments to attorneys who obtained graduate degrees with a commitment to work in public service. The out-of-state attorneys will be helping to fund this program. The question posed to the Attorneys Subcommittee was whether a rule change was necessary. The Subcommittee felt that none was needed, except for the addition of the cross reference that would reflect the existence of the fee in the forms for the motion of *pro hac vice* and to put in a provision that if the *pro hac vice* admission is not granted, the attorney would get his or her money back. The issue of whether the money should be used for this purpose is not for the Committee to decide.

Mr. Maloney commented that his only objection to the bill is that this is not really a fee, but a tax, because 75% of the proceeds are going to this executive branch scholarship fund. A fee is something that is used to help the administration of a program. A tax is used for general public support. The Chair said that the legislature passed the bill, and the changes to the Rule and forms call attention to the change. By consensus, the Committee approved Bar Admission Rule 14, Form RGAB-14/M, and Form RGAB-14/O as presented.

Agenda Item 5. Reconsideration of a proposed amendment to Rule 7-208 (Hearing) concerning appearances by video conferencing

---

The Chair told the Committee that the issue of appearances by video conferencing had been discussed at the May, 2011 meeting. It had been deferred, because of some concern by Committee members that in inmate grievance cases, the Attorney General would be present at the hearing, but not the prisoner. The Chair said he had done some research to find out how this works. The Attorney General is not present in an inmate grievance case. In at least three counties, Somerset, Anne Arundel, and Washington, these hearings are being conducted by video conferencing. This is because these counties have large prison populations. No one is present at the hearings, except the judge. The proceedings are conducted on a split screen, which the Honorable Daniel M. Long of the Circuit Court for Somerset County, had reported is very clear. It is similar to high definition television. According to the Honorable M. Brooke Murdock of the Circuit Court for Baltimore City, that jurisdiction would like to conduct hearings by video conferencing also, because of their large prison population, but she was not sure that they have the proper equipment to do this yet.

Mr. Howard presented Rule 7-208, Hearing, for the Committee’s consideration.

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW

IN CIRCUIT COURT

CHAPTER 200 - JUDICIAL REVIEW OF

ADMINISTRATIVE AGENCY DECISIONS

AMEND Rule 7-208 to add a new section (c) to allow appearances by video conferencing or other electronic means under certain circumstances, as follows:

Rule 7-208. HEARING

(a) Generally

Unless a hearing is waived in writing by the parties, the court shall hold a hearing.

(b) Scheduling

Upon the filing of the record pursuant to Rule 7-206, a date shall be set for the hearing on the merits. Unless otherwise ordered by the court or required by law, the hearing shall be no earlier than 90 days from the date the record was filed.

(c) Hearing Conducted by Video or Other Electronic Means

(1) Generally

Except as provided in subsection (c)(2) of this Rule, the court, on motion or on its own initiative, may **[conduct a] [allow one or more parties or attorneys to participate in a]** hearing by video or other electronic means. In determining whether to proceed under this section, the court shall consider:

(A) the availability of equipment at the court facility and at the relevant remote

locations necessary to permit the parties to participate meaningfully in the proceeding and to make an accurate and complete record of the proceeding;

(B) whether, in light of the issues before the court, the physical presence of a party or counsel is particularly important;

(C) whether the physical presence of a party is not possible or may be accomplished only at significant cost or inconvenience;

(D) whether the physical presence of fewer than all parties or counsel would make the proceeding unfair; and

(E) any other factors the court finds relevant.

(2) Exceptions and Conditions

(A) The court may not conduct a hearing by video or other electronic means if (i) such a procedure is prohibited by law, or (ii) unless agreed to by the parties, additional evidence will be taken at the hearing.

(B) The court may not conduct a hearing by video or other electronic means on its own initiative unless it has given notice to the parties of its intent to do so and afforded them a reasonable opportunity to object. An objection shall state specific grounds, and the court may rule on it without a hearing.

~~(c)~~ (d) Additional Evidence

Additional evidence in support of or against the agency's decision is not allowed unless permitted by law.

Cross reference: Where a right to a jury trial exists, see Rule 2-325 (d). See *Montgomery County v. Stevens*, 337 Md. 471 (1995) concerning the availability of prehearing discovery.

Source: This Rule is in part derived from

former Rules B10 and B11 and in part new.

Rule 7-208 was accompanied by the following Reporter's Note.

> Electronic proceedings in Maryland that are already in place include video conferencing of bail review hearings and electronic hearings to set conditions on a stay of a foreclosure sale. To address the issue of electronic proceedings in a broader range of judicial proceedings, the Remote Access Subcommittee was appointed. The Subcommittee recommends starting with allowing appearance by electronic video conferencing or other electronic means in judicial review of administrative agency decisions. The Subcommittee proposes amending Rule 7-208 to allow a party to appear from a remote location by video conferencing or other electronic means if certain conditions are met.

Mr. Howard explained that a new section (c) had been proposed for addition to Rule 7-208. It allows hearings conducted by two-way video conferencing or by other electronic means. Some fairly rigorous criteria are included. Section (c) is to be used only for reviews on the record. It involves arguments of counsel based on a cold record. The Committee had already adopted Rules 2-513 and 3-513, Testimony by Telephone, and this was arguably a bigger step than the proposed changes to Rule 7-208. Only attorneys and parties are seen, not witnesses. To the extent that a party may feel that it is important to be present and be given an opportunity to object, the court can consider the need for the party's presence. In administrative decisions, the judge often needs to hear the arguments of counsel, and this is the principal purpose of the change to Rule

7-208. This is proposed as an incremental initial step into an area where if this is effected, it may be applied to motions hearings.

The Chair pointed out that in subsection (c)(1), there is a choice of language that is bracketed. The Vice Chair inquired if the previous draft used the language "conduct a," and the Chair replied that it had used that language. Judge Pierson expressed his preference for the second choice, which was "allow one or more parties or attorneys to participate in a ...". The Chair said that the initial Subcommittee proposal used the language "conduct a ...". It would be necessary to have a motion to substitute the language. Judge Pierson moved to substitute the language in the second choice, and the motion was seconded. The motion passed unanimously. There being no other comment on the proposal, the Committee approved Rule 7-208 as amended.

Agenda Item 6. Consideration of proposed revisions to the Rules in Title 17 (Alternative Dispute Resolution) and Rule 9-205 (Mediation of Child Custody and Visitation Disputes) and conforming amendments to Rule 2-504.1 (Scheduling Conference) and Rule 14-212 (Alternative Dispute Resolution)

Mr. Klein told the Committee that as a prefatory note, according to his research, the Alternative Dispute Resolution (ADR) Rules had been originally adopted effective 1999. Since that time, some minor changes had been made to them. The last amendments were five or six years ago. In the interim, the ADR Committee of the Conference of Circuit Court Judges, chaired by

the Honorable Thomas Ross of the Circuit Court for Queen Anne's County, proposed a set of amendments to the circuit court Rules governing ADR. Moving in parallel with that process was an effort of the District Court ADR Committee, chaired by the Honorable Dorothy J. Wilson of the District Court in Baltimore County, to develop for the first time a set of rules governing ADR in the District Court.

Mr. Klein said that also, there were proposed amendments coming from the Department of Family Administration of the Judiciary of which Connie Kratovil-Lavelle, Esq. is the Executive Director, with some minor changes to the Title 9 Rules governing ADR and child custody and visitation matters. All of these proposals are coalescing at one time. The ADR Subcommittee had held several public meetings with many people attending, including all segments of the practicing bar, all the major bar associations, and other interested persons. They received valuable input on all of the proposals that were before them at one time. They discussed the pros and cons of various words and many concepts and competing policy considerations. They needed to do something with that information.

Mr. Klein said that a smaller drafting group had met. It consisted of the Rules Committee Chair; Mr. Klein; the Reporter; Judge Ross; Judge Wilson; Rachel Wohl, Esq., who is the Executive Director of the Maryland Mediation and Conflict Resolution Office (MACRO); Jonathan Rosenthal, the Executive Director of the District Court Mediation Office; Ms. Kratovil-Lavelle; and Robert

Rhudy, Esq., the Executive Director of the Court of Special Appeals Mediation Program. The smaller drafting group tried to take the concepts and policies as well as the consensus that had been discussed and coalesce them into a comprehensive set of dovetailed rules, so that if there were a difference in language between the District Court Rules and the Circuit Court Rules, it was there for a reason. This is what is before the Committee today.

Mr. Klein noted that the Rules represent a comprehensive reorganization of Title 17. Because two courts are being addressed, it is organized with some general rules up front governing both courts, followed by rules of the circuit court, followed by rules of the District Court. The drafters anticipate in the future creating rules for the Court of Special Appeals' and perhaps the Orphans' Courts' ADR programs as well.

Mr. Klein commented that the current draft before the Committee retains the fundamental philosophy of the Court of Appeals in the current Rules, which is summed up as follows: fee-for-service ADR cannot be forced over the objection of a party. In the circuit court, one free settlement conference can be required, which can be done under the current Rules. Alternative A maintains this. Alternative B is also for the consideration of the Court of Appeals, in which in addition to compelling one free settlement conference, the circuit court could order no more than one other free ADR session. It could be another settlement conference, mediation, or something else.

The District Court has no rules currently. The proposal would be that the court cannot require a party to participate in any fee-for-service ADR under any circumstance even if no one objects. Either a free settlement conference or free mediation, but not both, can be required, under the current proposal.

Mr. Klein said that he was working from the marked version of the Rules. He presented Rule 17-101, Applicability, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 – GENERAL PROVISIONS

Rule 17-101. APPLICABILITY

[Showing changes from current Rule 17-101]

~~(a) Generally~~

~~The rules in this Chapter apply to all civil actions in circuit court except (1) they do not apply to actions or orders to enforce a contractual agreement to submit a dispute to alternative dispute resolution and (2) other than Rule 17-104, they do not apply to health care malpractice claims.~~
~~Committee note: Alternative dispute resolution proceedings in a health care malpractice claim are governed by Code, Courts Article, §3-2A-06C.~~

~~(b) Rules Governing Qualifications and Selection~~

~~The rules governing the qualifications and selection of a person designated to conduct court-ordered alternative dispute resolution proceedings apply only to a person~~

~~designated by the court in the absence of an agreement by the parties. They do not apply to a master, examiner, or auditor appointed under Rules 2-541, 2-542, or 2-543.~~

(a) General Applicability of Title

Except as provided in section (b) of this Rule, the Rules in this Title apply to the referral by a court of all or part of an action or proceeding pending in the court to an ADR process.

(b) Exceptions

Except as otherwise provided in a particular Rule, the Rules in this Title do not apply to:

(1) an ADR process in which the parties participate without a court order of referral to that process;

(2) an action to enforce an agreement to arbitrate under the common law; the Federal Arbitration Act, 9 U.S.C. §§1 et seq.; the Maryland Uniform Arbitration Act, Code, Courts Article, Title 3, Subtitle 2; or the Maryland International Commercial Arbitration Act, Code, Courts Article, Title 3, Subtitle 2B;

(3) an action to foreclose a lien against owner-occupied residential property subject to foreclosure mediation conducted by the Office of Administrative Hearings under Rule 14-209.1;

(4) unless otherwise provided by law, an action pending in the Health Care Alternative Dispute Resolution Office under Code, Courts Article, Title 3, Subtitle 2A; or

(5) referral of a matter to a master, examiner, auditor, or parenting coordinator under Rules 2-541, 2-542, 2-543, or 9-205.2.

(c) Applicability of Chapter 200

The Rules in Chapter 200 apply to actions and proceedings pending in a circuit

court.

(d) Applicability of Chapter 300

The Rules in Chapter 300 apply to actions and proceedings pending in the District Court.

Mr. Klein pointed out an error in section (a) of Rule 17-101. The language that reads "...an action..." should read "...a civil action...". The unmarked version has the correct language. The exceptions are listed in section (b). Subsection (b)(1) provides that these Rules do not cover private mediation. The Vice Chair pointed out that subsection (b)(1) is not an exception to the general rule, because the general rule requires that there be a court order. The Chair said that this provision was intended to make it very clear that none of this, including fee schedules, training, etc. applies to what the parties want to do themselves, if it does not involve a court referral. He agreed with the Vice Chair that it may be redundant.

The Reporter suggested that subsection (b)(1) could be put into a Committee note. Mr. Maloney expressed the view that this cannot be explicit enough. The Vice Chair remarked that she did not disagree with this, but the issue is where it should be placed. The Chair asked if it should be deleted or moved to a Committee note. Mr. Sykes moved that it be put into a Committee note following section (a). The motion was seconded, and it passed.

Judge Pierson asked if arbitration orders are excluded from

the Rule except for what is in subsection (b)(2). Could the court order parties to participate in arbitration under these Rules? The Chair responded that the court can order non-binding arbitration. It is essentially neutral evaluation, but it is called "non-binding arbitration." A party cannot be forced into binding arbitration unless it is by agreement. Judge Pierson inquired if the court can pass an order subject to the parties' objection requiring the parties to arbitrate. He questioned whether subsection (b)(2) should be broader. The Rules do not apply to any contractual obligation to arbitrate. The Chair said that section (e) of Rule 17-102, Definitions, indicates that the arbitration is non-binding.

The Vice Chair commented that subsection (b)(2) of Rule 17-101 refers to an action to enforce an agreement to arbitrate under the common law. If a person has a contract with someone who agrees to arbitrate any dispute, then it would be binding. Subsection (b)(2) does not apply to that situation, because arbitration is defined to be non-binding in section (e) of Rule 17-102. The Chair said that subsection (b)(2) clarifies that one cannot bring an action to enforce arbitration agreements into this. The Vice Chair inquired if this means binding arbitration agreements. The Chair answered that it means whatever is under section (e).

Judge Pierson commented that his concern was more that the issue of arbitration can arise in civil actions in various ways, not necessarily solely in the context of an action to enforce

arbitration. He understood the intent to be that binding arbitration is completely outside the scope of these Rules. He expressed the concern that subsection (b)(2) of Rule 17-101 should be broader. The Chair said that binding arbitration could be within the scope if the parties agree to it. If the court orders arbitration, and the parties tell the court that they want the arbitration to be binding, this would be under the Rule. Judge Pierson said that his question was whether that would be within the scope of the Rules.

The Chair explained that what is excluded is an action to enforce an agreement. The Vice Chair inquired if this meant an action to enforce an agreement that would require binding arbitration. The Chair responded in the affirmative. Judge Pierson remarked that often what he sees is an action that is broad, and in defense of that action, there is a motion to enforce an arbitration. The Chair reiterated that this is not included under these Rules. Judge Pierson said that this is why subsection (b)(2) of Rule 17-101 could be a little broader. The Chair asked Judge Pierson what he would like to see added to it. Judge Pierson answered that he had not thought about what language to add. He questioned whether the Style Subcommittee could redraft this, but the Chair noted that this is not a style issue.

The Vice Chair inquired if it would be sufficient if the Rule provided that these Rules do not apply to binding arbitration. Judge Pierson responded that this is what he had

been thinking of. The Vice Chair commented that the word "arbitrate" in subsection (b)(2) is used in a manner that is different from the definition of the word "arbitration" in section (e) of Rule 17-102. It appears that this takes into consideration the typical case where someone files a suit to enforce an arbitration clause. It could be a situation where a non-binding arbitration could be referred as part of ADR and become binding by virtue of the agreement of the parties.

The Chair noted that this is worded differently in the current Rule. He read from current Rule 17-101, Applicability: "The rules in this Chapter apply to all civil actions in circuit court except (1) they do not apply to actions or orders to enforce a contractual agreement to submit a dispute to alternative dispute resolution...". Judge Pierson expressed the view that this language is better, because it uses the words "actions or orders." He moved that the language of proposed Rule 17-101 (b)(2) be changed to the language of the current Rule. The motion was seconded, and it passed unanimously.

The Reporter asked if the language from the current Rule is being substituted for all of the language of subsection (b)(2) of the new Rule. The Chair answered that the language being substituted is the words "do not apply," not the entire Rule 17-101. The Reporter asked if all of proposed subsection (b)(2) is to be deleted. The Vice Chair said that subsection (b)(2) will read as follows: "an action or order to enforce a contractual agreement...".

Mr. Maloney inquired what the difference was between section (e), non-binding arbitration and section (k), neutral fact-finding, in Rule 17-102. The Chair remarked that it is a difficult distinction to make. In non-binding arbitration, someone gets an award telling the person something, and he or she does not have to pay any attention to it. It is advisory. Mr. Maloney asked about neutral fact-finding. The Chair replied that this may be different, because it may be binding. Mr. Maloney noted that they both could be binding if the parties agree. He expressed the opinion that the difference is unclear. The Chair said that the language in the current Rule is broader, because it not only goes to arbitration, but an agreement to submit a dispute to any ADR process, including mediation and neutral fact-finding. Mr. Maloney observed that non-binding arbitration is the same as neutral fact-finding. He could not see a distinction between the two. Mr. Michael noted that an arbitration does not require fact-finding. He frequently arbitrates without fact-finding.

Mr. Johnson inquired if the arbitration is a process where the arbitrator is certified. Mr. Maloney had made the point that the definition of "arbitration" refers to impartial arbitrators, but the definition of "neutral fact-finding" refers to impartial individuals. Is there some requirement of certification for arbitrators? Anyone can be a neutral fact-finder. The Chair responded that in Rule 17-205, Qualifications of Court-designated ADR Practitioners other than Mediators, no distinction exists in

terms of qualifications. Master Mahasa remarked that when she was reading this, she had the same concern. Some of the differences seemed so minimal that it could cause more confusion for the parties than help them try to decide how to get ADR. Is there some way that these definitions can be combined?

The Chair said that the term "arbitration" is defined in section (e) of Rule 17-102. The term "neutral case evaluation" is defined in section (i) of the same Rule. "Neutral fact-finding" is defined in section (k). Master Mahasa noted that some of these definitions seem to mean essentially the same thing. Mr. Howard expressed the view that there are some distinctions among the definitions. It may be that the definitions need to be made clearer. An arbitrator makes an award and does not make findings. A neutral fact-finder makes a non-binding determination of facts when the facts are disputed. This does not occur in an arbitration scenario. Neutral case evaluation is a different process, also. The judge evaluates strengths and weaknesses without necessarily finding facts.

Mr. Brault remarked that he thought that all of the differences grew out of the first efforts to draft a rule on this subject. People who specialized in mediation largely in family law were at the first hearings. The Committee had split hairs as to who is a mediator, who is a neutral case evaluator, and who is an arbitrator. The Chair commented that the drafting process started with pure mediation of child access issues under Rule 9-205, Mediation of Child Custody and Visitation Disputes. The

argument was that if the mediator even suggested a course of action or solution, is it still mediation? That was the debate then, and it continues to be. The way that "neutral case evaluation" is defined is simply an opinion as to what a court would do if the case went to trial. It has nothing to do with fact-finding, and an award may have no relevance to what a judge can do.

Judge Weatherly expressed the opinion that the distinctions are really important, leaving circuit courts the opportunity to keep as many tools in the toolbox as possible. Years ago, cases in the circuit court in Prince George's County got very backed up. The court brought in 20 or 30 private attorneys to help out in civil cases. They worked very hard getting through the backlog of cases. It was not referred to as "mediation," and it was not "arbitration." The point of this is not to take any process away from the courts that they can use, such as retired judges to do settlement conferences, sitting judges to help, and attorneys who do neutral case evaluation, whatever gets the parties closer to an agreement. However, it should not be so loose that there are no requirements or definitions. The Chair pointed out that these terms are already defined in the current Rule. This is not new. The Vice Chair said that her reaction to this was that when she attends any ADR proceeding, none of them are precisely boxed into one of these definitions. She did not know if it was important to have this number of distinctions.

The Reporter observed that no one had said that the current

definitions had not been working. Mr. Klein remarked that recently an attorney had called him and asked about the fact that mediators cannot recommend the terms of a settlement. Mr. Klein had answered that this had been in the Rule for a long time. The current definitions are not changed much, but they are restyled. There are academic distinctions. In the real world, these lines get blurred. The Subcommittee did not attempt to eviscerate existing definitions. To the extent that any language in a definition is new, it was simply to restyle it. He had not heard a compelling argument to reinvent that wheel. The Subcommittee is not recommending getting rid of these distinctions.

Mr. Brault commented that the original Rules were written a long time ago when it was recognized that a new profession was emerging. It was no longer only judges conducting settlement conferences to assist the parties in resolving their dispute before trial. Mediators and other people who are not judges also performed this function. It became important to address the issue of their qualifications.

Mr. Michael noted that the qualifications only became important for court-ordered mediation. If the mediation is voluntary, none of this makes any difference, because the parties already know what they are getting from the person providing the ADR. What was problematic was the feeling that there ought to be at least a certain level of competency on the behalf of the person conducting the ADR, because not only attorneys with domestic experience wanted to be mediators, but also

psychologists and others. However, the court has no control over people who are not attorneys, so the thought of some kind of minimal competency requirement became part of this.

Mr. Brault agreed, and he added that then the debate about charging fees came up. The Chair noted that when the proposed ADR Rules originally were transmitted to the Court of Appeals, the Rules provided that the court could order fee-for-service ADR. However, the Court of Appeals rejected this.

The Chair asked the Committee if anyone had a motion to amend or delete any of the definitions. Mr. Michael said that he had been looking at the definition of "mediation" in section (g) of Rule 17-102. He added that he was a mediator in medical malpractice cases. The definition states that the impartial mediators, without providing legal advice, can assist the parties in reaching their own voluntary agreement for the resolution of the dispute. He did not like the phrase "without providing legal advice," because very often there are motions, and the parties ask the mediator what he or she thinks is going to happen. Sometimes giving advice is part of the process.

Mr. Maloney agreed with Mr. Michael, noting that when a mediation is not successful, often it is because the mediator cannot tell a party that there is a high likelihood that the party is going to lose on a specific issue. The Chair stated that this has been at the core of the definition for may years. Mr. Klein pointed out that many mediators do not have law degrees. It is not permissible for a non-attorney to give legal

advice.

The Chair said that the stricken language in the definition of the term "mediation" in section (g) of Rule 17-102 had not been deleted, it had just been moved to Rule 17-103, Role of Mediator, because it was not part of the definition of the term "mediation." It is what mediators do. The Chair commented that the language is in a Committee note in Rule 17-103. The problem is that if a non-attorney mediates, he or she should not be giving legal advice, because it is not allowed. If the mediator is an attorney, he or she should not be giving legal advice to parties in conflict, especially if the case is in litigation, without express consent and meeting certain requirements. The thought was that mediators should not be giving legal advice.

The Reporter pointed out that what is really being talked about is a misnomer. It is really settlement conferences. They are sometimes called "mediations," but they are not. Mr. Sykes inquired if it would be legal advice if a layman mediator said to a party that the layman did not think that the court would decide a dispute a certain way, and this then convinces the parties to settle the case. The Chair responded that in the 1980's, when the ADR Rules were first being drafted, the Committee had in mind that one could not be a court-appointed mediator unless the person were a member of the Maryland bar. The attorneys in the District of Columbia and Virginia objected to this, and the Committee backed off on this issue. Then the point was made that someone could be a member of the Maryland bar without ever having

taken a course in domestic relations law. Yet some of the non-attorney mediators had been trained to deal with the child access cases. Finally, the Committee backed off on that issue as well, agreeing that for child access cases, it was not necessary for the mediator to be an attorney.

Mr. Brault said that he had a question about subsection (b)(4) of Rule 17-101. The Rules do not apply to medical malpractice actions pending under the Health Care Alternative Dispute Resolution Office. Is the statute not applicable even after the case has been waived into the circuit court? Mr. Michael answered that this statement had been made by the Director of the Office, although others often do not agree. Mr. Brault commented that a problem would be the scenario of where the case is waived to the circuit court, and the Director writes a letter to someone notifying the person that Code, Courts Article, Title 3, Subtitle 2A, which created the Health Claims Arbitration Office (HCAO), remains the applicable law, and the person is bound to follow the provisions for mediation. The Chair pointed out that the subsection (b)(4) begins with the language "unless otherwise provided by law."

The Chair said that he thought that medical malpractice cases were all sent to mediation. Mr. Michael explained that as part of the scheduling order, in many counties, the court requires malpractice cases to go to settlement conferences. Judge Pierson pointed out that the statute requires mediation in health care claims. Mr. Michael agreed, but he noted that it

never takes place. Judge Pierson commented that the statute does not provide for opting out. Mr. Michael observed that the requirement is waived. The problem with malpractice cases is that if a case can be settled out early, it will be resolved before it is filed in circuit court in most instances. In all of the other cases, there has to be a certain level of discovery that takes place before any meaningful discussions are going to occur, and this is well after the HCAO finished with the case.

Judge Pierson responded that he was not referring to the HCAO. He asked if mediation in a malpractice action is required in the circuit court. Ms. Wohl answered that the statute requires ADR. Mr. Brault noted that in the vast majority of these cases, although they use the term "mediation," what really occurs is a settlement conference. In his experience, the parties select their own mediator, so that they can find someone who is skilled in the field.

Judge Pierson remarked that the statute mandates that the court require ADR. The Chair noted that the statute, Code, Courts Article, §3-2A-06C, reads as follows: "(d) Within 30 days after the later of the filing of the defendant's answer to the complaint or the defendant's certificate of a qualified expert under §3-2A-04 of this subtitle, the court shall order the parties to engage in alternative dispute resolution at the earliest possible date." The Chair said that section (b), Applicability of Section, reads as follows: "This section does not apply if all parties file with the court an agreement not to

engage in alternative dispute resolution." There is an opt-out provision, but it has to be for everyone.

Mr. Michael said that the 30-day provision referred to by the Chair is routinely handled by a conference call that results in the statement that no one is ready to mediate. There has been no discovery, no one knows the other party's experts, and it is too early. They communicate that they will come back at 60 days before trial, for example. Most of the orders provide for this.

Judge Pierson expressed the view that subsection (b)(4) of Rule 17-101 had to have an exception for health care malpractice cases in the circuit court. Mr. Brault pointed out that the older version of this provision had that exception. Current Rule 17-101 reads as follows: "The rules in this Chapter...(2) other than Rule 17-104, do not apply to health care malpractice claims." Judge Pierson noted that subsection (b)(4) has the language: "...an action pending in the Health Care Alternative Dispute Resolution Office...," so this only applies to an action that is before the HCAO. Mr. Brault added that it is only there long enough for the Director to sign the order sending it out. No one resolves any dispute in that office any longer. The case is filed there, the Director signs the order transferring it, and the Director sends a letter telling the parties that they have to mediate under the statute. Judge Pierson explained that his point was that these Rules could apply to medical malpractice cases, but he did not think that the opt-out provisions of these Rules could override the statute. Mr. Maloney suggested adding

the phrase “unless otherwise provided by law.” The Rule should not refer to the health claims statute.

The Vice Chair asked if subsection (b)(4) were being deleted. Mr. Michael said that what would be deleted would be after the first comma in subsection (b)(4). The Chair inquired what would follow after the comma. The Reporter commented that the best place to make this change would be in Rule 17-201, which provides that the court orders the parties to participate in ADR, but the Rule has to be clear that the parties cannot opt out. Rule 17-201 (a) needs to be modified. The Chair questioned whether Rule 17-201 (a) should include a reference to Code, Courts Article, §3-2A-06C.

Mr. Maloney remarked that the opt-out reference should be in Rule 17-202. Mr. Klein noted that the current Rule excludes health care malpractice claims entirely, except for qualifications required for people who mediate those kinds of cases. He was not sure that the Subcommittee intended to change this. The Reporter suggested that this language should be put back into the Rules. Mr. Klein observed that the reference in subsection (b)(4) to the “Health Care Alternative Dispute Resolution Office” should be excluded, and the current language in the Rules should be put in. The current Rule, section (a) of Rule 17-101, Applicability, uses the language “...other than Rule 17-104,” (which is entitled “Qualifications and Selection of Mediators”) so a new cross reference to Rule 17-204, Qualifications of Court-designated Mediators, could be added.

Judge Pierson commented that he did not want to complicate this, but currently there are no rules that effectuate the ADR provisions of the malpractice statute, because they were entirely excepted. It is not necessarily a bad idea to have those provisions generally covered by these Rules. The ADR Program Manager in Baltimore City is concerned that no court rule applies. The only conflict that Judge Pierson could see was the one provision not permitting opting out of ADR. Other than that, he did not know of any reason why these statutory ADR provisions should not be included in the Rules. The Chair suggested that subsection (b)(4) of Rule 17-101 could read as follows: "unless otherwise provided by law, a health claims malpractice action;" Then a cross reference to Code, Courts Article, §3-2A-06C could be added. This is what allows the court to order ADR, unless the parties object. The Rule cannot provide that the judge is not able to order ADR, if the statute provides that the judge can do so.

Mr. Klein cautioned that the qualifications section should not be lost, because it may be totally excepted from these Rules, and there is an entire section that addresses what someone has to do to qualify as a mediator in Rule 17-204. Judge Pierson remarked that this is why he had said that this is complicated. There is another set of qualifications for health care mediators. Mr. Klein agreed, and he noted that the basic qualifications are in section (a) of Rule 17-204. There is an overlay specifically for health care claims in Rule 17-204 (d). Excepting health

claims malpractice actions would eliminate the qualifications in Rule 17-204. Judge Pierson pointed out that there should be language about being not subject to the opt-out provision. The Chair said that under the statute, the parties can opt out of ADR. Judge Pierson responded that he did not think that the parties could opt out entirely, but they could just opt out of the 30 days. The Chair noted that the Rule does not permit an assignment to any fee-for-service ADR. Judge Pierson observed that the statute does permit this. The Chair observed that the statute provides that the court can order an ADR process. The parties can pick their own ADR provider, but if they do not, then the court can choose one. Judge Pierson remarked that this is different from the ordinary civil case where a party can simply opt out. This is not the way it is in medical malpractice cases.

Ms. Wohl pointed out that the statute being discussed requires two different things that are unlike other orders to mediation. One is that some form of ADR shall be ordered. The other is that normally any one party can opt out, and they would be out, but in this instance, all of the parties would have to agree to opt out. The Chair inquired if the intention is that if a court orders the parties to mediation, and both of the parties do not opt out, the mediators must have any particular qualifications, or is it assumed that the qualifications under Title 17 of the Rules are going to apply? Ms. Wohl replied that it is the latter.

Mr. Maloney suggested that a Committee note should be added

under subsection (e)(3) of Rule 17-202 to make it clear that when the court rules on an objection to opt out, it must be read in conformance with the health claims statute. Subsection (e)(3) provides that the court shall revoke or modify its order. Then a Committee note can be added. The parties may have other objections to the referral that are not necessarily an opt-out. It could be an objection to the qualifications of the mediator or something else. The Chair said that under subsection (e)(3), any party can object, so that would have to be modified. The statute provides that both must opt out. Mr. Maloney reiterated the language of subsection (e)(3), "...the court shall revoke or modify its order...". The Chair noted that this is so if a party timely objects, but under the statute, both sides have to object. This would have to be accounted for. Mr. Maloney suggested that subsection (e)(3) could read as follows: "...except as otherwise provided by law, the court shall revoke or modify...". The Chair noted that the introductory language of subsection (e)(3) is still " [i]f a party timely objects...". Mr. Maloney commented that the court is given the discretion to do what it wants to do to comply with the statute.

The Chair asked the Committee if they were in agreement with Mr. Maloney's suggestion to modify subsection (e)(3) of Rule 17-202. The Chair suggested that subsection (e)(3) could read as follows: "[i]f a party, or in an action subject to Code, Courts Article, §3-2A-06C, both parties...". Otherwise, it appears as if there is a conflict. Ms. Wohl pointed out that section (a)

of Rule 17-202 states: "[t]he court may require the parties and their attorneys to participate...". In medical malpractice cases, the language should be: "[t]he court shall require...". The Chair suggested that section (a) of Rule 17-101 could provide: "The Rules in this Title shall apply to medical malpractice actions except to the extent of any inconsistency in Code, Courts Article, §3-2A-06C, in which case the statute applies." Judge Kaplan moved that this language be adopted, the motion was seconded, and it carried unanimously.

Mr. Klein presented Rule 17-102 for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 – GENERAL PROVISIONS

Rule 17-102. DEFINITIONS

[Showing changes from current Rule 17-102]

In this ~~Chapter~~ Title, the following definitions apply except as expressly otherwise provided or as necessary implication requires:

(a) ADR

"ADR" is an acronym for "alternative dispute resolution."

(b) ADR Organization

"ADR organization" means an entity, designated by the court, that selects individuals who possess the applicable qualifications required by Rule 9-205 or the Rules in this Title to conduct ADR ordered by

the court.

(c) ADR Practitioner

"ADR practitioner" is an individual who conducts an ADR under the Rules in this Title.

~~(a)~~ (d) Alternative Dispute Resolution

"Alternative dispute resolution" means the process of resolving matters in pending litigation through ~~a settlement conference,~~ arbitration, mediation, neutral case evaluation, neutral fact-finding, ~~arbitration, mediation, other non-judicial dispute resolution process,~~ settlement conference, or a combination of those processes.

~~Committee note: Nothing in these Rules is intended to restrict the use of consensus-building to assist in the resolution of disputes. Consensus-building means a process generally used to prevent or resolve disputes or to facilitate decision making, often within a multi-party dispute, group process, or public policy-making process. In consensus-building processes, one or more neutral facilitators may identify and convene all stakeholders or their representatives and use techniques to open communication, build trust, and enable all parties to develop options and determine mutually acceptable solutions.~~

~~(b)~~ (e) Arbitration

"Arbitration" means a process in which (1) the parties appear before one or more impartial arbitrators and present evidence and argument supporting their respective positions, and (2) the arbitrators render a decision in the form of an award that is not binding~~,~~ unless the parties agree otherwise in writing.

Committee note: Under the Federal Arbitration Act, the Maryland Uniform Arbitration Act, the International Commercial Arbitration Act, at common law, and in common

usage outside the context of court-referred cases, arbitration awards are binding unless the parties agree otherwise.

~~(c)~~ (f) Fee-for-service

"Fee-for-service" means that a party may or will be charged a fee by ~~the person or persons conducting the alternative dispute resolution proceeding~~ an individual designated by a court to conduct ADR under the Rules in this Title or by the ADR organization that selects the individual.

~~(d)~~ (g) Mediation

"Mediation" means a process in which the parties work with one or more impartial mediators who, without providing legal advice, assist the parties in reaching their own voluntary agreement for the resolution of the dispute or issues in the dispute. ~~A mediator may identify issues and options, assist the parties or their attorneys in exploring the needs underlying their respective positions, and, upon request, record points of agreement reached by the parties. While acting as a mediator, the mediator does not engage in arbitration, neutral case evaluation, neutral fact-finding, or other alternative dispute resolution processes and does not recommend the terms of an agreement.~~

Cross reference: For the role of the mediator, see Rule 17-103.

~~(e)~~ (h) Mediation Communication

"Mediation communication" means a communication, whether by speech, writing, or conduct, made as part of a mediation, including a communications made for the purpose of considering, initiating, continuing, ~~or~~ reconvening, or evaluating a mediation or ~~retaining~~ a mediator.

~~(f)~~ (i) Neutral Case Evaluation

"Neutral case evaluation" means a process in which (1) the parties, their

attorneys, or both appear before an impartial ~~person~~ evaluator and present in summary fashion the evidence and arguments supporting their respective positions, and (2) the ~~impartial person~~ evaluator renders an evaluation of their positions and an opinion as to the likely outcome of the dispute ~~or issues in the dispute if the action is tried~~ if determined through the litigation process.

(j) Neutral Expert

"Neutral expert" means an individual who has special expertise to provide impartial technical background information, an impartial opinion, or both in a specified area.

~~(g)~~ (k) Neutral Fact-finding

"Neutral fact-finding" means a process in which (1) the parties, their attorneys, or both appear before an impartial ~~person~~ individual and present evidence and arguments supporting their respective positions as to particular disputed factual issues, and (2) the ~~impartial person~~ individual makes findings of fact as to those issues. Unless the parties otherwise agree in writing, those findings are not binding.

~~(h)~~ (l) Settlement Conference

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

Committee note: Nothing in these Rules is intended to restrict the use of consensus-building to assist in the resolution of disputes.

Source: This Rule is new.

Mr. Klein explained that in section (c) of Rule 17-102, the word "an" should be deleted. The Chair inquired if anyone had a comment on the definitions. None were forthcoming, so Rule 17-102 was approved as amended.

Mr. Klein presented Rule 17-103, Role of Mediator, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 – GENERAL PROVISIONS

Rule 17-103. ROLE OF MEDIATOR

[Showing changes from current Rule 17-102 (d)]

A mediator may help identify issues and options, assist the parties ~~or~~ and their attorneys in exploring the needs underlying their respective positions, and, upon request, record points of agreement ~~reached~~ expressed by the parties. While acting as a mediator, the mediator does not engage in ~~arbitration, neutral case evaluation, neutral fact-finding, or other alternative dispute resolution processes~~ any other ADR process and does not recommend the terms of an agreement.

Committee note: Mediators often will record points of agreement expressed by the parties to provide documentation of the results of the mediation. Because a mediator who is not a Maryland lawyer is not authorized to practice law in Maryland, and a mediator who is a Maryland lawyer ordinarily would not be authorized to provide legal advice or services to parties in conflict, a mediator

should not be drafting agreements regarding matters in litigation for the parties to sign. If the parties are represented by counsel, the mediator should advise them not to sign the document embodying the points of agreement until they have consulted their attorneys. If the parties, whether represented or not, choose to sign the document, a statement should be added that the points of agreement as recorded by the mediator represent the parties' statements and that the mediator did not draft the statements but merely recorded them.

Mr. Klein explained that the Subcommittee had taken part of the current definition of the term "mediator" and moved it into Rule 17-103. Nothing was new in this Rule conceptually. The Committee note was new and had been the subject of much discussion in the Subcommittee and in the drafting committee, and Mr. Klein thought that it represented a consensus view. This was an effort to (1) avoid the unauthorized practice of law, (2) avoid conflicts of interest for people who are attorneys, and (3) drive home the notion that the mediator may be a scribe, but should not be an originator of the terms of the agreement.

Ms. Potter referred to the language in the note, "points of agreement," and asked if it should be called "an agreement." The Chair responded that when the first mediation rules, which addressed only child access, were adopted, the Rule had been very specific that a court could order this only if both parties were represented by counsel. The mediator would draft whatever the parties said that they agreed to and then submit it to counsel. The mediator would make the changes approved by counsel and then

submit the agreement directly to the court. This was changed so that parties who were not represented could be required to go to mediation. This was a policy question, and it raised the question about who is actually doing the legal work. When the Title 17 Rules went to the Court of Appeals, there was discussion in the Court of Appeals at the open hearing on this. A number of mediators had said that they draft agreements frequently, and if they are not allowed to do so, there will not be an agreement. The Court of Appeals disagreed, informing the mediators that they are not present at a mediation to be an attorney. They would be allowed to be a scribe and record what the parties had said, but they would not be allowed to draft an agreement. This is the law now. Whether the mediators follow this is another matter.

Ms. Potter inquired if this is meant to apply to the situation where the parties are both *pro se*, and the mediator is not an attorney. The Chair replied that even if the mediator is an attorney, or even if one of the parties is represented, it would apply. Senator Stone asked if a party's attorney would be present at the mediation. The Chair answered that the party's attorney is not always present. In the child access mediations, attorneys often are not present. Senator Stone said that he was thinking of the medical malpractice cases which would be more likely to have an attorney present. The Chair agreed.

Ms. Wohl commented that she was speaking as staff to the Conference of Circuit Judges ADR Committee. Judge Ross, who is

the chair of that Committee, was unable to attend the meeting today. Two members of the Committee had sent in comments on this. The Honorable Karen Abrams of the Circuit Court for St. Mary's County had expressed the view that a mediator must advise or must suggest to unrepresented parties their right to seek legal advice before signing an agreement. The Honorable Pamela White of the Circuit Court for Baltimore City had asked if this Rule should mention the paperwork, such as consent orders, that mediators in court-sponsored programs could file consequent to mediation. She had referred to the circumstance where mediators are given a template, like a consent order, and they fill in the document. The Chair noted that this goes hand in hand with the issue of giving legal advice, which mediators are not supposed to do in court-annexed mediations.

Ms. Potter noted that after section (c) of Rule 17-105, the cross reference should also refer to the Committee note at the end of Rule 17-103. The Chair pointed out that this is in Rule 17-105, Confidentiality, but the agreement itself is not confidential. Mr. Klein asked Ms. Potter what she was proposing. Ms. Potter answered that she was looking for a place for the Committee note. Rule 17-103 discusses what a mediator does and how to record the agreement. She asked if the Committee note could go after section (c) of Rule 17-105. Mr. Klein said that the note is placed in Rule 17-103, because it defines the role of a mediator, and the last sentence of Rule 17-103 states that a mediator does not recommend the terms of an agreement. Should

the Rule also state after section (c): "See the Committee note to Rule 17-103?" The Chair commented that there will be cases where parties will not sign the agreement. Either they are not represented, or they feel that the agreement is not what they agreed to. This is proper. The question is whether the mediator should be drafting this or only recording what the parties have agreed to.

Judge Weatherly expressed the view that this would apply also to custody mediation. Rule 9-205 does not exclude this. She said that she did not know what happens around the State. In Prince George's County, people who are doing custody mediations are producing parenting plans. In 87% of their cases, one or both parties are *pro se*. There is no one else to draft an agreement, so the mediators prepare the parenting agreements. They submit the agreements to the court. If the parties do not like the agreement, they can rescind it. Does this Rule indicate to those custody mediators that they should not be drafting the agreements?

Mr. Klein responded that Rule 9-205 has a Committee note after section (g) that is the identical Committee note to the one that appears in Rule 17-103. The Chair said that what had been anticipated was that if the parties agree that the mother should have custody of the children, and the father should have visitation at certain specified times, the mediator can write this, the parties can sign, and it is the parenting plan.

Judge Weatherly commented that the parenting agreements are detailed. They are often five typewritten pages for a fairly easy, standard parenting plan. She had never seen a handwritten one. The Chair asked what would happen in a situation where the issue is pure custody and visitation, the parties are unrepresented, and the mediator drafts the agreement. One spouse then says that he or she was not aware that use and possession of the house was available, and if that spouse had known this, he or she would never have agreed to the arrangement. This affects child custody, visitation, and child support among other issues. Judge Weatherly answered that in Prince George's County, the parties are referred to mediation at scheduling conferences. Unrepresented parties are advised of opportunities to get counsel. If a mediator tells the parties at a mediation session that they will be talking about parenting and access, the mediator may again encourage the parties to get counsel. In her county, if the parties reach an agreement, the agreement is signed, and then the parties have 10 days to rescind it. The Chair pointed out that in child access cases, the agreement goes to the court, and the court does not have to approve it. The judge can ask the parties if they had considered certain issues. In the Title 17 Rules, an agreement is going to be binding if the parties sign it.

Judge Weatherly noted that in her county, they are doing ADR in termination of parental rights cases (TPR). She would assume that some mediators draft those agreements, although there are

many cases with counsel. The Chair said that parties are often represented in TPR cases. In cases under Title 17, many parties are not represented. Judge Weatherly asked what the product is when ADR is conducted in District Court. Judge Love answered that the result is a handwritten agreement signed by the parties on the same day. Judge Pierson commented that in Baltimore City, they do not refer cases with one or more unrepresented parties to ADR. The Chair responded that those cases could be referred to ADR.

The Chair said that the Court of Appeals tried to address these issues earlier. The concern was that the mediator is there to help the parties reach an agreement, not to draft an agreement for the parties. If the parties reach an agreement, the mediator can write down whatever the parties agreed to. It does not have to been in "legalese." A mediator cannot do this outside of a mediation, and neither can a person who is not an attorney. Judge Weatherly noted that there are many *pro se* forms on the internet that have legal language in them.

The Chair asked if anyone had a motion on the text or the Committee note in Rule 17-103. None was forthcoming. By consensus, Rule 17-103 was approved as presented.

Mr. Klein presented Rule 17-104, Basic Mediation Training Programs, for the Committee's consideration.

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 – GENERAL PROVISIONS

Rule 17-104. BASIC MEDIATION TRAINING PROGRAMS

[Showing changes from current Rule 17-106 (a)]

To qualify under Rule 17-204 or 17-304, a basic mediation training program ~~must~~ shall include the following:

(a) conflict resolution and mediation theory, including causes of conflict, interest-based versus positional bargaining, and models of conflict resolution;

(b) mediation skills and techniques; including information-gathering skills; communication skills; problem-solving skills, interaction skills, conflict management skills; negotiation techniques; caucusing; cultural, ethnic, and gender issues; and strategies to (i) identify and respond to power imbalances, intimidation, and the presence or effects of domestic violence, and (ii) safely terminate a mediation when such action is warranted;

(c) mediator conduct, including conflicts of interest, confidentiality, neutrality, ethics, and standards of practice; and

~~(4) rules, statutes, and practice governing mediation in the circuit courts~~

(d) simulations and role-playing, monitored and critiqued by experienced mediator trainers.

Mr. Klein explained that because Rule 17-104 is located in Chapter 100 of the reorganized Title 17, it is clear that this Rule will apply to all levels of court. These qualifications

will apply to mediators in District Court, circuit court, and when there are appellate court and Orphans' Court Rules, in those courts. Structurally, the Rule sets forth basic requirements for all mediators. The Rules applying to specific courts and specific subject matter areas are in the next Chapter. Rule 17-104 sets forth the basic requirements for training programs. It is essentially the same as the current Rule which is Rule 17-106, Mediation Training Programs, except that additional language has been added to section (b) pertaining to mediation skills and techniques. It refers to identifying and responding to power imbalances, intimidation, the presence of domestic violence, and safely terminating a mediation. Subsection (c)(4) has been deleted. This requirement has been moved to Chapter 200, Proceedings in Circuit Court. By consensus, the Committee approved Rule 17-104 as presented.

After the lunch break, Mr. Klein told the Committee that he was temporarily taking the place of the Chair who was working on the Rules pertaining to judgments on affidavits, which is Agenda Item 7. Mr. Klein said that any guest who had a comment on any of the Rules would be encouraged to speak after the Committee members had had a turn to speak about a particular Rule. This is how the Committee benefits and hopefully improves the end product.

Mr. Klein said that someone had a comment on the Committee note in Rule 17-103 pertaining to the role of the mediator that had just been discussed. David Simison, Esq. stated that he had

sent the Committee a letter, which had been distributed at the meeting. (See Appendix 1). He told the Committee that he was the Vice Chair of the ADR Section of the Maryland State Bar Association (MSBA). The Chair is Craig Distelhorst, Esq. They had a section council session by telephone the prior day, and they discussed what has been defined as comprehensive changes to the ADR Rules. Because there are comprehensive changes, they would like the Committee to allow their input and review. They respect the hard work that the Subcommittee put in to present this to the Rules Committee. They acknowledged that the work started more than a year ago. They also acknowledged that their membership has in part been involved in that process, about which they were pleased. They would like the opportunity to digest the changes that have been proposed. They are the people who are in the trenches, who are living with these Rules. There are portions of the Rules to which their membership had already had instant reactions. They would like to have the opportunity to take some time and give some considered thought to what was intended by the drafters of the proposed changes and see how the people in the trenches might bring their experience to that.

Mr. Simison acknowledged that they would have the opportunity to speak at the hearing at the Court of Appeals on the Rules. Because the ADR Rules are so important to the State, which has a national reputation for leading the country in ADR, he and his colleagues asked the Committee to please respect their request and allow them some time to consider the proposed changes

and offer whatever meaningful productive suggestions they might make. They are not working against the Committee or the courts. Everyone involved has to make this work. They had already heard about problems. In the definition of the word "mediation," there was a suggestion that the clause stating that mediators cannot give legal advice be taken out. The Committee note on drafting the agreements in Rule 17-103 represents a significant change. It had been stated that some mediators are drafting agreements. Some of them are attorneys, and some are not. The ADR Section of the MSBA would like to offer the Committee suggestions, such as more definitions, so that people will know what is allowed and what is not. The Committee note on drafting is not as clear as it should be. They would like the opportunity to suggest clarifying language.

Mr. Simison said that they had hosted a roundtable in Annapolis on drafting, and 40 or 50 mediators from around the State attended it. They had been confused under the existing Rule, and he did not feel that the proposed Rule would make the situation any clearer. There had been comments from members of the ADR Section about confidentiality issues and fee issues referred to in his letter. He asked the Committee to seriously reconsider the proposed changes to the Rules at its next meeting, which would allow them July and August to formulate some helpful comments.

Mr. Klein told Mr. Simison that he had seen his letter that morning, and Mr. Klein had discussed the letter with the Rules

Committee Chair. The Chair preferred to go forward with the discussion of the Rules. Mr. Klein remarked that he wanted to make sure that the lines of communication were open and functioning. The MSBA had been invited to the two large meetings where they had discussed the concepts that are embodied in the ultimate draft. He wanted to make sure that the MSBA had received that invitation. He had not checked the list of attendees to see if a representative from the MSBA came to the meetings. Mr. Simison responded that he had been personally involved in statewide ADR activities for at least 10 years, and he did not know about those meetings. Mr. Klein inquired who the chair of the Section was at the time of the meetings. Mr. Simison replied that Andrea Terry, Esq. was the past Council Chair. He did not know how the chain of communication worked. The ADR Section had invited Judge Ross and Ms. Wohl to a presentation in November in the Circuit Court for Anne Arundel County on the subject of the changes that were being considered as of that date. Their understanding was that the changes were in the future and that they would have the opportunity for a response.

Mr. Klein told the Committee that to his knowledge, there was no burning need to get the ADR Rules up to the Court of Appeals unlike some other matters that were discussed today. The Reporter commented that Judge Wilson might disagree with this. Mr. Klein remarked that as a policy matter, they did not want to transmit the District Court Rules to the Court ahead of

or separate from the circuit court Rules. They had spent a great amount of time making sure that the Rules worked well together from a drafting standpoint. He felt that they should make sure that the best product is sent to the Court of Appeals. If the reason the MSBA wants to delay is because of a breakdown in communication, this has to be cured. To offer the Court the best product, it may be that this ought to be deferred to allow additional time for comment to the written draft. In fairness to the MSBA, the draft that is being considered today was posted on the Judiciary's website and available to the general public in its current form on June 8, only a week ago.

Mr. Klein asked the Committee what they wanted to do. Mr. Sykes noted that it had been mentioned that some members of the ADR Section Council had been involved with the Subcommittee. He asked to what extent the involvement was. Mr. Klein answered that he thought that no representative from the MSBA had been at the meetings of the drafting subcommittee. There had been two large public meetings with almost as many people present as were present at today's meeting. The MSBA had been invited to attend those meetings. Whether they got the invitation is a separate question. The invitations had been sent out to many people. Mr. Simison was asking the Committee for additional time to focus on what was being proposed. Mr. Klein added that he thought that this was a fair request.

Ms. Williamson told the Committee that she was representing the Maryland Council for Dispute Resolution, another Maryland-

based organization that is comprised of mediators. She had been able to attend the two meetings Mr. Klein had referred to. They were given the opportunity to respond, and some of their suggestions appear in the newest version of the Rules. They were happy to see this. However, there is also new material in the Rules that their organization had not had a chance to review and respond to. Since the entire mediator community in Maryland is being affected, which is not limited only to attorneys represented by the ADR Section of the MSBA, this broader community would appreciate the opportunity to respond. New ideas are in the proposed Rules, and the various organizations have not had the chance to consult one another.

Judge Wilson thanked the Committee for the opportunity to speak. The District Court ADR Committee, the District Court, and the Honorable Ben C. Clyburn, Chief Judge of the District Court, are somewhat anxious to have the proposed new rules adopted, because the District Court is operating without any ADR rules whatsoever. They have been relying on the circuit court Rules to guide them as to what they do at the District Court level. To this extent, they are interested in seeing the process go through expeditiously. Having said that, she expressed the concern that those who are members of the MSBA and the other ADR organizations have a voice and an opportunity to consider the major changes that are being proposed and to offer valuable insight as to how to go forward. Notwithstanding their desire to see the Rules go forward expeditiously, it would be to everybody’s benefit to

defer if necessary to get those valuable opinions and considerations on the table.

Judge Weatherly moved to table further discussion on this to give all the mediation organizations an opportunity to digest the Rules. The motion was seconded. Mr. Sykes suggested that it would be a good idea to compile a list of the people interested in this topic to ensure that they are invited to the meeting at which it will be discussed. Mr. Klein told the interested persons who were present to make sure that their contact information was on the sign-in sheet for today's meeting. He asked for a vote on Judge Weatherly's motion, and it carried by a majority vote. He stated that as the Chair of the ADR Subcommittee, he would like to receive any written comment on the proposed ADR Rules by July 15, 2011, which was approximately one month from today. Subject to the availability of the Subcommittee, he suggested scheduling a public meeting of the entire ADR Subcommittee for early August to address the written comments that are received. The Subcommittee can privately caucus, and there may even be a turnaround draft ready for discussion at the public meeting. This should be done by early August to get this on the agenda of the September meeting of the Rules Committee. Any changes that come out of the public meeting would then be incorporated into another draft of the Rules. It is important to get the Rules to the Court of Appeals.

Mr. Johnson remarked that Mr. Ethridge, who was the liaison between the Committee and the MSBA, was at the meeting today.

This post was created so that these kind of communication issues would not arise. What Mr. Johnson thought had happened was because the sections of the MSBA are separate from its Board of Governors, they may not have received notice. Mr. Johnson asked Mr. Ethridge to speak with the new MSBA president about this. Mr. Johnson expressed the view that the way Mr. Klein and the Subcommittee had handled this matter was totally appropriate. There had been a glitch in the system where people had not been notified. He knew that the Reporter sends out notices about the meetings. Mr. Klein responded that he had checked, and the notice went out to whoever was listed at the time as being the Chair of the ADR Subcommittee of the MSBA. Mr. Johnson noted that the problem is that the sections operate autonomously from the Board of Governors and from the officers of the MSBA. This was why he was suggesting that Mr. Ethridge try to get the communication mechanism worked out so that the appropriate people from the MSBA are notified about relevant topics. This was not an issue with the Rules Committee Office.

Mr. Distelhorst remarked that as the Chair of the ADR Section of the MSBA, he felt that Mr. Johnson's suggestion was reasonable, and he and the other MSBA representatives appreciated it. He added that he had already appointed a committee to participate in the drafting of the ADR Rules, but since it is more difficult to get people together in the summer, he asked if the comments could be received by July 22, 2011 instead of July 15, 2011. Mr. Klein responded affirmatively. The Reporter

stated that the comments should be sent to her at the Rules Committee Office, and then she would disseminate them. Judge Weatherly inquired if the Reporter had considered inviting the Chair of the Family Law Committee. The Reporter said that they had notified the Chair of the Family Law Committee and the Chair of the ADR Committee. The meetings are always announced on the Judiciary website. Everyone is invited to attend, and particularly as to Rule 9-205, they need the input of those committees.

Mr. Brault questioned whether anyone from the MSBA committees ever submits a request for a rule or a rule change or language correction to the ADR Subcommittee or to the Rules Committee. Mr. Distelhorst replied that they had attended a meeting last November with Judge Ross and Ms. Wohl, at their invitation, to discuss what was happening at the time. After that discussion, he and his colleagues had been waiting to see what was going to come out of that process. Mr. Brault stated that the Rules Committee receives requests all the time from various sources about needed rules changes, problems in the administration of the courts, etc. Mr. Distelhorst said that they had not been proposing particular changes, but they were aware of the process going on. They had had an interactive discussion with Judge Ross and Ms. Wohl and the ADR Section. About 40 to 60 people attended the meeting. They knew a product would be forthcoming, but they did not have specific questions ready.

Mr. Klein commented that in fairness to the MSBA, it was difficult for them to absorb in eight days all of the proposed changes to the ADR Rules. Mr. Johnson noted that if other sections of the MSBA have an interest in these Rules, the Reporter of the Rules Committee should be informed as to which section it is, so the Reporter would know who the appropriate person is to notify.

Ms. Williamson remarked that she was a member of the ADR Section of the MSBA. When the ADR Subcommittee of the Rules Committee got together in the spring, her organization, the Maryland Council for Dispute Resolution, had been invited to look at the proposed changes and to comment on them. They did comment in writing. They had not requested any changes, but when they were given the opportunity to make the proposed changes, they had made some suggestions in writing. Mr. Klein pointed out that the current draft of the rules pertaining to the circuit court has an Alternative A and B for Rule 17-202, General Procedure. One of the alternatives offers two bites of the apple for ADR, but eventually someone would have to have his or her day in court. The other alternative is based on the premise that one bite of the apple is enough. If there is a view as to which of the alternatives is preferable, this would be helpful for the Subcommittee to know. As of now, it will be presented for the Court of Appeals to decide which alternative is preferable.

Mr. Rhudy told the Committee he wanted to take the opportunity to distribute a brochure explaining the appellate

mediation program that is available. He had participated in some of the meetings at which the subject of the ADR Rules had been discussed. Mr. Klein said that Mr. Rhudy was the Executive Director of the ADR program in the Court of Special Appeals. Mr. Rhudy explained that the program was a pilot project that had been created in February of 2010 for civil mediation. It will be evaluated some time during the first two-year period. Hopefully, if people are satisfied, rules for this program would be considered by the Rules Committee. They have conducted about 190 mediations so far with a 69% settlement rate. They are co-mediating with 22 retired judges, most of whom are from the circuit court, but there are a few retired Court of Special Appeals and Court of Appeals judges who also co-mediate. The Honorable Joseph H. H. Kaplan is one of their co-mediators. Mr. Rhudy added that he wanted those present at the meeting to know about the program. The Honorable Peter Krauser, Chief Judge of the Court of Special Appeals, had worked with Chief Judge Bell to have an administrative order passed to create the program. After the evaluation of the program in four or five months, Mr. Rhudy said that he hoped to come back before the Committee to discuss rules for the program.

Agenda Item 7. Reconsideration of proposed amendments to: Rule 3-306 (Judgment on Affidavit), Rule 3-308 (Demand for Proof), and Rule 3-509 (Trial Upon Default)

The Chair told the Committee that he had been meeting with

some of the consultants on issues that had been raised with respect to the rules pertaining to judgments on affidavit. There appears to be some consensus on some of the issues that seems to be the most troubling. Outstanding issues still exist, and there will be an opportunity for interested persons to make their presentations. The Committee could then vote on these issues.

Judge Norton presented Rules 3-306, Judgment on Affidavit; 3-308, Demand for Proof; and 3-509, Trial Upon Default, for the Committee's consideration.

AMEND Rule 3-306, to add a new section (a) containing definitions, to divide current section (a) into sections (b) and (c), to change the tagline of new section (b), to add the words "in the amount claimed" to new section (b), to add a new tagline to new section (c), to require that an interest worksheet in a certain form accompany the affidavit if interest is claimed, to add a new subsection (c)(4)(C) pertaining to attorneys' fees, to add a new section (d) pertaining to claims arising from assigned consumer debt, to delete from new subsection (e)(2)(A) the words "section (a) of," to add the words "or other credit" to new section (f), to add the word "latest" to new section (g), and to make stylistic changes, as follows:

Rule 3-306. JUDGMENT ON AFFIDAVIT

(a) Definitions

In this Rule the following definitions apply except as expressly otherwise provided or as necessary implication requires:

(1) Charge-off

"Charge-off" means the act of a creditor that treats an account receivable or other debt as a loss or expense because payment is unlikely.

(2) Charge-off Balance

"Charge-off balance" means the amount due on the account or debt at the time of charge-off.

(3) Consumer Debt

"Consumer debt" means a secured or unsecured debt that is for money owed or alleged to be owed and arises from a consumer transaction.

(4) Consumer Transaction

"Consumer transaction" means a transaction involving an individual seeking or acquiring real or personal property, services, future services, money, or credit for personal, family, or household purposes.

(5) Original Creditor

"Original creditor" means the lender, provider, or other person to whom a consumer originally was alleged to owe money pursuant to a consumer transaction. **"Original creditor" includes the Central Collection Unit, a unit within the State Department of Budget and Management.**

(6) Original Consumer Debt

"Original consumer debt" means the total of the consumer debt alleged to be owed to the original creditor, consisting of principal, interest, and any other fees or charges.

Committee note: If there has been a charge-off, the amount of the "original consumer debt" is the same as the "charge-off balance."

(7) Principal

"Principal" means the unpaid balance of the funds borrowed, the credit utilized, the sales price of goods or services obtained, or the capital sum of any other debt or obligation arising from a consumer transaction, alleged to be owed to the original creditor. It does not include interest or any other fees or charges added to the debt or obligation by the original creditor or any subsequent assignees of the consumer debt.

(8) Future Services

"Future services" means one or more services that will be delivered at a future time.

(9) Future Services Contract

"Future services contract" means an agreement that obligates a consumer to purchase a future service from a provider.

(10) Provider

"Provider" means any person who sells a service or future service to a consumer.

~~(a)~~ (b) ~~Time for Demand - Affidavit and Supporting Documents~~ Demand for Judgment by Affidavit

In an action for money damages a plaintiff may file a demand for judgment on affidavit at the time of filing the complaint commencing the action. The complaint shall be supported by an affidavit showing that the plaintiff is entitled to judgment as a matter of law in the amount claimed.

(c) Affidavit and Attachments – General Requirements

The affidavit shall:

(1) be made on personal knowledge~~,~~;

(2) ~~shall~~ set forth such facts as would be admissible in evidence~~,~~; ~~and shall~~

(3) show affirmatively that the affiant is competent to testify to the matters stated in the affidavit; and;~~. The affidavit shall~~

(4) include or be accompanied ~~(1)~~ by:

(A) supporting documents or statements containing sufficient detail as to liability and damages, including the precise amount of the claim and any interest claimed~~; and (2)~~;

(B) if interest is claimed, an interest worksheet substantially in the form prescribed by the Chief Judge of the District Court;

(C) if attorneys' fees are claimed, sufficient proof evidencing that the plaintiff is entitled to an award of attorneys' fees and that the fees are reasonable; and

Cross reference: See Rule [District Court Attorneys' Fee-Shifting Rule number].

(D) ~~If~~ if the claim is founded upon a note, security agreement, or other instrument, ~~by~~ the original or a photocopy of the executed instrument, or a sworn or certified copy, unless the absence thereof is explained in the affidavit. ~~If interest is claimed, the plaintiff shall file with the complaint an interest worksheet.~~

(d) If Claim Arises from Assigned Consumer Debt

Alternative A

If the claim arises from consumer debt, and the plaintiff is not the original creditor, the affidavit also shall include or be accompanied by the items listed in this section, and the plaintiff shall list the items and information required to be provided in an Assigned Consumer Debt Document and Information Checklist, substantially in the form prescribed by the Chief Judge of the District Court, which shall be filed with the affidavit. Each document that accompanies the affidavit shall be clearly numbered as an exhibit and referenced by number in the Checklist.

Alternative B

If the claim arises from consumer debt, and the plaintiff is not the original creditor, the affidavit also shall include or be accompanied by (i) the items listed in this section, and (ii) an Assigned Consumer

Debt Checklist, substantially in the form prescribed by the Chief Judge of the District Court, listing the items and information supplied in or with the affidavit. Each document that accompanies the affidavit shall be clearly numbered as an exhibit and referenced by number in the Checklist.

(1) Proof of the Existence of the Debt or Account

Proof of the existence of the debt or account shall be made by a certified or otherwise properly authenticated photocopy or original of at least one of the following:

(A) a document signed by the defendant evidencing the debt or the opening of the account;

(B) a bill or other record reflecting purchases, payments, or other actual use of a credit card or account by the defendant; or

(C) an electronic printout or other documentation from the original creditor establishing the existence of the account and showing purchases, payments, or other actual use of a credit card or account by the defendant.

(2) Proof of Terms and Conditions

(A) Except as provided in subsection (d)(2)(B) of this Rule, if there was a document evidencing the terms and conditions to which the consumer debt was subject, a certified or otherwise properly authenticated photocopy or original of the document **actually applicable to the consumer debt at issue** shall accompany the affidavit.

(B) Subsection (d)(2)(A) of this Rule does not apply if (i) the consumer debt is an unpaid balance due on a credit card; (ii) the original creditor is or was a financial institution subject to regulation by the Federal Financial Institutions Examination Council or a constituent federal agency of

that Council; and (iii) the claim does not include a demand or request for attorneys' fees or interest in excess of the Maryland Constitutional rate of six percent per annum.

(3) Proof of Plaintiff's Ownership

The affidavit shall contain a statement that the plaintiff owns the consumer debt. It shall include or be accompanied by:

(A) a chronological listing of the names of all prior owners of the debt and the date of each transfer of ownership of the debt, beginning with the name of the original creditor; and

(B) a certified or other properly authenticated copy of the bill of sale or other document that transferred ownership of the debt to the plaintiff.

Committee note: If the bill of sale or other document transferred debts in addition to the consumer debt upon which the action is based, the documentation required by subsection (d)(3)(B) of this Rule may be in the form of a redacted document that provides the general terms of the bill of sale or other document and the document's specific reference to the debt sued upon.

(4) Identification and Nature of Debt or Account

The affidavit shall include the following information:

(A) the name of the original creditor;

(B) the full name of the defendant as it appears on the original account;

(C) the last four digits of the social security number for the defendant appearing on the original account, if known;

(D) the last four digits of the original account number; and

(E) the nature of the consumer transaction, such as utility, credit card, consumer loan, retail installment sales agreement, service, or future services.

(5) Future Services Contract Information

If the claim is based on a future services contract, the affidavit shall contain facts evidencing that the plaintiff currently is entitled to an award of damages under that contract.

(6) Account Charge-off Information

If there has been a charge-off of the account, the affidavit shall contain the following information:

(A) the date of the charge-off;

(B) the charge-off balance;

(C) an itemization of any fees or charges claimed by the plaintiff in addition to the charge-off balance;

(D) an accounting of all post-charge-off payments received and other credits to which the defendant is entitled;

(E) the later of the date of the last payment on the consumer debt or of the last transaction giving rise to the consumer debt; and

(F) if the **original** creditor is a financial institution subject to regulation by the Federal Financial Institutions Examination Council or a constituent federal agency of that Council, a statement that the charge-off and the charge-off balance are in accordance with applicable federal regulations or the published policy of the Council.

Cross reference: See Federal Financial Institutions Examination Council Uniform Retail Credit Classification and Account Management Policy, 65 Fed. Reg. 36903 - 36906

(June 12, 2000).

(7) Information for Debts and Accounts not Charged Off

If there has been no charge-off, the affidavit shall contain:

(A) an itemization of all money claimed by the plaintiff, (i) including principal, interest, finance charges, service charges, late fees, and any other fees or charges added to the principal by the original creditor and, if applicable, by subsequent assignees of the consumer debt and (ii) accounting for any reduction in the amount of the claim by virtue of any payment made or other credit to which the defendant is entitled;

(B) a statement of the amount and date of the consumer transaction giving rise to the consumer debt, or in instances of multiple transactions, the amount and date of the last transaction; and

(C) a statement of the amount and date of the last payment on the consumer debt.

(8) Licensing Information

The affidavit shall include a list of all Maryland collection agency licenses that the plaintiff currently holds and provide the following information as to each:

(A) license number,

(B) name appearing on the license, and

(C) date of issue.

~~(b)~~ (e) Subsequent Proceedings

(1) When Notice of Intention to Defend Filed

If the defendant files a timely notice of intention to defend pursuant to Rule 3-307, the plaintiff shall appear in court on the trial date prepared for a trial

on the merits. If the defendant fails to appear in court on the trial date, the court may proceed as if the defendant failed to file a timely notice of intention to defend.

(2) When No Notice of Intention to Defend Filed

(A) If the defendant fails to file a timely notice of intention to defend, the plaintiff need not appear in court on the trial date and the court may determine liability and damages on the basis of the complaint, affidavit, and supporting documents filed pursuant to ~~section (a) of~~ this Rule. If the defendant fails to appear in court on the trial date and the court determines that the pleading and documentary evidence are sufficient to entitle the plaintiff to judgment, the court shall grant the demand for judgment on affidavit.

(B) If the court determines that the pleading and documentary evidence are insufficient to entitle the plaintiff to judgment on affidavit, the court may deny the demand for judgment on affidavit or may grant a continuance to permit the plaintiff to supplement the documentary evidence filed with the demand. If the defendant appears in court at the time set for trial and it is established to the court's satisfaction that the defendant may have a meritorious defense, the court shall deny the demand for judgment on affidavit. If the demand for judgment on affidavit is denied or the court grants a continuance pursuant to this section, the clerk shall set a new trial date and mail notice of the reassignment to the parties, unless the plaintiff is in court and requests the court to proceed with trial.

Cross reference: Rule 3-509.

~~(c)~~ (f) Reduction in Amount of Damages

Before entry of judgment, the plaintiff shall inform the court of any reduction in the amount of the claim by virtue of any payment or other credit.

~~(d)~~ (g) Notice of Judgment on Affidavit

When a demand for judgment on affidavit is granted, the clerk shall mail notice of the judgment promptly after its entry to each party at the latest address stated in the pleadings. The notice shall inform (1) the plaintiff of the right to obtain a lien on real property pursuant to Rule 3-621, and (2) the defendant of the right to file a motion to vacate the judgment within 30 days after its entry pursuant to Rule 3-535 (a). The clerk shall ensure that the docket or file reflects compliance with this section.

Source: This Rule is derived as follows:
Section (a) is new.
Section ~~(a)~~ (b) is derived from former M.D.R. 610 a.
Section (c) is derived from former M.D.R. 610 a.
Section (d) is new.
Section ~~(b)~~ (e) is derived from former M.D.R. 610 b, c and d.
Section ~~(c)~~ (f) is derived from former M.D.R. 610 e.
Section ~~(d)~~ (g) is derived from former M.D.R. 610 d.

Rule 3-306 was accompanied by the following Reporter's Note.

In the last 10 years, many debt collection cases seeking judgment on affidavit pursuant to Rule 3-306 have been filed on behalf of Consumer Debt Purchasers (CDP's), which are entities that purchase consumer claims in default at the time of acquisition from the original creditor or from an assignee of the original creditor, which may also be a CDP. Problems with the cases filed by CDP's have arisen, including: failure of the CDP to be licensed, the wrong party being named as plaintiff, filing after the statute of limitations period has run, lack of personal knowledge by the affiant, lack of supporting documentation containing sufficient detail as to liability and damages, failure of the CDP to prove it owns the debt, and incorrect identification of the

amount claimed.

To ensure fairness to all parties, to make the claim transparent, to adopt best practices used in other states, and to conform the Rules to current practice in collection-related litigation, the Maryland Attorney General proposed changes to Rules 3-306, 3-308, 3-509, and 5-902. After hearing from members of the debt collection bar and others, the District Court Subcommittee considered the changes proposed by the Attorney General. The Subcommittee recommends amendments to Rules 3-306, 3-308, and 3-509. It referred proposals concerning Rule 5-902 to the Evidence Subcommittee.

In the proposed amendments to Rule 3-306, section (a) is new. Subsections (a)(1) and (a)(2) are derived from Black's Law Dictionary and a regulation of the Federal Financial Institutions Examination Council. Subsection (a)(3) is derived from portions of the Maryland Collection Agency Licensing Act, Code, Business Regulation Article, §7-101 (c) and Code, Commercial Law Article, §§14-201 and 15-701. Subsection (a)(4) is derived from Code, Commercial Law Article, §14-201. Subsection (a)(7) is derived from Black's Law Dictionary. Subsections (a)(8), (a)(9), and (a)(10) are derived from Virginia House Bill No. 852 (offered January 22, 1996), Chapter 178.

In relettered section (b), the words "in the amount claimed" are added to clarify that the affidavit must be sufficient to show not only the defendant's liability but also the amount of the judgment to which the plaintiff is entitled.

In section (c), the existing requirement that the plaintiff file with the complaint an interest worksheet is amended to require that an interest worksheet in the form prescribed by the Chief Judge of the District court accompany the affidavit. Also in section (c), a new subsection (c)(4)(C) is added to require proof of entitlement to, and reasonableness of, attorneys' fees if such

fees are sought.

Section (d) is new. Subsections (d)(1) and (d)(2) are derived from Fairfax County, Va. Purchased-Debt Default Judgment Checklist. Subsection (d)(3) is derived from North Carolina Gen. Stat. §58-70-150-(2) and Connecticut Superior Court - Procedures in Civil Matters, §24-24 (b)(1)(A). Subsection (d)(4) is derived from FTC Report (July 2010) ("Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration"); North Carolina Gen. Stat. §58-70-155 (b); Connecticut Proposed Small Claims Judgment Checklist for Magistrate, provided in July 2010 FTC Report; recommendations arising from prior Maryland State regulatory actions; and New York City Administrative Code, Title 20, Chapter 2, Subchapter 30 (Debt Collection Agencies) §§20-488 - 20-494.1.

In section (e), the words "section (a) of" are deleted.

In section (f), the words "or other credit" are added.

In section (g), the word "latest" is added.

Also, stylistic changes to the Rule are made.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE – DISTRICT COURT

CHAPTER 300 - PLEADINGS AND MOTIONS

AMEND Rule 3-308 by adding a Committee note, as follows:

Rule 3-308. DEMAND FOR PROOF

When the defendant desires to raise an issue as to (1) the legal existence of a party, including a partnership or a corporation, (2) the capacity of a party to sue or be sued, (3) the authority of a party to sue or be sued in a representative capacity, (4) the averment of the execution of a written instrument, or (5) the averment of the ownership of a motor vehicle, the defendant shall do so by specific demand for proof. The demand may be made at any time before the trial is concluded. If not raised by specific demand for proof, these matters are admitted for the purpose of the pending action. Upon motion of a party upon whom a specific demand for proof is made, the court may continue the trial for a reasonable time to enable the party to obtain the demanded proof.

Committee note: This Rule does not affect the proof requirements set forth in Rules 3-306 (d) and 3-509 (a) pertaining to claims arising from consumer debt where the plaintiff is not the original creditor.

Source: This Rule is derived from former M.D.R. 302 a.

Rule 3-308 was accompanied by the following Reporter's Note.

The proposed Committee note to Rule 3-308 makes clear that the proof requirements of Rules 3-306 (d) and 3-509 (a) are independent of, and are not triggered by, any demand that may be made by the defendant pursuant to Rule 3-308.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE – DISTRICT COURT

CHAPTER 500 - TRIAL

AMEND Rule 3-509 to require the introduction of certain evidence for certain claims arising out of consumer debt, as follows:

Rule 3-509. TRIAL UPON DEFAULT

(a) Requirements of Proof

When a motion for judgment on affidavit has not been filed by the plaintiff, or has been denied by the court, and the defendant has failed to appear in court at the time set for trial:

(1) if the defendant did not file a timely notice of intention to defend, the plaintiff shall not be required to prove the liability of the defendant, but shall be required to prove damages, and for claims arising from consumer debt, as defined in Rule 3-306 (a)(3), where the plaintiff is not the original creditor, the plaintiff shall also introduce appropriately certified or otherwise properly authenticated documents or other credible evidence sufficient to satisfy the requirements set forth in Rule 3-306 (d);

(2) if the defendant filed a timely notice of intention to defend, the plaintiff shall be required to introduce prima facie evidence of the defendant's liability and to prove damages, and for claims arising from consumer debt as defined in Rule 3-306 (a)(3), where the plaintiff is not the original creditor, the plaintiff shall also introduce appropriately certified or otherwise properly authenticated documents or other credible evidence sufficient to satisfy the requirements set forth in Rule 3-306 (d).

. . .

Rule 3-509 was accompanied by the following Reporter's Note.

> Proposed amendments to Rule 3-509 add to the Rule the requirement that, for claims arising out of consumer debt, as defined in Rule 3-306 (a)(3), where the plaintiff is not the original creditor, the plaintiff must introduce evidence sufficient to satisfy the requirements of Rule 3-306 (d).

Judge Norton said that instead of going over each of the definitions in Rule 3-306, he would mention some of the more substantive issues that had arisen at the last meeting at which this Rule had been discussed. Subsection (a)(5), the definition of "original creditor," had generated discussions as to whether this definition included the Central Collection Unit (CCU) of the State of Maryland. The bolded language was added to emphasize that the CCU was included as an original creditor. The next change was to section (d), If Claim Arises from Consumer Debt. Two alternatives of section (d) had been proposed. At the end of subsection (ii) of Alternative B, the language "in conformance with this Rule" was proposed to be added. The plaintiff bar's apprehension was that absent the relationship back to the Rule, the Chief Judge of the District Court could unilaterally add more requirements to what should be included on both the items listed and the Assigned Consumer Debt Checklist. By relating this back to conformance with the Rule, it would reflect that what is to be filed has to be in accordance with the Rule.

Judge Norton commented that the scheme of Rule 3-306 was a general rule, and then what generated discussion was consumer

debt circumstances. Subsection (d)(1), Proof of the Existence of the Debt or Account, provided three basic ways that it could be proved: (A) a document signed by the defendant evidencing the debt or the opening of the account, which is a rare circumstance, because credit cards are not set up that way; (B) a bill or other record reflecting purchases, payments, or other actual use of a credit card or account by the defendant, a frequent way to prove the debt; and (C), an electronic printout or other documentation from the original creditor establishing the existence of the account including purchases, payments, or other actual use of a credit card. These are the ways to establish the existence of the debt.

Judge Norton explained that the next issue, subsection (d)(2), Proof of Terms and Conditions, resulted from the discussion at the previous meeting. One of the concerns was that the terms and conditions are boilerplate and change every three to six months. People have credit cards for years and are flooded with pages of varying conditions and changes to their accounts, which would not be of any import, other than if the creditor were seeking attorneys' fees or interest rates of a certain amount. Subsection (d)(2)(B) contains an exception, which provides that subsection (d)(2)(A) does not apply if the debt is an unpaid balance due on a credit card, if the original creditor is or was a financial institution subject to regulation by the Federal Financial Institutions Examination Council, and if the claim does not include a demand or request for attorneys's

fees or interest on the charge-off balance in excess of the Maryland constitutional rate (the language "on the charge-off balance" is being suggested for addition after the word "interest" and before the word "in") of six percent per annum. If these conditions exist, then the creditor does not have to put in all of the boilerplate language establishing the terms of the credit card agreement. If the creditor wants to seek attorneys' fees, he or she could do so, but would have to follow the requirements of the Rule.

The Chair commented that he wanted to mention an issue that had been raised, which the Subcommittee had felt that there was no need to respond to, except possibly in a Committee note. The issue was if the charge-off balance in a credit card situation would cover purchases of goods or services and then interest and late fees, etc. on top of that. Under federal law, there is apparently some dispute among the courts as to whether the interest and the late fees, which are then compounded each month, constitute new principal or interest. To the extent that it might constitute interest, if the downstream creditor is seeking any interest on that amount, which is the amount of the charge-off balance that would constitute interest, this might constitute compounding interest, which is permissible under federal law, but not under Maryland law. No one had an answer to that issue. The Subcommittee's view was that this was a matter of substantive law, and if raised in a case, a court would decide it. However, purely from a procedural point of view, which is what is being

addressed in this Rule, the Rule could provide that if a creditor is not asking for attorneys' fees or interest of more than six percent, he or she would not have to produce all of the documentation otherwise required by the Rule.

The Chair said that the legislative history of Rule 3-306 should reflect the point that the language referred to by Judge Norton was not intended to answer that question. As long as the creditor is not asking for more than six percent interest, it is not necessary for the creditor to produce terms and conditions, but if someone wants to challenge the creditor's right to ask for any interest in the charge-off balance, he or she is free to do so. This would be a matter for a judicial determination. Judge Norton suggested that a Committee note to this effect should be added. The Chair said that something needs to be added to make clear that Rule 3-306 is procedural only and is not intended to address that substantive issue.

Judge Norton drew the Committee's attention to subsection (d)(3), Proof of Plaintiff's Ownership. This had elicited a lively discussion as recently as 15 minutes ago. There are several approaches. In the circumstance where the original credit card company sold the debt to B who sold it to C who sold it to D who sold it to E, and E is now suing, how much of that documentation should be required by rule? The Subcommittee's view was that much of this would be under subsection (A), a chronological listing of the names of all prior owners of the debt and the date of each transfer of ownership of the debt,

beginning with the name of the original creditor. Subsection (B) requires a certified or other properly authenticated copy of the bill of sale or other document that transferred ownership of the debt to the plaintiff.

Judge Norton noted that there was some discussion on the part of those who have the interests of the consumer that some other states, including Delaware, have adopted rules requiring the production of every single bill of sale or assignment. Some states give the choice of (A) or (B). The Subcommittee opted, among other reasons for efficiency purposes, that it would be sufficient to have an affidavit as to the identity of each person, company, or entity within each transaction and the date of the transaction, together with evidence of the actual bill of assignment from the last transaction. There was some discussion about this. The majority view was that this would be sufficient. Some states are authorizing this to be sufficient. A minority view is to require every single bill of sale, and some states have chosen this option.

Judge Norton drew the Committee's attention to subsection (d)(4), Identification and Nature of Debt or Account. The purpose of this provision is to identify the account itself, so the court knows which particular account is at issue. People often have many credit cards, and this information will particularize the account that is the subject of the lawsuit and particularize the debtor. Judge Norton pointed out that subsection (d)(5), Future Services Contract Information, would

pertain to a health club or fitness center, where someone has signed a contract to pay for a 12-month membership and then defaults. The debt is sold. In these types of assignments, the plaintiff is entitled to an award of damages under that contract.

Judge Norton told the Committee that 95% to 99% of all of the cases that were being discussed today fell under subsection (d)(6), Account Charge-off Information. The basic circumstance is that there is an original bank that issues a credit card, and the cardholder defaults. The account is sold without all of the paperwork and documentation attached. Proposed subsection (d)(6) sets out the required information if there has been a charge-off of the account. It includes the date of the charge-off and the charge-off balance. If there is a claim for anything over and above the charge-off balance, it would also include an itemization of any fees or charges claimed by the plaintiff. In subsection (d)(6)(D), the word “accounting” was being changed to the word “itemization.” In subsection (d)(6)(E) the words “the later of” were being deleted, so it would read “the date of the last payment on the consumer debt or of the last transaction giving rise to the consumer debt...”. The reason the word “accounting” was changed to the word “itemization” was that some of the creditors had indicated that the word “accounting” did not have the meaning that was intended. It could mean that even more information is required, and the concept of itemization is what the Rule was intended to mean. The purpose of subsection (d)(6)(E) is to provide a defendant notice with respect to issues

of limitations, so that any attorney who is retained by a defendant can make some ascertainment of the statute of limitations. There had been some discussion as to whether judges are prohibited from taking notice of affirmative defenses. Under the federal trade law, this may be an area where a judge could take notice of a limitations issue *sua sponte* without the issue having been raised.

Judge Norton noted that subsection (d)(6)(F) was to be entirely deleted, because of the language at the end that reads, "a statement that the charge-off and the charge-off balance are in accordance with applicable federal regulations or the published policy of the Council." The "Council" refers to the Federal Financial Institutions Examination Council. This deletion was proposed because plaintiff E, down the line from the original creditor who was plaintiff A, does not have any idea whether plaintiff A's actions were in accordance with applicable federal regulations or the published policy of the Council. If plaintiff A had not done this properly, there are various federal regulatory authorities who could police this, and also plaintiff E would be aware of the identity of the federal financial institution by reading the chronology listing, so that he or she would know the identity of the original creditor. It is an improper burden to place on the creditor to affirm under affidavit that it was done properly.

Judge Norton drew the Committee's attention to subsection (d)(7), Information for Debts and Accounts not Charged Off. This addresses the "vanilla" situation where someone had an account that has not been charged off. It lists the various information required in this situation. Subsection (d)(8) is new. Certain federal cases have civil penalties and very high attorneys' fees for plaintiffs filing lawsuits when they are not licensed. The plaintiffs have to include a list of their licenses when they file the claim as part of the required information in the claim. Judge Norton said that the only other changes to the Rule were in section (f) with the addition of the language "or other credit" and in section (g) where the word "latest" has been added before the word "address" in the first sentence.

The Chair asked if anyone present at the meeting had any comments on Rule 3-306. Mr. Laws told the Committee that he represented Pasadena Receivers. He referred to the Committee note that had been proposed to be added, which would state that the Rule was procedural and not substantive law. However this note is crafted, he would like to see it general enough to encompass the Rule overall. This has some ramifications for a debt collection practice. The Rule should be clear that it does not alter substantive law.

Mr. Laws remarked that with respect to subsection (d)(1), Proof of the Existence of the Debt or Account, he proposed that in addition to the three items Judge Norton had referred to, the

charge-off statement where the original creditor identifies the defendant should be listed. The purpose of this subsection is to make it clear that this debt is owed by this defendant. The charge-off statement is going to reflect the name and the amount of the debt, so it will identify the defendant. It is issued by the banks consistent with federal law. Notice to the defendant precedes the charge-off statement. Rather than having to pull together documents going back in time, the charge-off statement is kind of a gold standard, and it is not necessary to go back in time for more information. It is important to remember that this part of the Rule is not proof of the debt for purposes of trial. It is information for the District Court judges when the proceeding is uncontested. This streamlines the procedure from the creditor's perspective and streamlines it for the courts as well. Less paperwork has to be filed. It does not give any more or less information than what is already provided in subsections (A), (B), and (C) of subsection (d)(1).

The Chair noted that when this was discussed, the problem was that nobody was sure exactly what all of the charge-off statements contained and how much information was in them to prove the actual use of the account by this debtor. Mr. Laws remarked that the charge-off statement is going to reflect the amount of the debt as of that point in time, and it will include everything that preceded it and the date of the charge-off. It would give information with respect to this defendant, and it

identifies the obligation. This is the purpose of subsections (A), (B), and (C) of subsection (d)(1) also.

The Reporter asked Mr. Laws why his clients would have trouble providing the information listed in subsections (A), (B), or (C) of subsection (d)(1). Mr. Laws answered that subsection (A), a document signed by the defendant evidencing the debt of the opening of the account, frequently does not exist. Subsections (B), a bill or other record reflecting purchases, payments, or other actual use of a credit card or account by the defendant and (C), an electronic printout or other documentation from the original creditor establishing the existence of the account and showing actual use of a credit card or account by the defendant, refer to further information going back into the obligation itself, so it creates a further burden with respect to digging out the information. Typically, when someone buys a portfolio of debt, the one piece of documentation that is available is the charge-off statement. It provides the value of whatever is being sold. Having to dig back into the media of the transaction is a further obligation on the part of the purchaser of the debt. There are situations where this is not always available. The charge-off statement is always available. The Rule would exclude a certain category of debt from being sold in Maryland.

Ms. Anne B. Norton told the Committee that she is the Deputy Commissioner of Financial Regulation for the State of Maryland. Her office would be opposed to adding the language that would

permit the charge-off letter to establish proof of the existence of the debt or account. They had seen inconsistencies in the faces of the charge-off letters as well as in the documentation and details that are included in the charge-off letter. They would strongly oppose adding this to subsection (d)(1), because they had seen considerable abuses and inconsistencies. They would be willing to compromise in other areas. Mr. W. Thomas Lawrie, an Assistant Attorney General who represents the Commissioner of Financial Regulations, said that the previous draft had proposed not just adding the fourth provision to subsection (d)(1), but also the definition of the term "principal" as an accepted definition.

Mr. Laws commented that he and his colleagues agreed with the rest of the Rule, and Judge Norton and the Subcommittee had done a good job drafting the Rule. This is not a proceeding where the defendant debtor has disputed the debt. The Rule is intended to give the District Court judge sufficient information to establish that the person is the debtor. The remainder of the Rule is to protect defendants who have not contested the debt.

Mr. Laws remarked that from the view of the people that he represented, it is important to weed out the bad debt collectors. This is not to say that in 25,000 obligations, some type of typographical or clerical errors will not occur. The problem is when people are intentionally misleading or sloppy. Ms. Norton said that she was not sure that the mistakes are intentional.

They see pleadings filed that are contradictory. It is not an intentional or willful desire to mislead the court. It is the nature of the volume of these cases. There are not adequate protections in place.

Ms. Santoni told the Committee that she is a private consumer protection attorney in Baltimore County. She has been practicing for about nine years, and she noted that there are about five other consumer protection attorneys in the State. People think that it is a lucrative or easy practice, and she stated that this is not the case. In her office, she sees tragic stories on a regular basis. After a judgment on affidavit is obtained, the plaintiff can then garnish the defendant's wages and seize the defendant's property. The defendant's credit report is adversely affected. All she and her colleagues are asking for is that before a judgment, which has a devastating effect, is entered, the procedure should be done correctly. She has seen numerous charge-off statements where there is no letterhead and scant information -- the name of the debtor and the amount of the debt, and that was all. Considering what is being done to the citizens of Maryland, which is a judgment against them, she and her colleagues are requesting that more information be required than a minimal amount that makes it easy for a judge to rubberstamp. She appreciated the fact that people should pay their bills and that the judge's job is difficult. However, before someone is deprived of his or her property, the procedure has to be done correctly. Because these debts are

frequently bought 25,000 at a time, often at pennies on the dollar, it seems unfair that these types of debts should be rubber-stamped. Society and the laws of the State require due process.

Mr. Michael commented that he did not practice this type of law, but he asked if anyone present were at all concerned about the proof of plaintiff's ownership where, in his view, the procedures are somewhat inconsistent with the requirements set up in the foreclosure rules where specific attention to detail is required for the people who are foreclosing on property. He did not know how often the scenario of several people buying the same debt occurs, but he expressed the concern that Rule 3-306 is only requiring proof of the last transfer as to ownership and ignoring the preceding chain. If the chain is flawed in some way, the debt that is being sued upon is not really owned by the person who claims ownership. Judge Norton responded that the minority view is that all documents in the chain should be provided. The Subcommittee decided, however, that an affidavit with a chronology, dates of transfer, identification of parties, and the last assignment would be sufficiently reliable. He said that he understood Mr. Michael's point.

Mr. Michael asked Judge Norton why he was satisfied with the procedure that had been suggested. Judge Norton replied that sometimes there are 200 of these cases a day. If a judge is looking over many of these cases, the attention given to each case is not going to be as precise as if there were only 25

cases. It is a matter of letting the judges be more efficient. Mr. Maloney stated that he is opposed to allowing the debt collection industry to substitute what they call “industry standards,” which is an oxymoron. There are no industry standards. The debts are purchased in bulk, and all the buyer gets is a charge-off statement. The reason people are able to buy these debts at such an enormous discount is that the people in the industry have agreed not to follow any standards. They are not filing the original credit card statements and the assignments. They are hoping to make money on the volume and file the judgments by affidavit.

Mr. Maloney remarked that he did not know how the plaintiffs would handle it if someone filed a notice of intention to defend. Ms. Santoni responded that this is usually not the case. The problem is that the proper information regularly is not there. Then what happens is that people are getting these judgments against them. It is a real problem, and she added that she was pleased that the Rules Committee is addressing it. In cases where she represents people, she pushes the plaintiffs to send more documentation. If they produce this, they are entitled to get a judgment.

Mr. Maloney commented that the plaintiffs justify how these cases are handled, because they are for relatively small amounts, they are high volume, and it is too much work to file more documentation. If the cases were for a higher amount, and they went to the circuit court, they would not get anywhere. Because

the volume in the District Court is high and the amounts are low is not an excuse to lower the court standards to meet industry standards, which are practically non-existent. Ms. Santoni remarked that when an attorney has a client who says that he or she can no longer feed the person's children, because the person's wages are being garnished, some steps have to be taken. Mr. Maloney observed that the people made a business decision to buy debt at pennies on the dollar with minimal documentation, and they are asking the court to excuse the minimal documentation.

The Chair responded that there needs to be a balance. It is not a question of excusing things that should not be excused or just looking at the burden on the court, although this is a consideration. The question is whether there is enough that is already required. In subsection (d)(3)(A), the plaintiff must include a chronological listing of the names of all prior owners of the debt and the date of each transfer of ownership, beginning with the original creditor. This information is stated under oath. The Subcommittee's view was that on balance, this plus the last bill of sale is sufficient. It is not necessary to require every bill of sale in the chain of ownership. The additional papers would only be going to support what the affidavit already says.

Mr. Maloney questioned whether other states are requiring this. The Chair answered that some are, and some are not. Mr. Michael added that Judge Norton had said that this is the minority view. Judge Norton replied that this was the minority

view on the Subcommittee. He had not monitored what all other states are doing. The Chair noted that every state is scrambling to address this problem.

Mr. Lawrie told the Committee that the jurisdictions that require complete documentation of each bill of sale are Delaware, which just passed a new administrative rule; Cook County, Illinois; North Carolina; Minnesota; Tennessee; and Massachusetts. States that require only documents from the last sale to the plaintiff are New York and Connecticut. In the states that they were able to identify as having rules, the majority seemed to require more documents.

Mr. Brault inquired if there were any data accumulated anywhere that would help the Committee understand whether all of these debts are legitimate and are truly owed debts. Are judgments being entered against people who never knew about the debt? Their identity may have been stolen or for some other reason, it was not a justifiable action. Mr. Lawrie answered that he did not know that there is any solid data. The Federal Trade Commission (FTC) had conducted a fairly thorough analysis of this issue last year, and the previous year they had conducted a series of roundtables attended by numerous industry representatives, consumer advocates, and state legislators. The roundtables were conducted all over the country. This resulted in the FTC issuing a report.

Mr. Brault asked if there is a realistic idea of how many of the debts are not truly owed. Mr. Lawrie replied that some of

the debts are not truly owed, but it is probably not a large percentage of them. He did not know what that amount was. In most cases, the consumer owed a debt to the original creditor, but a number of issues impact on whether the obligation is valid at this point in time, such as whether the amount reflected downstream by the debt buyer is accurate, or if the statute of limitations has run.

Mr. Maloney stated that the historic standard for judgment by affidavit is in section (a) of current Rule 3-306, Judgment on Affidavit. He read from that provision: "...The affidavit shall be accompanied (1) by supporting documents or statements containing sufficient detail as to liability and damages, including the precise amount of the claim and any interest claimed; and (2) if the claim is founded upon a note, security agreement, or other instrument, by the original or a photocopy of the executed instrument, or a sworn or certified copy, unless the absence thereof is explained in the affidavit. If interest is claimed, the plaintiff shall file with the complaint an interest worksheet." Historically, there had been fairly high standards for obtaining a judgment by affidavit. The recent mass of debt collection cases weakened this because of volume and industry practice.

Ms. Santoni noted another problem, which is that even if a debt is owed, if there is debt buyer after debt buyer after debt buyer, the debtor is not protected. If someone states that he or she owns the debt, this may not be true. If there is no proper

chain of title, the risk to the consumer is that he or she may end up owing the debt to the proper party down the road, which is another reason that she and her colleagues are suggesting that the procedures be done correctly, so that ownership is proven, and the debtor knows whom he or she really owes.

Mr. Whiteman told the Committee that he is an attorney in the firm of Peroutka and Peroutka and that he represented consumer debt purchasers. The issue is that when no defense is raised, while there may be questions about identity theft, the misuse of the particular credit card by another person, or various other situations, these are trial points. In his view, nothing keeps a defendant who has a defense from asserting it and forcing the attorney to present his or her case at trial. In his experience, when a defendant claims that it was not he or she who owed the money and gives the address of the person who does owe the money, the case disappears from their office very quickly.

Mr. Whiteman commented that as to the affidavit, he had a case where he had 18 months worth of statements that the debtor never contested. Ultimately, the defendant acknowledged that he owed the money, but if Mr. Whiteman had filed a complaint based on his 18 months worth of statements and his three bills of sale, the complaint would be 3/4 inch to one inch thick, which is not necessary when the final statement that the credit card company issued six months or so after the last payment stated that the defendant owed a specific amount of money.

Mr. Michael responded that he was not sure that this was an issue of trial, but rather an issue of standing and jurisdiction. If the debt is not valid, the plaintiff does not have standing. It is not a matter of trial; it is a matter of whether someone is a proper plaintiff.

Mr. Whiteman remarked that his client A would say that he or she bought the debt from B, and this statement would be under the penalties of perjury. This cannot be circumvented, if the case is to be filed by affidavit. His clients are putting themselves in jeopardy of a criminal prosecution for filing a false affidavit. Mr. Maloney responded that in this situation, Mr. Whiteman would be invoking the court's jurisdiction to get a judgment. A certain aspect of this is troubling. This essentially is an ex parte process, because the defendant does not file a notice of intention to defend and does not come to court. This may be because the defendant did not know how to file the notice of intention to defend or was too unsophisticated to come to court. This leaves the plaintiff attorneys and the courts. They have a common interest in resolving the volume of cases. The court does not want to spend time on all of these cases, and neither do the attorneys. No one is really speaking for the debtor, except for the people who are attending the Rules Committee meeting. Affidavit judgment is the District Court version of a summary judgment in circuit court. The plaintiffs are attempting to be excused from what has historically been high documentation standards to get a judgment. Whatever rule the

Court of Appeals imposes, the industry will have to comply. Some people will respond that this is too much documentation, it is too expensive, and the industry cannot handle it, so they will refuse to comply with the requirements of whatever rule is effected. This will affect the market for buying these kind of debts.

Mr. Whiteman expressed the view that the analogy to summary judgment is appropriate. At the summary judgment stage, his client would file an affidavit stating that he or she bought the debt, the defendant owes the money, and there is nothing more to prove. The new Rules would mean that this would no longer take place. He and his colleagues felt that the judgment on affidavit was acceptable when all of these facts exist: someone bought it, the proof is available, the defendant owes it as evidenced by the credit card statement, and the defendant has not filed a notice of intention to defend. There is no good faith dispute of the material facts. All that the defendant has to do is file the notice of intention to defend, and the case proceeds to trial. Mr. Maloney commented that if one of these cases is filed in the circuit court, many circuit court judges would not grant the judgment, even if there were no opposing party.

Mr. Moylan told the Committee that he is an attorney with Asset Acceptance. The charge-off statement is the gold standard. It is inherently reliable. The large banks will not lie to the Internal Revenue Service to make minimal money selling their debt. This is a volume industry.

Judge Stone told the Committee that he is a District Court Judge in Baltimore County, and he had had the pleasure of working with the Subcommittee on this matter. He is the Chair of the District Court Civil Committee. The proposed Rules were not an attempt to lower the bar or cater to the debt collection industry. They were an attempt to raise the bar. Rule 3-306 as it currently exists was deemed to be insufficient to protect consumers, and this is why changes to the Rules were being proposed. It was not an attempt to give the industry a leg up. In fact, it was exactly the opposite. Mr. Maloney had made a comment about judges not wanting to deal with all of this paperwork. This was not the case. It was not a question of not wanting to deal with it; it was a question of how the balance is struck, because as Judge Stone had explained to the Subcommittee and many members of the Subcommittee know, typically the judges rule on 50 to 100 affidavit judgments. In Baltimore County and many other counties, they do not go on the docket. They are handled in between the judges' dockets. Many judges consider them at lunchtime.

Judge Stone said that if some kind of balance is not set up as to how much paperwork is going to be required, then the situation will be that the work simply will not get done. The legislature does not appear to be giving the counties more judges. The number of judges is not changing. The Subcommittee is trying to strike a balance between very real concerns about proof of the ownership of the debt on the one hand, and on the

other hand, the court's ability to get the job done. It is not a question of catering to an industry or not wanting to deal with the paperwork; it is a question of how much can one person do in a day and how the work is going to get done if too much work is required.

Mr. Michael said that to get the issue on the table, he would propose an amendment to subsection (d)(3)(B) of Rule 3-306. He suggesting adding the language: "each succeeding debt owner and to" after the word "debt" and before the word "the," so that the wording of the provision would be: "a certified or other properly authenticated copy of the bill of sale or other document that transferred ownership of the debt to each succeeding debt owner and to the plaintiff." The chain of ownership approach that was the minority view of the Subcommittee would become the majority view. The motion was seconded.

Mr. Brault inquired how someone would obtain a certified copy of a bill of sale. He knew how to get a certified copy of a judgment. Senator Stone suggested that the word "certified" could be taken out of the proposed language. Mr. Brault asked about the language "or properly authenticated." Ms. Gagnon told the Committee that she was past president of the Maryland/D.C. Creditor's Bar Association. The language, "certified or other properly authenticated copy" is a term that is used throughout Rules 3-306 and 3-509. The meaning of this language was one of the concerns of her organization. This language is undefined and overly broad. Mr. Brault remarked that he was not sure who does

the certificate, but it would be difficult to certify an early transaction if the debt has been sold seven or eight times since.

Ms. Santoni commented that there is a way to address this problem when the debt is sold. If, at the time of sale, the seller certifies in an affidavit that the information is accurate under the penalty of perjury, and the seller is selling it to someone else, then the debt collectors would have that document on file and could use it at any time. She was not sure that it would be the unwieldy nightmare that everyone had said that it would be. As the debts become transferred multiple times, why could part of the sale paperwork not include that these are provided under oath? This solves the problem. Subsection (d)(6)(F) provides that if the original creditor is a financial institution subject to regulation by the Federal Financial Institutions Examination Council, the affidavit shall contain a statement that the charge-off and the charge-off balance are in accordance with applicable federal regulations. Why could the original creditor not supply that information at the time of sale, and sign an affidavit that the creditor could attach to the complaint? There could be other ways of providing this information to the debt purchasers when the debts are sold that does not result in a nightmare for the debt sellers or purchasers and becomes part of their routine business practices.

The Chair said that this had been discussed with D. Robert Enten, Esq., who represents the Maryland Bankers Association. He had had several concerns. One, which Mr. Michael's proposed

amendment might address, was that absent the language proposed, there is no way a downstream debt purchaser would know whether the original creditor had complied with federal requirements. The second concern is that if this is a requirement, it would have to be prospective, applicable only to debts charged off after the effective date of the Rule; otherwise this would require information that is unobtainable. The third concern is that this should be eliminated because it is a regulatory issue. If the original creditor did not comply with federal requirements for charge-offs, federal regulatory agencies can address this in a regulatory context since it is a violation of their law. On balance, other information can be required, but this really does not add that much. What is the usefulness of what is being required?

Mr. Klein asked where the information about the preceding transactions is coming from if the only requirement is a copy of the last bill of sale, but there has to be an affidavit that gives the chronology of all else that preceded. Where is this information available? If someone already has it, what is so difficult about attaching it? If someone does not have it, how can he or she give the affidavit? How can someone get past subsection (d)(6)(F) if he or she does not have the documents to begin with?

Judge Love remarked that some people were of the opinion that Rule 3-306 did not have to be changed. They felt that judges in their discretion could determine what constitutes

sufficient detail to grant or deny affidavit judgment, as judges have been doing for many years. He agreed with Judge Stone's observations that the changes that have been proposed for this Rule ensure some transparency in the consumer debt collection practice. It is an expansion of requirements so that plaintiffs in these cases must provide specific, identifiable proof.

Judge Love commented that changes to Rule 3-306 dealing with assignments require plaintiffs to provide information about their right to bring a lawsuit because they "own the debt." Rule 3-308 requires defendants to raise the issue of the capacity of the party to sue or be sued. If the issue is not raised by the defendant, it is deemed to be admitted for the purposes of the pending action. If the defendant does not raise the assignment issue, the issue is admitted, and the case proceeds. Notwithstanding this, although Rule 3-308 has not yet been discussed, the Committee note in that Rule provides that in all other civil cases in the District Court, the defendant is required to raise that issue, or it is waived. An exception is being carved out for consumer transactions. It was thought that a requirement that the plaintiff swear under the penalties of perjury that he or she owns the debt and can demonstrate the chain of the purchases of these assignments would be sufficient for most District Court judges to be able to ascertain that the plaintiff owns the debt sued upon. This is the genesis of subsection (d)(3) of Rule 3-306. If the Rule is not changed, Judge Love assumed that the issue of capacity to sue would remain

governed by Rule 3-308. The plaintiff's ownership of the debt would be admitted for the purpose of the affidavit judgment, unless the issue is raised by the defendant.

Mr. Harris told the Committee that he is from the Public Justice Center, a legal nonprofit organization based in Baltimore that represents the rights of low-income people, including those sued for consumer debts. Along with the Legal Aid Bureau, the Public Justice Center had submitted a letter in support generally of the spirit of the amendments proposed by the Rules Committee. They had mentioned the issue of subsequent assignment. They would like to have proof of each assignment. People have been sued by more than one debt collector on the same debt. When this happens, more often than not, the judge will say to the debtor that he or she paid the wrong person who had gotten a judgment against the debtor. The plaintiff actually owns the debt, so the debtor is out of luck, and the debtor ends up paying double.

Mr. Harris said that he would like to make sure that the procedure has an extra safeguard, so that no one is sued twice for the same debt. To the extent that the documentation proving every transfer of ownership would help that, and he and his colleagues believe that it would, they would be in support of this.

The Chair observed that if the case went to trial, and a notice of intention to defend had been filed, the plaintiff would have to come to court and could testify under oath that the plaintiff got the debt from someone who got it from someone else.

This would be sufficient for trial. It is evidence of the chain of ownership. In the affidavit situation, as in a summary judgment, the affidavit simply takes the place of the testimony. It is not subject to cross-examination, however. In a trial, no documents would have to be produced. Mr. Michael remarked that it is fairly blatant hearsay. The Chair pointed out that it could be objected to. Mr. Michael inquired if this scenario envisioned no attorney on the other side. Without the kind of documentation Mr. Michael had suggested in his amendment to subsection (d)(3)(B), the case cannot be proved, unless the plaintiff has the documentation regarding the subsequent purchasers. The Chair asked where the plaintiff would get the information. Mr. Michael responded that it would come from the same source as the information in subsection (d)(3)(A). It seems that the plaintiff will have to prove the purchase of the debt from the subsequent buyer with some kind of bill of sale. He felt that the plaintiff would have to prove that chain of ownership if the attorney representing the debtor objected to what he saw as blatant hearsay, A selling it to B selling it to C, who would have no personal knowledge of the earlier transaction.

Judge Pierson questioned whether these were negotiable instruments. In the note situation, it is not necessary to prove the chain of ownership. With a negotiable instrument, there is a presumption of ownership, and it is negotiated by transfer of possession. It is not necessary to prove chain of ownership on a

negotiable instrument. The Chair pointed out that over 90% of these cases involve credit cards. Ms. Potter commented that she was sympathetic to the debtors, but in most of these cases, they had been served, and they had the right to contest. They had chosen to ignore the lawsuit, just like they had chosen to ignore the original event that got them into the difficult situation.

Mr. Maloney noted that the proceeding is ex parte. Ms. Potter reiterated that the defendant chose to not file an answer. Mr. Maloney said that the question is what the minimum standards are that the plaintiffs would have to meet to invoke the court's jurisdiction to prove standing and to get a judgment. He added that if these cases were in the circuit court under the same circumstances, and the defendant did not answer a summary judgment motion, many judges would look at this and decide that it does not meet the standards.

Ms. Santoni remarked that often the defendants do not choose to avoid attending the proceeding. Maryland has significant problems with service. It may be that the defendant was not actually served. Mr. Maloney had mentioned other problems, such as the defendants being unsophisticated. Ms. Santoni said that she understood that the rules have to be followed, but is not enough to say that the defendants choose not to come to court. Ms. Potter agreed, noting that problems with "sewer service" exist. Ms. Gagnon had made the point that under the amendment proposed by Mr. Michael, if company C is out of business, and company F has now bought the debt, how can F get a bill of sale?

Mr. Klein said that no one had answered the question that he had raised earlier as to where the plaintiff gets the information to put into the affidavit. Mr. Lagana told the Committee that he was from Pasadena Receivables. In answer to Mr. Klein's question, the information that Mr. Lagana and his colleagues would use in the affidavit is information they get from the chain of title or a bill of sale from the original bank to the reseller to them. Including these few sheets of paper is not an onerous requirement. They do this most of the time, anyway. Many times, judges ask for them. The problem would be where the original bill of sale from the original bank to the reseller states that the bank sold 25,000 accounts to the reseller. Listing 25,000 names takes a great deal of paper, and it would be onerous for the court to find the name of the debtor in that list. Plaintiffs often include a portion of the spreadsheet that they purchased, which many judges ask for. The Chair observed that he read the Committee note after subsection (d)(3)(B) to require only that portion of the spreadsheet. The plaintiff would need to attach to the general bill of sale something that shows the debt at issue. The Reporter noted that this would be for the final transfer. The question is how much of this information the plaintiff has to give for the previous transfers.

Mr. Klein said that what he had heard is that the plaintiffs have the information, and it is a question of how difficult it is to look for. Mr. Lagana responded that they do not have the information from the original creditor. Mr. Klein remarked that

he wanted to understand how this works, since he did not practice this type of law. He noted that Mr. Lagana had mentioned a chain of title in the documentation that the attorney gets from whoever he or she buys from. He asked Mr. Lagana if the point is that the attorney wants to make sure that he or she is getting something that the seller owns. Mr. Lagana replied affirmatively. The Reporter asked Mr. Lagana how he would know that the accounts have not been sold to two or three other debt buyers. Mr. Lagana replied that if the accounts are sold to more than one buyer, the seller would be breaking the law.

Senator Stone referred to Ms. Santoni's point about "sewer service," which is bad service. There are many cases on this issue, which is a serious one, but Senator Stone expressed the view that it is a mistake to confuse this with Rule 3-306. They are separate issues. Ms. Gagnon responded that she used to work for the law firm, Peroutka and Peroutka. For a two-year period, they had kept track of every motion filed in their affidavit judgment cases in which lack of service was alleged. That number was .08 percent of the time, which caused her colleagues and her to feel that the allegation of "sewer service" is not valid.

The Chair called the question on Mr. Michael's motion to amend subsection (d)(3)(B). Judge Weatherly inquired what the motion was. The Reporter answered that the language "to each succeeding debt owner and" would be added after the word "debt" and before the word "to." The motion passed on a vote of 9 to 8.

Ms. Potter questioned the meaning of the language in

subsection (d)(3)(B) that reads “a certified or other properly authenticated copy of the bill of sale...”. Ms. Gagnon pointed out that this language also appears in Rule 3-306 (d)(1) and (d)(2)(A) as well as in subsection (d)(3)(B). Mr. Brault remarked that this is an important issue. He said that he did not practice this kind of law either. He observed that the credit card companies are giving the cards to single mothers who have trouble feeding their children. He understood that the original creditor was likely to be a bank. The bank has this debt, and it also has a great amount of income. The bank charges off the debt and recovers a reduction in its income tax. The bank has recovered part of the debt by a reduction in income tax. Does anyone require establishing the actual net amount of damages sustained by the original creditor, or is this a ridiculous question?

Mr. Whiteman replied that this is not a ridiculous question. This issue has been raised, and the general argument is that the plaintiff steps in the shoes of his or her predecessor. If the predecessor were owed $5000, the current plaintiff would be owed the same amount. If the predecessor did not get all of the $5000, the damages are what is still owed. The reality of Mr. Brault’s question is that the debts are settled frequently. Mr. Maloney commented that he had a case involving a debt of $800,000 that the circuit court for Prince George’s County reduced to $400,000, because his client had written off $400,000 of it as uncollectible. The Court of Special Appeals affirmed this

decision. The holding was that one cannot get the benefit of a tax write-off. Mr. Whiteman pointed out that if the client had been a credit card company, and it had charged the debt off, written it off as a total loss, and sold the debt, the company should not get the money. The Chair cautioned that this is a matter of substantive law, not procedure.

Mr. Weber questioned whether the proposed Rule change extends beyond the original intended scope that was listed in Mr. Lawrie's letter. For example, someone buys a car and finances it through the dealer. The contract is with the dealer, but the financing is provided by some other lender. The contract is with the original creditor. At the time of sale, or later, the loan is assigned to another party. The contract itself refers to someone who is not the party who is now at interest.

The Chair remarked that he was not sure what the problem was. The plaintiff ultimately is the person who got the assignment from the original creditor. The plaintiff should have all of the documentation available. Mr. Weber said that in these instances, though, there are provisions of the affidavit rule that do not apply. The Chair inquired why they would not apply. Mr. Weber answered that it was because the debt collection license does not apply. The Chair noted that this is not necessarily true; the plaintiff may or may not be required to be licensed.

Mr. Weber commented that his understanding was that the intent is for the Rules changes to be applicable to consumer debt

buyers. He expressed the opinion that the reach has gone far beyond the consumer debt buyers, and it is going to reach into every facet of finance that goes on in the State of Maryland. If this is the intent, then he said that he would withdraw his comment, but he did not believe that this was the intent. He asked that the language be amended, since it had been already amended with respect to the CCU.

Mr. Lawrie told the Committee that the drafters of the changes to Rule 3-306 intended for the Rule to apply to situations other than just debt buyers. There are instances where companies have prearranged contracts where they set up and assign loans out of State. The loan is funded, and the companies buy it and then collect on it. The Rule was intended to apply to this kind of situation. It is not only for bad debt buyers. Mr. Weber inquired if the intent was to apply to assignees in sales finance, such as financing autos or furniture. The Reporter responded that when the Subcommittee was drafting the Rules, the Subcommittee was careful to also consider the situation of individuals such as a plumber who sells his delinquent accounts to someone else. That situation, which is much less sophisticated than an assignment to Ford Motor Credit, was blended into this.

Mr. Weber said that he recognized that the issue is usually the credit card or other toxic debt that has been charged off and assigned once or twice or more. There are certain questions regarding those accounts which Mr. Weber understood to be part of

the discussion. He was more concerned about his clients who are not buying bad debt. They are financing the ability to buy consumer goods. They are the finance companies that allow people to go buy furniture or to go to any car dealership in the State to purchase a car, with the premise being that the contract is with the original dealer.

The Chair questioned what was onerous about the Rule. Someone has purchased a contract, a debt, from the party who sold the goods. Mr. Weber agreed, noting that that party has essentially funded the deal. The Chair responded that he understood that it is not a bad debt; it is a perfectly good debt. The Chair pointed out that the car dealer would have provided all of the documentation to the assignee. Mr. Weber acknowledged that this may be the case.

Mr. Weber explained that his question was one of clarification. The Chair noted that both under Alternative A and B, if the claim arises from a consumer debt, which it could if someone is selling a car, and the plaintiff is not the original creditor, then the Rule would apply. Mr. Weber said that he was trying to ascertain whether the intent was the opposite of the one expressed by the Attorney General to include these other entities in the same way that the CCU had been included. The Chair responded that it may not have been the intent of the Attorney General, but it has gone beyond that now. The issue is when someone who has no contract with the debtor is suing on an obligation that he or she purchased, the person would have to

prove his or her right to do this, who the debtor is, and what the balance is.

Mr. Weber remarked that if it is an arms' length transaction handled at the time of the sale or shortly thereafter, outside of the actual purchase transaction, any payments or dealings with respect to the servicing of the account would never have been with the original dealer and would only have been with the subsequent assignee or the finance company. This is where Mr. Weber's question arises from.

The Chair commented that when the car buyer takes the car out of the dealership, who does the car buyer owe? Mr. Weber replied that based on the contract, it would be the original dealer. At the time of sale or within hours of the sale, the dealer then assigns the contract to Ford Motor Credit or a similar entity. The Chair noted that Ford Motor Credit is not the original creditor.

Mr. Weber reiterated that he was asking if the intent was that the Rule would apply to this situation, and he was not clear as to whether it would apply. Judge Love observed that the answer is that it would not apply specifically, but it appears that someone in that situation would have to comply with this Rule. This is the way that he reads the Rule. The Chair expressed the view that the proposed Rule is clear. Mr. Weber cannot propose an amendment to or a deletion of the Rule, but someone on the Committee can do so. The Chair added that he was not sure what the problem was in complying with the Rule. Some

people were complaining that all of these documents may not be available, because the debt was charged off some time ago, etc. In Mr. Weber's situation, the plaintiff should have all of the documentation.

Ms. Hackworth told the Committee that she is house counsel for Portfolio Recovery, which is a debt purchaser doing a large amount of work in Maryland. She said that she had a concern about what the time line on this is. It was her understanding that Montgomery County had just decided this week that they would not grant affidavit judgments without a charge-off statement. Her company has always given the charge-off. The Chair commented that asking about the time line is a fair question. One of the problems that the Rule is trying to address is to create some uniformity in the State. Judges are taking different actions even within the same court. The time line is this: at some point the Committee is either going to approve the Rule or not, or it will propose an amendment to the Rule. The Rule will then be sent to the Court of Appeals in a report. That report will be on the Judiciary website with at least a 30-day comment period, and anyone can make comments. The Court will then hold an open hearing on the proposal. Anyone can attend and give their comments to the Court. If the Court adopts the Rule, the accompanying rules order will state when the Rule goes into effect. Unless there is an emergency, normally, rules of the Court of Appeals take effect either the succeeding July 1 or

January 1, whichever is closer. Sometimes, the Court will pick a later date, simply to give more notice.

The Chair asked if anyone else had a comment on Rule 3-306. The Rule came out of the Subcommittee, so it would require a motion to disapprove. There being no motion, Rule 3-306 was approved as amended.

Judge Norton began the discussion of Rule 3-308, Demand for Proof.

Judge Norton explained that the proof requirements in a consumer debt case are an exception to the general rule that certain issues, such as the capacity to sue, are deemed admitted unless raised by the defendant. The Committee note highlights this distinction. There being no comment on Rule 3-308, the Rule was approved as presented.

Judge Norton began the discussion of Rule 3-509, Trial Upon Default.

Judge Norton told the Committee that Judge Stone had proposed an alternative draft of Rule 3-509 and directed the Committee's attention to that version. Judge Stone's version reads as follows:

> Rule 3-509. TRIAL UPON DEFAULT
>
> (a) Requirements of Proof
>
> When a motion for judgment on affidavit has not been filed by the plaintiff, or has been denied by the court, and the defendant has failed to appear in court at the time set for trial:

> (1) if the defendant did not file a timely notice of intention to defend, the plaintiff shall not be required to prove the liability of the defendant, but shall be required to prove damages. For claims arising from consumer debt, as defined in Rule 3-306 (a)(3), where the plaintiff is not the original creditor, the court may require proof of liability, shall consider the requirements set forth in Rule 3-306 (d), and may consider other competent evidence as well;
>
> (2) if the defendant filed a timely notice of intention to defend, the plaintiff shall be required to introduce prima facie evidence of the defendant's liability and to prove damages. For claims arising from consumer debt, as fined in Rule 3-306 (a)(3), where the plaintiff is not the original creditor, the court shall consider the requirements set forth in Rule 3-306 (d), but may consider other competent evidence as well.

Judge Norton explained that what Rule 3-509 contemplates is a trial upon default in two circumstances. One is if a motion for a judgment on affidavit had not been filed. The complaint is not under affidavit, and the defendant has filed no defense. The second circumstance is if the complaint was filed under affidavit, and the court decides that it is not sufficient for the court to grant a judgment on affidavit and sets the case in for trial. At this point, if the defendant fails to appear, there will not be a full trial. Pursuant to Rule 3-509, there is a trial upon default.

That is the setting that the amendment addresses. The plaintiff is in court, no defendant is in the courtroom, and a judgment by default is granted. Under the first scenario, the

defendant did not file a timely notice of intention to defend. What should occur? Under the second one, the defendant did file a notice of intention to defend. What should occur? The basic rule that has existed for many years is that if the defendant did not file a notice of intention to defend, the plaintiff is not required to prove the liability of the defendant but is required to prove damages. Where the defendant filed a notice of intention to defend, the plaintiff has to introduce prima facie evidence of liability and damages. This was the Rule as it existed before the proposed amendment.

Judge Norton said that the Subcommittee proposed an exception for claims arising from consumer debt as defined in Rule 3-306 (a)(3) where the plaintiff is not the original creditor. If the defendant had not filed a notice of intention to defend, the court may require proof of liability and shall consider requirements set forth in Rule 3-306 (d), and the court may consider other competent evidence. Under subsection (a)(2), where the plaintiff has to provide evidence of the defendant's liability and where the plaintiff is not the original creditor, the court shall consider the requirements set forth in Rule 3-306 (d), but may consider other competent evidence as well.

Judge Norton explained that the two changes are that the court shall consider requirements set forth in Rule 3-306 in both instances, and the court may consider other competent evidence, as it always may. The biggest change is that the court has the discretion to require proof of liability in the circumstance

where the defendant did not file a notice of intention to defend. The reason for the change with respect to whether the court should ascertain liability is that there could be many defects in or problems with the case that may have given rise to why the court denied the judgment for affidavit to begin with. The case may have been lacking certain evidence, so the court refuses to grant a judgment by affidavit. Then the plaintiff comes to court, and there is still no defendant, but suddenly, liability is not an issue because the case is under the trial by default rule. The very reason that judgment on affidavit was denied is unreliability at the affidavit stage, and that unreliability could include unreliability as to the issue of the defendant's liability; suddenly, liability has to be assumed at the trial upon default stage. The Rule change allows a judge, who felt that a problem with liability exists and therefore denied judgment on affidavit, to consider the liability issue at the trial upon default. The judge would not be required to ignore this concern at the second stage of the proceeding.

Ms. Potter questioned the addition of language concerning consideration of other competent evidence, because the court can always consider competent evidence. Judge Stone noted that the revised version of Rule 3-509 states that the plaintiff must comply with all of the requirements of Rule 3-306. In a trial posture, even trial upon default, if the plaintiff comes to court with something not on the Rule 3-306 checklist, but something that would otherwise satisfy the judge, the judge would have to

say that he or she could not consider it, even though it is competent evidence, because the Rule provides that the judge has to go strictly by Rule 3-306. The purpose of the "other competent evidence" language was to allow for that scenario, and make the Rule clear that the evidence could be considered.

Mr. Sykes inquired if Rule 3-306 must be complied with. The Chair answered that the court has to consider the requirements of Rule 3-306 but, if something is missing, can address it in other ways. Mr. Sykes commented that the language of the Rule could be: "...the court shall consider all the evidence, including the factors set forth in Rule 3-306 (d). The word "factors" is better than the word "evidence." The Chair responded that the Style Subcommittee can discuss this. The intent of the Rule is clear.

By consensus, the Committee approved Judge Stone's version of Rule 3-509 as presented.

The Chair said that the agenda had been completed, except for the ADR Rules. He thanked everyone who took the time to come to the meeting and participate, particularly those people who had volunteered to work with the Subcommittee on drafting. The Judgment on Affidavit Rules had involved a very complex issue, and the Committee was grateful, because the Rules were a better product than before. They had addressed most of the concerns that had been expressed by people on all sides.

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