COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 & 6 of the Judiciary Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland on November 13, 2009.

Members present:

Hon. Alan M. Wilner, Chair

F. Vernon Boozer, Esq.
Lowell R. Bowen, Esq.
Hon. Ellen L. Hollander
Harry S. Johnson, Esq.
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Hon. Thomas J. Love
Zakia Mahasa, Esq.
Timothy F. Maloney, Esq.
Robert R. Michael, Esq.
Hon. John L. Norton, III
Scott G. Patterson, Esq.
Debbie L. Potter, Esq.
Kathy P. Smith, Clerk
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Amy Womaski, Mediator
Paul C. Berman, Ph.D.
Hon. Ann Sundt
Hon. Deborah Sweet Eyler
Rose Naughton
Andrew Ginder, A.O.C., Court Research and Development
Bradley A. Kukuk, Esq., Maryland Family Law News
Suzanne Delaney, Deputy Director, Government Relations
Jennifer Prout, Commissioner, District Court of Maryland
Hon. Ben C. Clyburn, Chief Judge, District Court of Maryland
Joseph Wheeler, Esq.
Diane Pawlowicz, Executive Director, Court Research & Development
Kelley O'Connor
Roslyn Zinner
David K. Hayes, Esq., Office of the Attorney General
Connie Kratovil-Lavelle, Esq., Executive Director, Family Administration
Rachel Wohl, Esq., Executive Director, Mediation Conflict Resolution Office
Charlotte K. Cathell, Register of Wills for Worcester County

The Chair convened the meeting. He announced that he was sorry he had to report two unfortunate events. One was that Anne Ogletree, a member of the Committee, had broken her leg and was currently in the hospital. The other was the death of Alexander Jones ("Sandy"), who was a member of the Committee from 1969 to 1988. He was a marvelous person with a small practice in Somerset County, a country lawyer who had seen it all and was very knowledgeable. He had moved to Chestertown, very close to Washington College. He has been missed from the Rules Committee for a long time.

The Chair said that he had an information item to tell the Committee. He had received an e-mail from the Office of the Secretary of State, which is in charge of publishing the Maryland Register, stating that they have decided not to publish it any more. Beginning in January, they will stop the publication of the hard print version of it and will only have an on-line service to which one can subscribe to for a fee. The State librarian, Steven Anderson, sent out a message alerting everyone to this. What are the implications of this? Official notices are put into The Maryland Register, including notices of meetings (as required by the meetings law, Code, State Government Article, §10-506). It is where proposed regulations and proposed rules have to be published. The present proposal allows libraries computer access to the last six publications of the Register, but not beyond that. However, it is in a PDF form. Mr. Anderson was quite upset about this, and there will no doubt be some comment

about it. According to Mr. Anderson's e-mail, this is not a proposal that is going to be published anywhere, and no hearings will be held. It will just happen with an effective date of January 4, 2010. The Chair was not certain if this change is taking place due to the budget crisis. It will have some implications. He wanted to alert the Rules Committee. Some people are looking for a response to this from the Judiciary. After January, if anyone wants to find a proposed rule or regulation, or find out when some agency is meeting, it will be difficult.

Agenda Item 1. Case Management System Presentation by the Chief Judge of the District Court of Maryland

The Chair said that Agenda Item 1 is a presentation by the Honorable Ben C. Clyburn, Chief Judge of the District Court, on a case management system that is being proposed. Judge Clyburn told the Committee that he wanted to inform the Committee as to the direction of the Judiciary. What is being proposed is a new communication tool. He said that the Rules Committee members present would probably agree that information is the currency of the system. They would also agree that the Judiciary is the primary source of much of that information. It is important that this information be accurate, complete, and timely. What is being presented early in the process is how a new environment is about to be created which will allow the capture of realtime data and the transfer of that data in realtime.

Judge Clyburn asked the Committee to consider some of the large civil cases that an attorney such as Mr. Johnson has handled, how they start and how they proceed all of the way to the Court of Appeals. Judge Clyburn was recently at an Information Technology conference in Denver. Maryland is one of the states setting up a case management system. A recent study showed that a large civil claim starting at the trial court and going all the way up through the appellate process requires three trees to provide the paper that is used in that process. Currently, the clerks' offices, some judges' chambers, and other offices have piles of paper. The process is slow, inefficient, and driven by paper. Today, the new case management system will be introduced. It is a new communication tool that will allow the courts to go from a paper-driven system to an electronic system that will include paper on demand, for anyone who is nervous about a system with no paper. The concern just expressed about the cessation of publication of The Maryland Register will not be a concern with the new system, because paper will be available.

Judge Clyburn reiterated that the system will allow the capture of realtime data in the courtroom, and it will be able to be transferred to the realtime of the justice partners. For the first time, the four levels of courts are going to be integrated and will be able to communicate. It will not be a situation where a District Court Judge in a domestic violence case orders in the morning that the abuser as a condition of probation stay

away from the victim, and that abuser then goes to circuit court and gets a protective order expelling the victim from the house. While the decision is being made in the criminal case, the system will allow the District Court judge to be able to find out what is going on in that protective order case in the circuit court. The system allows the integration of the four levels of court.

Judge Clyburn said that he wanted to give the Committee an overview of where the Judiciary is with regard to the new system. They have been working on the system for about two years. It is at a critical point, and the input of the Rules Committee is necessary. They need to start thinking about this, because to implement the system, it may require the promulgation of new rules and new statutes. Judge Clyburn added that he wanted to share a proposed vision of how this will look and then update the Committee on where the system is headed.

Judge Clyburn introduced Joseph Wheeler, who is the project manager for MTG Consultants, the expert agency who is working with the Judiciary on the new system. MTG has been involved in the successful implementation of similar systems in other states. Judge Clyburn also introduced Kelley O'Connor, Susan Delaney, and Jennifer Prout from the Administrative Office of the Courts, who are working on a communication plan and on dealing with the legislature. The over-arcing goal for this project is public safety. When there is realtime data and the judge issues a warrant, instead of that warrant sitting on the desk of a clerk until the police can get that warrant and enter it into the

system, the new system will allow for the transfer of that warrant as soon as the judge issues it. In the courtroom, the court will enter that data, which will then go to the sheriff's office and to the Department of Public Safety, so there will not be the lag time during which someone could be killed. This situation happened several years ago. A warrant was found on a clerk's desk that was never issued, and a victim of domestic violence died as a result of this.

Judge Clyburn noted that the other goal of the new system is the fair and efficient administration of justice. It will also increase access to justice, because the public and the bar will be able to access by way of case search realtime data. For the past several years, the Judicial Information System (JIS) has engaged in a strategy to replace the Judiciary's technological infrastructure. Over the past couple of years with the help of the legislature, about 11 million dollars has been spent on getting this new infrastructure ready to allow the Judiciary to move from its current obsolete Legacy system to a new Oracle database. This will allow the Judiciary to either purchase from a commercial vendor a case management system off the shelf, or an expert developer can develop a case management system. The question may arise as to why this is being worked on now when the economy is so slow. The Judiciary is spending this money, because it is at risk. The current Legacy case management system is totally obsolete. In terms of functionality, it does not meet the needs of the Judiciary, and in terms of continued maintenance

on the Legacy system, because it is obsolete, the Judiciary is not going to be able to maintain it. They had taken a look at whether the Legacy system could be changed to fit the needs of the Judiciary, and it could not be changed.

Judge Clyburn continued that the new infrastructure is in place, and the Judiciary is ready to make a decision as to whether a new system should be purchased, built, or developed by an outside developer. Before this substantial amount of money is spent, the Judiciary had decided to engage MTG Technologies, which is an expert in this area. This company has worked with several other states to help with their successful implementation of case management, e-filing, and document management systems, so they have the expertise. The first action that must be taken is answer the questions: "Are we ready? Is JIS ready?" The answer is that they are not ready.

Judge Clyburn said that MTG looked at JIS from the perspective of management, technology, direction, and the answer was that JIS is not ready. For the past year, there have been internal changes at JIS to get ready for this process. Some new control boards have been established, and a strategic release plan has been implemented. JIS is now time-tracking all of the Judiciary activities to get ready to move from the Legacy system to the new Oracle database and the new case management system. Those involved in the process took a look at the technology in terms of the new infrastructure that was put together and found that it was the correct technology to take them in the correct

direction. They also took a look at the court processes. This is where business meets technology. The Administrative Office of the Courts (AOC) has created a new Court Business Office.

Judge Clyburn demonstrated a sheet outlining a business process for juveniles at the circuit court. It diagrams the flow of all work activity as matters in the court are processed. This has been done for every function in all four levels of court. The new Business Office is going to look at those processes to see if there is any inconsistency. It is already known that there is inconsistency within the circuit courts. An analysis will be done to try to come up with the most consistent and efficient process. The Business Office is going to look at the business processes and see what work flows and what new processes need to be adjusted, so that the realtime data can be captured. This will allow the court functions to be changed. They have also looked at the industry and the direction it is taking.

Judge Clyburn explained that the Honorable Robert M. Bell, Chief Judge of the Court of Appeals, has also put together an Advisory Committee, and he asked Judge Clyburn to chair the Committee. Judge Clyburn said that he has no expertise in this area, so the process can be reduced to the simplest form. However, the core experts of the courts are part of the Committee, with experts from every discipline of the Judiciary, including the clerks' office, court administration, District Court, District and circuit court judges, and appellate administrators, all of whom are experts in their respective

areas. The Committee has been charged with the responsibility of delivering in the next three to six years a state-of-the-art case management system. In the packet of information that was given out, there was a project charter and a communication plan. The charter is the most important document in any project, because it sets the scope of the project. He suggested that the Committee look over the charter carefully to see what it includes and excludes.

Judge Clyburn commented that jury management is a separate project as is the Department of Human Resources. States that have been unsuccessful in this enterprise have failed due to lack of discipline in the scope of the project. The materials also include a very detailed communication plan. The intention is to communicate through every possible channel to get the message out, so that the organization understands what is going on and also gets involved in what is going on. Regarding the Business Office, the biggest challenge of this project is going to be change. The new program will change the way the Judiciary conducts business. For this to succeed, this change will have to be managed. The Business Office is going to be key to the communication plan. It will be key to the training, the implementation, and most importantly the coordination of all of the people in the Judiciary. The goal is to have everyone involved in the change to the work flow in the business process.

Judge Clyburn said that there are three parts to the strategic plan: implementation, interoperability, and staffing.

How many people does it take to accomplish this endeavor? In Minnesota, which has been very successful in implementing a new plan, it took 40 to 60 individuals to get their plan into action. The staffing plan will be very important. It is also important to realize that in these difficult economic times, there will be no new vendors. The Judiciary will have to retain the vendors it already uses and retrain them as to the new system. As a result of efforts over the past year and a half, the Judiciary has developed a vision of how the new system will look. The Rules Committee will be key to making the vision work. It will be a paper-on-demand system which will allow individuals who may not have the technology to continue to file the paper. The clerk can review the paper which will then be recycled, and the document will go into an electronic file in the case management system. Data, scheduling orders, and any information decided in the courtroom or in the clerk's office will be electronically transferred to the various justice partners. If someone would like to e-file, the person can do so, and this is where the procedures in the clerk's office will change. The clerk will no longer take the piece of paper and put it into the file. Instead, the clerk will do a court review function to see whether the electronic filing satisfies the filing review. Once it satisfies the review, the clerk will send the document into the electronic file.

Judge Clyburn continued that the decisions of the clerks, judges, and commissioners will go into the electronic file and

then out to the justice partners. The Judiciary is currently working out an interoperability agreement with the Department of Public Safety and law enforcement. As a condition to continued funding, a system has to be set up, so that these justice partners will be able to accept this information electronically. The Department of Public Safety is a couple of years ahead of the Judiciary and is completing the implementation of its case management system. It will be able to accept that data electronically. When the data is in an electronic file, through Case Search, individuals will be able to access the information electronically, and it will be realtime data.

The challenge for the Rules Committee will be what happens when information is confidential or should be redacted from the electronic record, because the information is not able to be seen. The judges who still would like to have a piece of paper in front of them, so that they can read the brief or memorandum, will be able to get paper on demand. The stacks of papers will be in the judges' chambers and not in the clerks' offices nor the courtroom. There will be instances where a piece of paper will be needed. For example, an individual who gets a domestic violence protective order has to have that piece of paper, so that the person can show the order to a police officer if someone has approached the victim. The importance of paper is recognized, but the difference with the new system is that it is not set up to provide for the routine production of paper.

Judge Clyburn stated that he would talk about assumptions.

A basic assumption is that there are no paper files. The new court case record will be electronic, and this is what the Rules Committee has to look at. When e-citation was established in District Court, it was necessary to go to the House Judiciary Committee to get the legislative authority for filing a citation electronically. The legislature gave the authority so that the judges no longer have stacks of citations; instead, the citations go on the computer screen, or the police officer has a computer and is able to see the citation. The new system will be 100% electronic with paper on demand. From day one forward, all new cases will be electronic. Any inactive cases that are reopened will be scanned in and taken to completion in electronic form.

Judge Clyburn asked if technology is available that is flexible enough to allow for differentiated case management. The answer is "yes." This means that smaller jurisdictions process cases differently than the larger jurisdictions. The new system will be flexible enough to take into account that difference. The goal is consistency and efficiency. Differentiated cases will be in the system. Fees will be collected electronically and manually. Currently at the District Court, about $350,000 is collected monthly electronically. It is not necessary to pay fees at the courthouse. One can go on the internet and pay by credit card. Depending on the fee schedule decided upon by the Technology Oversight Board, the Rules Committee, and the legislature, the fees will be able to be collected electronically.

Judge Clyburn said that a question that often arises is "What if the computer goes down?" The system will have enough capacity and continuity, so that if it goes down, there will be sufficient backup to continue. The big benefit is the elimination of the paper file. There will also be some savings in cost related to the receiving, storing, retrieving, copying, and mailing of the paper file. Once the interoperability agreement is worked out with the justice partners, the interoperability will be greatly enhanced. Clerks will no longer have to run around to find files. Judges will no longer have to wonder what is going on in another court. Everything will be on one screen.

Judge Clyburn remarked that when representatives of the Judiciary went out to Colorado, they saw how flexible these systems are. The systems are flexible enough that judges can handle two or three matters at one time. The system will also minimize redundant data entry. Currently, a criminal case is entered by the commissioner or by the clerk of the District Court. If the case goes to the circuit court, that court makes another entry. If it goes to the Court of Special Appeals, there is another entry, and one as well if the case goes up to the Court of Appeals. In the new system, once the information is entered, there will no longer be redundant entries.

Judge Clyburn said that one of the purposes of the presentation was to get the Committee to start thinking about some of the future policy considerations. One of the key

decisions that will have to be made is the e-filing model. Right now, the landlord-tenant and the asbestos cases are using the single vendor model. A decision has to be made as to whether to use the multiple vendor model and as to what is mandatory versus optional. The Technology Oversight Board is leaning towards the system being discretionary, unlike the federal court which made the system mandatory. All of the e-filing in federal court is mandatory. In those states and courts around the nation where e-filing is offered, the participation rate is up to about 50%. This will continue to go up. Later on, some of these dockets may be made mandatory. It makes sense that bulk filings for asbestos litigation and for landlord-tenant cases would be made electronically.

Judge Clyburn said that the issue of electronic signatures needs to be considered. Another issue is the transfer of electronic orders. Does law enforcement have to type out a copy of the order, or can they take action based on that data? Eventually, the receipt of reciprocal data is being sought from the law enforcement partners. An example is that if a writ of restitution is being issued to the sheriff in a landlord-tenant case, the sheriff should be able to electronically notify the court that service has been effected. If there is e-filing, and all of the attorneys in the case have been certified for e-filing, then when papers are served on each other, the court gets electronic notice of service. The entire system will eventually use electronic exchange of information.

Judge Clyburn noted that one of the goals of the system is a rollout, and currently, the Judiciary is looking at criminal cases, because there are not as many justice partners up front. Using a small and medium circuit court and District court, the system would be rolled out for 30 days, and the system would be tested and the problems fixed; then the system would be used statewide. Some states have done their docket roll-outs at the appellate level. Oregon has completed electronic filing for both levels of appellate court. Judge Clyburn's hope is that roll-outs can be done in District Court, circuit court, and possibly appellate court. Policy development has to coincide with technology.

Judge Clyburn stated that one of the objectives of e-filing is to enable electronic records to improve access to justice, streamline case processing, provide better service, and maintain management control over procedures. The scope is to provide for e-filing in all courts, except for the Orphans' Court. Eventually, all case types will be in an electronic format. Two decisions have to be made pertaining to e-filing. First, it is necessary to obtain an electronic filing service, and then an electronic filing manager. The advisory group has received preliminary recommendations from the experts as to electronic filing and the filing manager. Those recommendations will be taken to the Technology Oversight Board, who will make the decision as to the service provider and the service manager.

Judge Clyburn commented that in terms of service, there can

be several providers, including a public option. Some states have adopted the multi-vendor option. For the manager, it will be someone from the Judiciary. The Rules Committee will have to take a look at the issue of the electronic record. Is any statutory action needed to implement this? If so, the statutory change would be made in the 2011 session.

Judge Clyburn noted that the e-filing option of using a single vendor raises many issues. Lexis-Nexis is currently the single vendor for asbestos and for landlord-tenant litigation. When only one vendor is used, and that vendor has all of that court information on its servers, who controls? With one vendor, many proprietary issues come up. Does that vendor have some sort of advantage in terms of access to that information? In the information packet, there is a survey that has been done throughout the country as to where the different states are relative to e-filing. Colorado has successfully implemented e-filing statewide with a single vendor. They are trying to change vendors, but their vendor has managed to lobby the legislature to prevent Colorado from using someone internally. Lexis-Nexis is fighting with the experts in terms of their Administrative Office of the Courts. There is a lack of control over the information.

Judge Clyburn inquired as to where there is control over future fixes or enhancements with a single vendor? The answer is negative, because any future enhancements to the system will be decided based on the profit modem. A problem is presented in terms of fees. A single vendor’s system is going to be more

expensive, because that vendor will want to turn a profit. If it is posted internally, there may be only a convenience fee or a fee to recover some of the costs as opposed to paying a vendor. There is also an excess of down time when the state is dealing with a vendor. A problem arose with Lexis-Nexis in Prince George's County. No decision has been made yet, but probably there will not be a single vendor in Maryland. Instead, there will likely be an internal option posted by JIS with the opportunity for multiple vendors. This means that if law firms want more capability, they can contract with a vendor as long as the vendor meets the standards of the Judiciary for information exchange.

Judge Clyburn summarized that considerations include whether the new system is mandatory versus discretionary, the definition of filing, what constitutes court acceptance, and fee schedules. The legislature will want to know how the system will be paid for. When Oregon put their system together, they charged a fee for access and used it to pay for e-filing. Within that fee, they have a cost recovery. Currently, Maryland does not charge that fee. A fee schedule will be designed that will charge a convenience fee for e-filing. This means that an attorney who wants to file a document at 2 a.m. should pay for that convenience.

Judge Clyburn added that another consideration is service. What constitutes service? The sheriffs will continue to serve process. Initial service will probably remain the same, but

subsequent service of discovery and motions will be electronic. Events, orders, and dispositions require electronic signatures. They are moving towards reciprocal data. Access issues need to be considered, although it is not a major problem, because the data will be realtime, and software exists that allows for redaction of confidential information. When members of the bar submit a document from which certain information needs to be redacted, will they be required to submit two copies? Will they have to submit an electronic redacted version? Confidentiality is an issue for e-records. The advisory group met with the federal court; the federal AOC; the Honorable J. Frederick Motz, who is a U.S. District Court Judge for the District of Maryland; and the AOC of the local U.S. District Court. The federal personnel as well as many states have addressed similar issues facing Maryland. With the help of MTG, the Judiciary will be able to answer questions that people may have as to how other jurisdictions have handled certain issues.

Judge Clyburn said that the next step in this process is to finalize the strategic plan. To accomplish this a vendor fair will be held. The week of January 12, 2010. Commercial vendors and developers will be present who will demonstrate their systems. After the vendor fair, procurement will be started. The legislature gave the Judiciary $4 million to purchase some of the foundational components. Once the e-filing model is finalized, the fee structure will be reviewed. The business processes will be defined and changed, then the draft

requirements attached to the requests for proposal will be finalized. The hope is that either the commercial developer or the off-the-shelf vendor will be in place under contract by next July. Also, it is hoped that the contract for the initial foundational component will be in place by mid-January or February. A briefing will take place before the House Appropriations Committee very soon. They also hope to meet with the Senate Appropriations Committee, because over the next four or five years, they will be requesting between $8 million and $12 million to institute the new system. They have spent about $11 million so far to put the infrastructure together.

The Chair asked what the Rules Committee is being requested to do before December 30, 2009. Judge Clyburn answered that they are looking for a response to what the Committee has seen so far. Once the implementation schedule and the models are set up, the Rules Committee will be asked to focus on what rule changes need to be made. The question about receiving statutory authority from the 2011 legislature will have to be answered. The authority would be to impose the fees and to make the court record itself electronic. The Chair commented that as a practical matter, in terms of timelines, the Committee needs to know what it should be doing. When would be the time frame for when Judge Clyburn and the advisory group needs a response? When would the Court of Appeals need to act? Some of the issues raised are going to take some time to flesh out.

Judge Clyburn responded that this is why he was making this

presentation at an early stage. The Court will probably have two to three years to flesh out the issues. The Chair remarked that this would need to be started fairly soon. Judge Clyburn said that his group will be able to guide the Committee through the issues. The federal AOC gave them an outline as to what they had to do to change their rules. MTG can inform them as to what the other states have done.

Judge Hollander asked why the Orphans' Courts are not part of the new system. Judge Clyburn replied that he did not know, but this is something that can be considered. In the future, e-filings could be allowed in the Orphans' Court. Mr. Klein noted that as a long-time consumer of the asbestos Legacy system of Lexis-Nexis, he was pleased to hear that the system will not be a single-vendor model, because it is an expensive operation. He asked how exhibits would be handled under the new system. Will they be paper-marked and then scanned into the system? Will the system have the ability to handle exhibits that are in color? Judge Clyburn answered affirmatively. Mr. Klein asked about documents that need to be filed under seal or for in camera inspection. Judge Clyburn replied that the system will be able to handle those.

Mr. Klein inquired as to whether there are members of the practicing civil and criminal bars on the advisory committee. Judge Clyburn answered that the committee is internal. Next Tuesday night, he will meet with the Board of Governors from the Maryland State Bar Association (MSBA). Hopefully, the MSBA will

set up a committee that will track the progress of this endeavor and be the liaison with the bar. Mr. Klein suggested that this Committee should include people who are under the current e-filing system, such as those involved in asbestos litigation. Judge Clyburn agreed, commenting that it is important to hear the experience of those individuals. Ms. Diane Pawlowicz, who is the Director of the research and development group and is present today, is in the process of doing a study in Prince George's County. She is going to talk to the attorneys and the users of the system, including the landlords, to get information on their experience.

Mr. Klein suggested that some representative of the press should be involved. Judge Clyburn responded that yesterday he had spoken with Robert Levine, who represents court news services. He will be at the meeting with the MSBA on Tuesday night. There will be a wide span for the communication plan. They are putting together brochures and are planning to develop a website, so that there is a continued flow of information as the project proceeds. A huge number of stakeholders will be impacted by this. The advisory group has been working very closely with the executive branch of the government, the new Information Technology Secretary, the State's Attorneys' Association, the State's Attorneys' technology group, and the Office of the Public Defender. The goal is that everyone will be able to access the new system.

Mr. Sykes commented that he had some questions regarding

terminology. What is the Legacy system, why is it named that, and why is it too brittle to retrofit? Mr. Wheeler responded that to carry forward the Legacy system, it would require many changes, both technologically and operationally. Mr. Sykes asked what the Legacy system is composed of. Mr. Wheeler answered that the Legacy system includes the pilot paper. The UCS, the case management system used in circuit courts, depends on paper files. Mr. Klein inquired as to whether the Legacy system includes the current electronic asbestos docket. Mr. Wheeler replied affirmatively.

Mr. Sykes asked again why the system is brittle and cannot be retrofitted. Mr. Wheeler answered that there are aspects of the way the system was developed and the documentation that is available that keep it from being changed or modified. In addition, the technologies that were employed when the system was built are no longer compatible with new machines that are being built today. As the system gets larger and more cases get filed with more files on record, the new machines needed to store that information no longer use the software that was originally designed for it. The Chair pointed out that this could happen to the proposed new system as well. Mr. Wheeler acknowledged that it could. He added that this was part of the reason that such an investment was made in the architecture and infrastructure. The planners took a long, hard look at how this works and tried to develop it with “open standards” that tend to be maintained in perpetuity.

Master Mahasa inquired as to whether the current case management systems will be subsumed in the new system. Judge Clyburn responded that they will be replaced. Everything will be one system. All of the current different systems in the various counties will become one system. This makes sense in terms of where technology is now. Society demands that this be done. There is no good reason not to take advantage of this. Mr. Johnson asked to what extent local jurisdictions have been advised of the proposed new system, because outside of costs to the State, there will be costs to the local jurisdictions. If they have not been advised, how will they be incorporated into the discussion? Judge Clyburn replied that the three key jurisdictions that will be impacted most will be Montgomery and Prince George's Counties and Baltimore City. They have representatives, court administrators, and clerks on the advisory group. Cost-sharing will be an issue that is going to have to be worked through. Much of the cost is going to be assumed by the State, because it is going to be a State system. Mr. Johnson inquired as to whether "stimulus" money can be applied for, because this is a justice system. Judge Clyburn answered that they will explore this. They had discussed with federal officials homeland security money, because there is a security aspect to this.

Mr. Wheeler referred to Mr. Klein's questions about exhibits. Mr. Wheeler said that the common practice around the country is that exhibits that normally measure 8½ inches by 11

inches would be maintained as a document in an electronic case management system. Accommodations are made for oversized or special exhibits. Special provisions can be made for issues concerning control of evidence. Maryland will not be the first jurisdiction to go through this. There have been satisfactory solutions elsewhere. Mr. Klein noted that he had asked if the new system will allow the filing of color images. At times, a party has to file something seen only by the judge, so it would need to be protected from access by anyone else. Mr. Wheeler responded that part of the provisions employed by other jurisdictions will allow role-based control of access to maintain privilege management in a structured manner.

The Chair questioned as to whether the local police departments are part of the justice partners. Judge Clyburn responded that as the local agencies are briefed, they will have to make decisions as to what they will accept. This relates to the issue of who will assume the cost. Some of it may have to be picked up by the local agencies. The Chair commented that in an ordinary criminal case, some of the exhibits are returned to the prosecutor or the police department. Will their retrieval system be compatible with the judicial system? Judge Clyburn responded that this will be discussed with the justice partners. This will be part of the interoperability agreement being worked on now. It is very detailed, and it is being worked on with the Department of Public Safety and with law enforcement.

Master Mahasa inquired as to what the target date is for the

new system to go into effect. Judge Clyburn said that his group has been working on this for about two years, and they are expecting that it will take three to six years for the system to go into effect. It took six years for the new system to go into effect in Minnesota, which had bought the new system off the shelf. Ms. Potter referred to the statement that the Committee needed to do something by December 30. Judge Clyburn answered that all he expected of the Committee was for them to make any comments. The only purpose of today's presentation was to brief the Committee and get them thinking about the proposed system. As the system is refined, the Committee will get more specific information. Much of the refinement will happen when the procurement is done. It will be a "best solutions" procurement. The Judiciary's requirements will be disseminated to the industry, so that they can inform the Judiciary the best way to meet its needs. It is similar to a competitive negotiation. When they find out exactly how the system will look, it will be presented to the Committee so that they can make the necessary policy decisions. The Committee will be briefed at least two more times.

The Chair remarked that the Committee will need more than just briefings. They will need to know well in advance what they need to do. The MSBA will have an opinion as to what should go into the Rules. The Committee will need to work out a plan. Judge Clyburn noted that part of the implementation plan will include getting the different stakeholders to do what is

necessary and will include funding. This is why it requires 40 to 60 people to do this. This is why the Business Office will be so important to provide sufficient staff.

Mr. Klein commented that from the perspective of the Rules of Procedure, a big issue in asbestos litigation is being able to serve everyone electronically once the case progresses past the initial complaint. It sounds like if the proposed system is optional, the Rules must be able to accommodate both paper service and electronic service. There may be a three-day mail rule for paper service and not for electronic service. For purposes of rule-making, should it always be assumed that the duality of paper and electronic options will continue to exist? Judge Clyburn replied that at the beginning, this should be assumed. As time passes, more people will participate in the new system. In some states that have made asbestos and bulk filing mandatory, there is a 100% participation rate, because it is mandatory. In that situation, rules pertaining to paper would not be necessary.

Mr. Sykes asked how the system will handle *pro se* litigants. Judge Clyburn responded that the chart in the meeting materials indicates that the piece of this system pertaining to access to justice has been deliberately left out. He added that he is the Vice Chair of the Commission on Access to Justice. They are putting together a pilot program in the District Court in Glen Burnie where there will be testing of the technology of some of

these applications for *pro se* litigants. In landlord-tenant cases, those persons who are *pro se* will be able to go on the computer and by virtual technology will be able to walk through the landlord - tenant process. Document assembly will also be available. Once this pilot program is tested, they will bring in those applications that are attached to the case management system. There will also be a provision that will allow *pro se* litigants to e-file. If they cannot, they can file paper, and the court will scan the paper into the file.

Mr. Sykes inquired as to what happens if litigants do not speak English. Judge Clyburn responded that interpreter services will be available. The court review process currently is that if someone comes in and does not speak English, he or she can pick up an interpreter telephone line that helps the person with interpretation. In the new system, there will always be an opportunity for someone to get interpretation.

Mr. Klein commented that in the civil discovery context when papers are filed, only notices are filed but not discovery requests and responses. However, in asbestos litigation, requests for discovery and the responses are filed. Is it envisioned that in the proposed system of electronic and paper filing, discovery and responses will be filed as opposed to a mere notice of the fact that they were delivered by paper. Judge Clyburn replied that this is the type of policy decision that the Committee would decide.

Mr. Klein asked if there is any policy decision of the State not to pay for storage of the papers. In asbestos litigation, everything is filed, so that everyone can access it. The Chair inquired as to how this is handled in the federal system. Mr. Klein replied that they do not store papers unless they become the subject of a motion. In Baltimore City, everything is filed. Judge Clyburn said that this practice may bear upon the implementation of the new system. When this part of the electronic record is discussed, the question is whether attorneys who are certified to e-file will be required to send in only the notice of service, but not file the document. The system may be set up to require that once the notice of service is sent in, it will go into the electronic court file, but as a partner, those documents will have to be maintained somewhere. If there are multiple vendors, it may be that only those partners will be able to look at the data electronically.

The Chair pointed out that confidentiality and access issues exist and must be considered. Mr. Klein remarked that in a case with large documents, it would take an enormous amount of storage. Judge Clyburn observed that some states have set a limit. If the document is 2000 pages, it may not be able to be filed electronically. In the federal system, there is some type of limit on paper size. This is another issue that the Committee will have to consider.

The Reporter questioned whether any type of automatic redaction of social security numbers is being built into the new

system. Judge Clyburn answered that software will take care of this. The Reporter noted that data entry is different from word entry. Will there be a way for information to go into a separate field if people would like to submit confidential information? Mr. Wheeler responded that this has been done in other jurisdictions. The advisory group is looking at whether this should be done in Maryland. A recent survey indicated that the filer could identify the information that needs to be redacted and supply a redacted copy as opposed to the court being the one responsible for identifying confidential information.

The Reporter commented that even if the information is being typed in, the confidential paragraph would automatically be redacted under the software. The information would be available in full for the judge but not for the public. Mr. Wheeler remarked that there have been a number of mechanisms used for this, but they have been less than perfect. The question is whether the Judiciary wants to use something that is less than 100%.

Judge Clyburn thanked the Committee for their attention. The Chair thanked Judge Clyburn for the presentation.

Agenda Item 2. Reconsideration of proposed New Rule 9-205.2 (Parenting Coordination) and Amendments to: Rule 16-204 (Family Division and Support Services) and Rule 17-101 (Applicability)

The Reporter told the Committee that she would present Agenda Item 2 in light of Ms. Ogletree's absence. Consultants

are present who are very knowledgeable about this subject, and the Reporter said that she was hoping to get some assistance from them. Parenting coordinators and the Honorable Deborah S. Eyler of the Court of Special Appeals, whose Committee worked on this topic at the Judicial Conference and submitted the original proposal, are in attendance.

The Reporter presented Rule 9-205.2, Parenting Coordination, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 200 - DIVORCE, ANNULMENT, ALIMONY, CHILD SUPPORT, AND CHILD CUSTODY

ADD new Rule 9-205.2, as follows:

Rule 9-205.2. PARENTING COORDINATION

(a) Applicability

This Rule applies to parenting coordination in actions under this Chapter in which the court has entered a pendente lite order or judgment governing child custody or child access.

Committee note: Actions in which parenting coordination may be used include an initial action to determine custody or visitation, an action to modify an existing order or judgment as to custody or visitation, and a proceeding for constructive civil contempt by reason of noncompliance with an order or judgment governing custody or visitation.

(b) Definitions

In this Rule, the following definitions apply:

(1) Parenting Coordination

"Parenting coordination" means a process in which the parties work with a parenting coordinator to resolve disputed parenting or family issues and reduce the effects or potential effects of conflict on the parties' child. Although parenting coordination may draw upon alternative dispute resolution techniques, a parenting coordinator does not engage in arbitration, mediation, neutral case evaluation, or neutral fact-finding, and parenting coordination is not governed by the Rules in Title 17.

(2) Parenting Coordinator

"Parenting coordinator" means an impartial provider of parenting coordination services who has the qualifications listed in section (c) of this Rule.

Committee note: A parenting coordinator, although impartial, is not required to remain neutral under all circumstances.

(c) Qualifications of Parenting Coordinator

(1) Education and Experience

A parenting coordinator shall:

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

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

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

(2) Parenting Coordination Training

A parenting coordinator shall have completed:

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

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

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

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

(3) Continuing Education

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

(d) Parenting Coordinator Lists

An individual who has the qualifications listed in section (c) of this Rule and seeks appointment as a parenting coordinator shall provide the individual's curriculum vitae to the family services coordinator of each county in which the individual seeks appointment. The family support services coordinator shall maintain a list of the individuals and, upon request, make the list and the information submitted by each individual available to the court, attorneys, and parties.

(e) Appointment of Parenting Coordinator

(1) Pendente Lite and Post-Judgment Parenting Coordinators

In a high-conflict action involving custody or visitation of a child, the court may appoint a parenting coordinator in accordance with this section. A pendente lite parenting coordinator may be appointed by the court on its own initiative or on motion of a party (A) when a pendente lite custody or visitation order is entered, or at any time thereafter; (B) when an action is reopened for modification of custody or visitation; or (C) in a proceeding for constructive civil contempt by reason or noncompliance with an order or judgment governing custody or visitation. Upon entry of a judgment granting or modifying custody or visitation, the court, with the consent of the parties, may appoint a post-judgment parenting coordinator.

Committee note: Appointment of a parenting coordinator does not affect the applicability of Rules 9-204, 9-205, or 9-205.1, nor does the appointment preclude the use of an alternative dispute resolution process under Title 17 of these Rules.

(2) Selection

A parenting coordinator shall be an individual who:

(A) has the qualifications listed in section (c) of this Rule,

(B) is willing to serve as the parenting coordinator in the action, and

(C) has entered into a written fee agreement with the parties or agrees to accept a fee not in excess of that allowed in the applicable fee schedule adopted pursuant to subsection (i)(1) of this Rule.

If the parties jointly request appointment of an individual who meets these requirements, the court shall appoint that individual.

(3) Contents of Order or Judgment

An order or judgment appointing a

parenting coordinator shall include:

(A) the name, business address, and telephone number of the parenting coordinator;

(B) if there are allegations of domestic violence against a party or child, any provisions the court deems necessary to address the safety and protection of the parties, all children of the parties, and the parenting coordinator;

(C) subject to section (i) of this Rule, a provision concerning payment of the fees and expenses of the parenting coordinator;

(D) if the appointment is of a post-judgment parenting coordinator, any decision-making authority of the parenting coordinator authorized pursuant to subsection (f)(1)(H) of this Rule; and

(E) subject to subsection (e)(4) of this Rule, the term of the appointment.

(4) Term of Appointment

Subject to the removal and resignation provisions of section (h) of this Rule:

(A) the service of an individual appointed as a pendente lite parenting coordinator terminates with the entry of a judgment that resolves all issues of child custody, visitation, and access; and

(B) the term of service of an individual appointed as a post-judgment parenting coordinator shall not exceed two years, unless the parties and the parenting coordinator consent to an extension for a specified period of time.

If the court does not appoint as a post-judgment parenting coordinator an individual who had served as a pendente lite parenting coordinator in the action, the court shall send a notice by ordinary mail to each party,

any attorney for the child, and the pendente lite parenting coordinator, informing them of the termination of the appointment.

(f) Provision of Services by the Parenting Coordinator

(1) Permitted

As appropriate, a parenting coordinator may:

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

(B) assist the parties in amicably resolving disputes regarding compliance with the order;

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

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

(E) suggest resources to assist the parties;

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

(G) in response to a subpoena issued at the request of a party or an attorney for a child of the parties, produce documents and testify in the action as a fact witness; and

(H) if the parties have agreed in writing or on the record that a post-judgment parenting coordinator may decide post-judgment disputes by making minor, temporary modifications to child access provisions ordered by the court, and the judgment or post-judgment order of the court authorizes such decision-making, make decisions as

authorized.

(2) Not Permitted

A parenting coordinator may not:

(A) require from the parties or the attorney for the child release of any confidential information that is not included in the court record;

Committee note: A parenting coordinator may ask the parties and the attorney for the child for the release of confidential information that is not in the court record, but neither the parenting coordinator nor the court may require release of such information to the parenting coordinator.

(B) except as permitted by subsection (f)(1)(G) of this Rule, communicate orally or in writing with the court or any court personnel regarding the substance of the action;

Committee note: This subsection does not prohibit communications with respect to routine administrative matters; collection of fees, including submission of records of the number of contacts with each party and the duration of each contact; or resignation. Nothing in the subsection affects the duty to report child abuse or neglect under any provision of federal or State law or the right of the parenting coordinator to defend against allegations of misconduct or negligence.

(C) testify in the action as a court witness or as an expert witness; or
Cross reference: See Rule 5-614 as to court witnesses and Rule 5-702 as to expert witnesses.

(D) except for decision-making by a post-judgment parenting coordinator authorized pursuant to subsection (f)(1)(H) of this Rule, make parenting decisions on behalf of the parties.

(g) Access to Case Records; Disclosure

(1) Access to Case Records

The parenting coordinator shall have access to all case records in the proceeding. If a document or any information contained in a case record is not open to public inspection under the Rules in Title 16, Chapter 1000, the parenting coordinator shall maintain the confidentiality of the document or information.

Cross reference: See Rule 16-1001 for the definition of “case record.”

(2) Disclosure of Information by Parenting Coordinator

Subject to subsection (g)(1) of this Rule, communications with and information provided to the parenting coordinator are not confidential and may be disclosed in any judicial, administrative, or other proceeding.

(h) Removal or Resignation of Parenting Coordinator

(1) Removal

The court may remove a parenting coordinator:

(A) on motion of a party, if good cause is shown, or

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

(2) Resignation

A parenting coordinator may resign at any time by sending by first-class mail to each party and any attorney for the child a notice that states the effective date of the resignation and contains a statement that the parties may request the appointment of another parenting coordinator. The notice shall be sent at least 15 days before the effective date of the resignation. Promptly after mailing the notice, the parenting coordinator shall file a copy of it with the

court.

(i) Fees

(1) Fee Schedules

Subject to the approval of the Chief Judge of the Court of Appeals, the circuit administrative judge of each circuit court may develop and adopt maximum fee schedules for parenting coordinators. In developing the fee schedules, the circuit administrative judge shall take into account the availability of qualified individuals willing to provide parenting coordination services and the ability of litigants to pay for those services. Except as agreed by the parties, an individual designated by the court to serve as a parenting coordinator in an action may not charge or accept a fee for parenting coordination services in that action in excess of the fee allowed by the applicable schedule. Violation of this subsection shall be cause for removal from all lists maintained pursuant to section (d) of this Rule and the Rules in Title 17.

(2) Designation by Court

Subject to subsection (i)(1) of this Rule and any fee agreement between the parties and the parenting coordinator, the court shall designate how and by whom the parenting coordinator shall be paid. If the court finds that the parties have the financial means to pay the fees and expenses of the parenting coordinator, the court shall allocate the fees and expenses of the parenting coordinator between the parties and may enter an order against either or both parties for the reasonable fees and expenses.

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

Source: This Rule is new.

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

> Proposed new Rule 9-205.2 is based upon a request from the Conference of Circuit Judges for a Statewide Rule that authorizes and guides the practice of parenting coordination. Parenting coordination, as described in subsection (b)(1), is "a process in which the parties work with a parenting coordinator to resolve disputed parenting or family issues and reduce the effects or potential effects of conflict on the parties' child."
>
> Section (a) provides for the applicability of the Rule. Under the Rule, the court may appoint a parenting coordinator in actions in which there is a *pendente lite* order or judgment that governs child custody or child access. A Committee note cites examples of actions in which parenting coordination may be used.
>
> Section (b) contains definitions of "parenting coordination" and "parenting coordinator," and distinguishes the process of parenting coordination from the processes governed by the Rules in Title 17. A Committee note explains that, although a parenting coordinator must be impartial, there may be circumstances under which the parenting coordinator need not remain neutral.
>
> Section (c) sets out the qualifications that a parenting coordinator must have. The requirements are in the areas of education, experience, licensing (if applicable), mediation training, parenting coordination training, and continuing education.
>
> Section (d), in conjunction with a proposed amendment to Rule 16-204 (a)(3), requires the family support services coordinator for each county to maintain a list of individuals who wish to be appointed to provide parenting coordination services in the county and have the qualifications listed in section (c).

Section (e) sets out the process for appointment of a parenting coordinator.

Under subsection (e)(1), if there is pending before the court an action involving custody or visitation of a child and an order or judgment governing custody or visitation has been entered, the court may appoint a *pendente lite* parenting coordinator. A *pendente lite* parenting coordinator may be appointed on motion of a party or on the court's own initiative. Consent of the parties to the appointment of a *pendente lite* parenting coordinator is not required. When the court enters judgment in the action, a post-judgment parenting coordinator may be appointed, but only if the parties consent to the appointment.

Under subsection (e)(2), an individual appointed to serve as a parenting coordinator must have the qualifications listed in section (c), be willing to serve in the action, and either have entered into a written fee agreement with the parties or be willing to accept a fee not in excess of the fee allowed under the applicable fee schedule adopted pursuant to subsection (i)(1). The parties, by consent, may select any individual who meets these requirements. If there is no consent and the appointment is to be of a *pendente lite* parenting coordinator, the court may select any individual who meets the requirements.

Subsection (e)(3) lists the required contents of an order or judgment appointing a parenting coordinator. In addition to the identity of the parenting coordinator, the contents of the order must include a provision concerning fees and expenses, the term of the appointment, and, if domestic violence is alleged, appropriate provisions for the safety of the parenting coordinator, the parties, and all children of the parties. If a post-judgment parenting coordinator is to be allowed to make decisions in accordance with subsection (f)(1)(H), the order or judgment must include that decision-making authority. The court may not authorize

decision making by a *pendente lite* parenting coordinator.

Pursuant to subsection (e)(4), the term of service of a *pendente lite* parenting coordinator ends upon entry of a judgment that resolves all child access issues. The term of service of a post-judgment parenting coordinator is for a specified period, not to exceed two years, unless the parties and the parenting coordinator agree to an extension. Subsection (e)(4) also contains a provision requiring notice to the parties, the parenting coordinator, and any attorney for the child regarding the termination of the appointment of a *pendente lite* parenting coordinator who is not appointed to serve as a post-judgment parenting coordinator.

Subsections (f)(1)(A) through (F) contain a list of services that the parenting coordinator may provide to assist the parties in reducing conflict between them and complying with the court's order regarding custody and visitation.

Subsections (f)(1)(G) and (f)(2)(B) and (C) set out the role of the parenting coordinator vis-a-vis the appointing court. The parenting coordinator is not an investigator or custody evaluator for the court, and may not be called to testify as a court witness. The parenting coordinator may be subpoenaed by either party, or by the attorney for the child, to produce documents and testify as a fact witness. The parenting coordinator may not be called by anyone to testify as an expert witness in the action.

Subsections (f)(1)(H) and (f)(2)(D) pertain to the decision-making authority of a parenting coordinator. A *pendente lite* parenting coordinator has no decision-making authority. A post-judgment parenting coordinator may be given the authority to decide upon minor, temporary modifications to the child access provisions ordered by the court, if the parties have agreed in writing or on the record to allow the parenting coordinator to make those decisions and the

court authorizes the decision making in a judgment or post-judgment order.

Subsection (f)(2)(A) prohibits the parenting coordinator and the court from requiring the release of confidential information that is not included in the court record. The parenting coordinator may ask the parties and the attorney for the child for access to that information. Each party and the attorney for the child may provide, or refuse to provide, any of the requested access or information. Pursuant to subsection (g)(1), however, the parenting coordinator's access to case records in the action is equal to that of the judge who entered the order or judgment governing child custody or child access. The parenting coordinator has access to all of the case records. This includes access to case record information that is sealed or shielded from inspection by the public. The parenting coordinator is required to maintain the confidentiality of all documents and information contained in case records that are not open to public inspection. Except for confidential case records, subsection (g)(2) provides that communications with and information provided to the parenting coordinator are not confidential.

Subsection (h)(1) allows the court to remove a parenting coordinator on a finding that the appointment is not in the best interest of the child or, for good cause shown, upon motion of a party.

Subsection (h)(2) provides a mechanism by which the parenting coordinator may resign the appointment.

Borrowing language from Rule 17-108, subsection (i)(1) provides for the development and adoption of fee schedules. Unless the parties and the parenting coordinator agree otherwise, a court-appointed parenting coordinator may not charge or accept a fee in excess of the amount allowed by the applicable schedule. Violation of the subsection is cause for removal from all lists maintained pursuant to

section (d) and the Rules in Title 17.

> Subsection (i)(2) allows the court to allocate the fees and expenses of the parenting coordinator between the parties and enter an order for payment. To encourage the provision of parenting coordination services *pro bono*, a Committee note following subsection (i)(2) observes that if a qualified parenting coordinator is an attorney, the number of hours of parenting coordination services provided *pro bono* may be reported in the appropriate part of the attorney's annual *pro bono* reporting form.

The Reporter said that the Committee had looked at a version of Rule 9-205.2 at the meeting last January. Many concerns had been expressed. One was the "tattoo" concern -- people did not want their children to be able to acquire tattoos on the authority of a parenting coordinator. Those concerns have been worked out and addressed in this draft. The Committee can consider the structure of the Rule and then comment. The Chair asked if the Reporter would be summarizing the Rule, and she replied affirmatively.

The Reporter said that section (a) addresses applicability. It has a key element that there has to be a court order. The Subcommittee felt that a parenting coordinator does not have to be appointed in every case. A judge or master should review the case and figure out what is going on. At the very least, there should be a pendente lite order pertaining to child access before a parenting coordinator is appointed. The Committee note gives some examples of the kinds of situations where a parenting coordinator appointment might be appropriate, including in the

initial action to determine custody if a pendente lite order was issued, in an action to modify an existing order indicating some problem exists, or in a proceeding for constructive civil contempt in a custody situation depending on the judge's determination as to whether this might be appropriate.

The Reporter explained that section (b) is the definition of "parenting coordination" and "parenting coordinator." This is derived from the original recommendation. It addresses the distinction between what "parenting coordination" is as opposed to what is in Title 17. Parenting coordination did not seem to fit into Title 17, although it might ultimately end up there. A parenting coordinator might engage in arbitration, mediation, or neutral case evaluation, but parenting coordination is a different animal which the experts can explain.

The Reporter continued that an important factor that arises later is the lack of confidentiality. Unlike mediation, there is no confidentiality, except for whatever the court had already declared as confidential. Parenting coordination is a much more open situation than mediation. A parenting coordinator, while impartial, may not be neutral as a mediator is required to be.

The Reporter pointed out that the educational requirements in section (c) were mostly taken from the original recommendations. Negotiation and conflict management had been added to subsection (c)(1) as separate areas in which someone could hold a master's or doctorate degree. There is an experience requirement and a licensing requirement if the

person's area of expertise is in some field in which a license is available, such as law or medicine. In some of the other areas listed, a license may not be required. Because the parenting coordinator is trying to diffuse a high conflict situation, a great amount of mediation training is required just as it is for a mediator. It includes the 40 hours of mediation training, the 20 hours of family mediation training, and the additional 12 hours of training in topics related to this particular area of expertise. The 12-hour training could have been training that the person received as part of his or her graduate program. Subsection (c)(3) provides for a continuing education requirement. Every two years, the parenting coordinator has to go through eight hours of continuing education to keep up to date on topics related to parenting coordination.

The Reporter said that section (d) provides for a list of parenting coordinators. Some policy issues related to this need to be considered by the Committee. How much of an apparatus should there be in this situation? Because this is a new concept, the idea is to have lists of these individuals available through the Family Support Services coordinator. The judge and any party who is interested can look at the list and see the qualifications. The judge can make sure that whoever he or she is appointing is qualified to do this. The Committee might wish to have a more formal application requirement and formal procedure for getting on the list. For right now, the Rule simply provides for a list to be available.

The Reporter noted that the appointment process is addressed in section (e), which applies in a high-conflict action. At the last Committee meeting, the concept of what "high conflict" is had been discussed. The Subcommittee concluded that it is similar to pornography in that "one knows it when one sees it." A judge who works in a family division knows what a "high conflict" action is. A pendente lite parent coordinator can be appointed on the court's own initiative or on motion of a party. The Committee may want to think about building in some kind of a means for the parties to object. Rather than the parties being forced to file a motion to undo the appointment of a parenting coordinator, there could be some kinds of pre-notice indicating that the court is thinking about appointing one. If a master were hearing the case, the master could issue a report and recommendation, and the parties could object to that recommendation and file exceptions, so there would be an opportunity to be heard. On the motion of a party, there would be an opportunity to be heard.

The Reporter stated that the Committee may want to think about this. There has to be a judge's order whether it is a pendente lite order, a reopening, or in a constructive civil contempt. It is fairly high conflict usually if it has reached the level that there was constructive civil contempt with the court order, or at least one person on the other side is making the allegations that there is a constructive civil contempt. This is a situation where the judge may want to consider whether

a parent coordinator would be helpful. If there is a judgment that ends the case, such as a judgment granting or modifying custody, and there is no longer anything pending, the court can appoint a post-judgment parenting coordinator. This is conditioned upon the parties consenting on the record or in writing. The Rule contains distinctions between what the pendente lite parenting coordinator can do as opposed to what the post-judgment parenting coordinator can do.

The Reporter said that the person who is selected as the parenting coordinator has to have those qualifications that were listed in section (c). The person has to be willing to serve. He or she may look at this as a conflict of interest or decide that he or she would not want to be the person appointed in this particular situation. Once someone is willing to serve, there is either a fee agreement that he or she has entered into with the parties, or the parent coordinator has agreed to not to charge more than what is on the fee schedule.

The Reporter noted that later on, the Rule addresses how the fee schedule is developed. If the parties have someone in mind who meets these requirements, the court has to appoint that person. The order or judgment has to identify who the parent coordinator is. The Subcommittee did not design the Rule so that there can never be a parent coordinator in a domestic violence case or that there always has to be one in such a case but suggested that each case be reviewed by the court to figure out what provisions the court would think were necessary to address

the safety and protection of both parties, all children of the parties (not just the child involved in the particular litigation), and the parenting coordinator who is going to be in the middle of all of this. If the case involves domestic violence, the parenting coordinator may work only by telephone. This is a means of protecting the parenting coordinator. There is a fee provision to figure out how the person will get paid. It could be *pro bono* or according to the fee schedule. If there is a post-judgment parent coordinator, this is an important distinction, because there is no decision-making by a pendente lite parent coordinator. The only decision-making that can occur is in the post-judgment situation where both parties have agreed to this. This should be in the order of appointment as well.

The Reporter told the Committee that subsection (e)(4) provides for a term of appointment. The appointment of a pendente lite parent coordinator would automatically terminate with the entry of a judgment. The Subcommittee felt that the post-judgment parent coordinator should serve two years unless the parties voluntarily agree to extend this. The original proposal was for one year, but the Subcommittee's view was that sometimes the issues need to settle out for a longer period of time. Two years could be more appropriate, but this would be by consent. The Subcommittee added a provision that if the pendente lite parenting coordinator is not appointed as the post-judgment parenting coordinator, the court shall send a notice to each

party, any attorney for the child, and the parenting coordinator, so that everyone knows that the original parenting coordinator is no longer part of the case.

The Reporter pointed out that section (f) is divided into what the parenting coordinator may do and what he or she may not do. Subsection (f)(1)(A) focuses on the court order that is required before the parenting coordinator can be appointed. The parenting coordinator has to help the parties figure out how to comply with the court order. This allows the judge and the master to be in control of the situation as opposed to the more creative approach that the Committee had disapproved of at the prior meeting. Subsections (f)(1)(B) through (F) are the "let's play nice" provisions. The parent coordinator is trying to do whatever is necessary to encourage the parties to get along. This includes education; helping the parties develop guidelines for communication; suggesting resources, such as a child psychologist or psychiatrist; and assisting the parties in modifying their own patterns of behavior to minimize or eliminate the conflict for the benefit of the child.

The Reporter said that subsection (f)(1)(G) was added because of the concern that the parent coordinator would end up being an investigator or an expert witness, not really helping the parties solve their conflict. If one party is not even attempting to cooperate, there are facts that the parent coordinator can testify to in terms of what was said or how the child was treated. The coordinator would not volunteer this

information, but one of the parties could realize that if the parent coordinator is subpoenaed as a fact witness, he or she could testify. This is a motivator that helps the parties work with the parenting coordinator, because if they do not, the coordinator will have some negative fact witness testimony.

The Reporter pointed out that subsection (f)(1)(H) provides that a post-judgment parenting coordinator may make minor, temporary modifications to child access provisions if the parties have agreed. If in a high-conflict situation, one of the parents needs to pick up the child at 6:00 p.m. rather than 7:00 p.m., which is the time specified in the court order, the parenting coordinator may be able to make this type of temporary modification. If the parties feel that there are too many modifications, they can file a motion to have the parenting coordinator removed, and the court can review the matter. It would be very limited decision-making on the part of the parenting coordinator to try to make the court order work.

The Reporter said that the parenting coordinator is not permitted under subsection (f)(2)(A) to require the release of confidential information. This was somewhat controversial, but this was the compromise that was worked out. The coordinator will have access to all of the information to which the judge had access. The Rule does provide that the parenting coordinator has to maintain confidentiality if any information is confidential. The coordinator has complete access to custody investigations, medical issues, and anything else that got into the court record.

The parenting coordinator can ask the parties for additional authorizations or information, but the parties are not required to give this.

The Reporter noted that under subsection (f)(2)(B), the parenting coordinator is not the investigator, so he or she is not to communicate with the court or send reports to the court. The coordinator can send reports to the parties but not to the court. The coordinator can do routine administrative functions to collect a fee, resign, etc. If it becomes apparent that there is child abuse or neglect, the coordinator has the duty to report this. To defend against allegations of negligence, the coordinator can communicate with the court, but not with respect to the substance of the action. The coordinator cannot testify as a court witness; the court cannot put him or her in that investigative role. The coordinator cannot testify as an expert witness in the case he or she worked on. A cross reference at the end of subsection (f)(2)(B) explains what is a court witness and what is an expert witness. Subsection (f)(2)(D) provides that the parenting coordinators do not have decision-making authority in the pendente lite case, and they only have the limited post-judgment authorization for decision-making that was agreed to and adopted by the court.

The Reporter noted that section (g) states that the parenting coordinator has access to all the information that the judge or master has. The coordinator must maintain confidentiality of any confidential information. He or she can

disclose information in a judicial, administrative, or other proceeding. This would apply to the child abuse situation.

The Reporter said that section (h) is a removal provision that if there is a motion and good cause is shown, the court can remove the parenting coordinator, or the court can do so on a finding that the appointment is not in the best interest of the child. Subsection (h)(2) provides that the parenting coordinator can resign by giving notice.

The Reporter told the Committee that section (i) pertains to the fee schedule. The fee provisions were derived from Rule 17-108, Fee Schedules. The question was raised whether it is the circuit administrative judge or the county administrative judge who develops fee schedules. This provision was taken directly from Rule 17-108, so it is the circuit administrative judge. If the circuit has jurisdictions with different economic circumstances, different fees can be set in different counties. This is easy to change if the Committee feels that it should be county by county. Subsection (i)(2) pertains to who pays for the parenting coordinator. The Committee note at the end of the Rule is intended to encourage the *pro bono* provision of these services by anyone who is an attorney, because the note points out that these hours can be counted on the *pro bono* form required to be filed every year by attorneys.

Judge Eyler told the Committee that with her at the meeting was Dr. Paul Berman, who works as a parenting coordinator, and

Connie Kratovil-Lavelle, Esq., Executive Director of Family Administration for the AOC. As a matter of background, the Rule first emanated from the Custody Subcommittee of the Judiciary. The Judiciary has many committees, one of which is the Family Law Committee, and within that committee is a Custody Subcommittee. Judge Eyler said that she was the head of that subcommittee. In 2005, it was brought to the attention of the Committee that parenting coordinator orders were being entered in cases throughout the State in some counties, but not in other counties. They appeared to vary. It was unclear whether there was authority for judges to be appointing parenting coordinators. It was unclear as to what parenting coordinators could do, and what they were supposed to be doing. Some of the orders granted immunity to a parenting coordinator, which is not permitted.

Judge Eyler said that the Subcommittee felt that it was a good idea to look into this situation, figure out what was going on, and then determine if it made sense to conform practice, so that there would be authority and standards that must be followed for the appointment of parenting coordinators. The appointments started in the early 1990's which is when parenting coordination became popular around the United States. Many States have rules or statutes addressing parenting coordinators.

Judge Eyler commented that several “town hall” meetings were held in Maryland. Professionals, including health care providers and attorneys, who had worked as parenting coordinators or had worked with parenting coordinators, were asked to come in to talk

about what they do and what is the purpose of having such a coordinator. The focus resulted in reducing conflict for children whose parents are in the middle of or have just gone through a divorce. The common theme was that some parents are so hostile that it does not matter to them if their children end up damaged collaterally.

Judge Eyler said that she had heard a divorce case with no parenting coordinator. The master had suggested that the parents e-mail each other about the child's schooling. The father e-mailed the child's mother asking how the child was doing at school and requesting reports from the school. The mother sent back a very hostile e-mail which Judge Eyler read to the Committee. It indicated the lack of communication that exists in divorce cases. Judge Eyler remarked that it is easy to understand how the child ends up in the middle.

Judge Eyler had heard another case where there was a typical exchange of a child from one parent to the other in a parking lot. Not only the parents but other relatives were present during the exchange. It ended up that the children were in their car seats, and the adults were outside fighting with each other. Many cases are high conflict.

Judge Eyler agreed that a judge can tell which cases are high conflict. The Rule was drafted and then many changes were made, most of which were positive. The Family Law Committee approved the Rule. In 2008, it was presented to the Conference of Circuit Court Judges who approved it. Then it was sent to the

Rules Committee. After it went before the Committee in January, it was sent to the Family and Domestic Subcommittee of the Rules Committee.

Judge Eyler said that she had two concerns about the Rule as it is drafted, although most of it is excellent. One of the lessons learned about parenting coordinators is that they can be used for different purposes in different courts at different times. Some judges are appointing parenting coordinators during the pendente lite phase of the case, before a final custody decision has been made. This is being done in high-conflict cases, not only to help the parents make decisions together and communicate about their children before custody was decided, but also so that the court would get some insight as to what was going on with the parents regarding the decision-making at the time the custody decision was made. Some courts were appointing parenting coordinators post-judgment after the final custody order had been entered, and the parenting coordinator was appointed to help the parties communicate from then on. Those cases were not consistent as to decision-making authority. This has been very narrowed down in the proposed Rule.

Judge Eyler expressed a concern as to the pendente lite cases. It is important for the court to be able to call the parenting coordinator as a witness when the custody decision has been made if the court thinks that the coordinator has factual information that would be helpful to the custody decision. The second concern also relates to the pendente lite situation. It

is most likely a drafting issue. In drafting the Rule, her subcommittee did not envision originally that there would have to be a pendente lite custody or visitation order in effect before a judge would issue an order appointing a parenting coordinator. Some counties do not have pendente lite orders issued at all, and some do not have them issued until much later in the proceedings. It could be very evident to the judge that a pendente lite parenting coordinator would be appropriate in the case for various reasons before there is a full-blown pendente lite hearing and order. It is critical that there be an order by the court appointing a pendente lite parenting coordinator. The Subcommittee prefers that there not be a requirement that a custody and visitation order is already in place.

The Chair asked what information the judge would have about this to make this kind of a decision prior to a pendente lite hearing or something equivalent to it. Baltimore County has a coordinator who gets into this before a pendente lite hearing in many cases. Without this, what would a judge have other than a huge contest before any facts come out? Judge Eyler responded that the Honorable Ann Sundt would speak about this. Judge Sundt told the Committee that section (a) of the Rule states: “This Rule applies to parenting coordination in actions under this Chapter in which the court has entered a pendente lite order...”. So, the first requirement would be that a pendente lite order is in existence. In response to the Chair’s question, Judge Sundt said that she did not know when a judge or a master ever has all

the information. If the “smell” test referred to by the Reporter is used, the judge’s first contact with high-conflict families is at the conference when the scheduling order is issued. The judge can see the way the parties sit across the room from each other. They may be throwing items at each other, a good indication of high conflict. The cases are tracked in Track 3 as high-conflict cases, and the attorneys agree that it is a Track 3 case. They refer to mediation and parenting education, and generally, it is the master who will say: “Does anyone think that this case is amenable to having a parenting coordinator appointed?” This will generally not happen if both sides refuse, because it will not work. The list of parenting coordinators is dwindling because most of them do not want to get caught as the bullets are flying. It can be a dangerous position like being the best interest attorney for the child.

Mr. Maloney inquired as to whether the coordinators can be sued. Judge Sundt replied affirmatively. Most are asked whether their insurance covers this. She personally does not appoint attorneys, because she is not sure that their malpractice insurance is going to protect them. She looks for health care providers who take out an additional rider to protect themselves in these situations. When the parents get through being angry with each other, they look at the next person in the case who becomes the living target. The idea that this appointment will be willy-nilly is generally not the case. These cases have a way of rising to a level where everyone is so uncomfortable that the

first action is to call for a sheriff.

Judge Sundt asked the Committee not to require that there be an existing order, because, as an example, in Montgomery County, the cases are put on such a fast track that a final merits hearing will be reached in 90 days from the scheduling order. Those 90 days could be crucial, and there may not be a pendente lite order in place. The Reporter questioned as to whether there should be an emergency ex parte order where the court has been involved, so that someone knows what needs to be done. Judge Sundt replied that there could be one by consent so that the case can go to a facilitator, but sometimes, there is no consent, and this is the very issue that the parties cannot agree on. What will happen is trying access twice. Where there are accusations of abuse, how can an access order be issued after a 45-minute hearing? This is where a parenting coordinator is useful to talk to the parents. Judge Sundt expressed the concern about issuing an order on the parents that exacerbates the unhappiness.

The Chair commented that part of the problem is that the practices addressing how to handle these cases vary significantly from county to county. His understanding had been that the first event in Baltimore County is a pendente lite hearing, but he has been told that is not the case. The first event is a scheduling order issued not by a master, but by a scheduler who deals with how the case is going to progress. How would this play out from county to county? He expressed the fear that someone would file a complaint for divorce, stating that it is a high-conflict case

and requesting a coordinator because of negative allegations against the other party. Should a judge who knows little about the case order a parent coordinator?

Ms. Kratovil-Lavelle commented that there is another level of pre-screening before the scheduling conference that all of the courts do as an administrative matter, although all jurisdictions have family support service coordinators. They are like case managers. The larger jurisdictions that have big family divisions have available a cadre of paralegals. They have a protocol where each case goes through a paper review first based on pleadings. This is done for a number of reasons including allegations of domestic violence that are filed early on by the parties in the information report. The court staff in the Family Divisions look at the pleadings. In the pleadings, one can get an idea of the nature of the case before there is even a scheduling conference. A thick file is an indicator of high conflict. The court has information.

The Chair pointed out that the coordinators have the information. Ms. Kratovil-Lavelle responded that they report to the masters and the court prior to the scheduling conference. They have gathered sample scheduling orders from the various jurisdictions, and most of them have a list of services that are ordered at scheduling conferences. These include parent coordination, mediation, and psycho-social evaluations. The Chair asked whether a judge or a master could appoint a parent coordinator before the scheduling conference. Judge Sundt

answered that this will not happen, because the scheduling conference is also tracked. There either has to be an answer, or the time for the answer has to have run. Most people do appear at the scheduling conference. This is the time when orders issue frequently. The scheduling order will state: “See attached.” There may be a parenting coordinator, a mediator, or a custody evaluator.

The Chair inquired whether the parties always appear at the scheduling conference. Judge Sundt responded that they almost always appear. It is very rare that only one side appears. If only one side argues for a parenting coordinator, it may not happen, particularly if there has been no answer. To some degree, this is trusting in the discretion of the judge or master who does the scheduling conference. She expressed the concern that the most valuable time for the parenting coordinator to be in the case is in that period before the court makes its final decisions.

The Chair questioned whether Judge Sundt would envision a master being able to make this pendente lite appointment. Judge Sundt replied that they do it as a recommendation, and then the court signs off. The fact is that the costs are going to be allocated between the parties, so most parties do not ask for this lightly. They know that this is an additional cost. She said that she would defer to her colleague, Dr. Berman, to talk about what the effect of this is. If the two goals that are enunciated in this Rule, resolution of the dispute and the

lessening of the impact on the children, are the goals in the case, this when a parent coordinator is appropriate. Judge Sundt told the Committee that her second concern was one that Judge Eyler had mentioned earlier, shackling the court's hands in calling the parenting coordinator as a fact witness. After *Frase v. Barnhart*, 379 Md. 100 (2003), she had done something that the appellate courts permitted her to do, because she realized that if she made a custody order, she was going to lose jurisdiction over any conditions that she might want to place. The parties were cooperating, but it was a matter of for how long. She wanted to keep them going. Sometimes when people behave nicely, it becomes habitual. What she did was to defer the entry of legal custody and make the parties work with a parenting coordinator for six months. They all understood that then there would be a hearing, and the parenting coordinator would come back in and report. This is a major value of the parenting coordinator. People learn to "play nice," but they learn some tactics to interact with each other without immediately provoking a telephone hangup or a nasty e-mail. Sometimes, the good behavior stays, because the parties find that they feel better.

Judge Sundt asked that the Rule not leave it up to the parties to call this fact witness, because this is not a case where someone wears a top hat while someone else wallows in the gutter. In high-conflict cases, most of the parties share the difficulties between them equally. There may be a situation

where neither of the parties wants to call the parenting coordinator. They know perfectly well that they behaved badly. As a judge, she would want to know this if she is going to make a legal custody decision. If the parties cannot cooperate, she needs to know this. This is where the input of the parenting coordinator is so important. She did not know of any other case in which a court's hands are tied in calling witnesses, particularly where children are concerned.

Ms. Potter noted that *pro se* litigants may have no money to pay for a coordinator. She asked why the parenting coordinator cannot communicate orally with the court or any court personnel. The parenting coordinator may want to tell the sheriff that he or she feels threatened. Judge Sundt responded that a procedural distinction was made. No one would tell a parenting coordinator who feels threatened that the person cannot take steps to address it. What is intended is to avoid ex parte communication between the parenting coordinator and the court or clerks, law clerks, and case managers. Ms. Potter inquired as to how a *pro se* litigant who has an issue concerning the case can get that issue before the court if the litigant cannot communicate in writing.

Judge Hollander remarked that she had a related question. During the time someone is serving as a parenting coordinator, a parent could become very angry. Tragedies happen because someone failed to alert someone. The Rule does not allow the parenting coordinator to contact the court even if there is a concern about

someone's medical state or someone being dangerous. Judge Sundt responded that it does not mean that the coordinator cannot notify someone, it is the ex parte aspect of the communication. In her county, the parenting coordinators are told to contact the case manager and request a status conference of all parties, even though this is a direct violation of the wording of the Rule.

Judge Hollander commented that often roadblocks are not ideal for children. If the parenting coordinator felt that someone was in danger, should there not be an exception to the Rule? Judge Sundt agreed, but she pointed out that in these cases, by the time one figures out the danger, it may be too late. The Chair observed that if any child abuse is alleged, there is a statute that covers reporting it, Code, Family Law Article, §5-705. Judge Sundt said that this is applicable when abuse is taking place. However, there are times when one may know the abuse is coming, and the person wants to send out an alarm. The issue is how the parenting coordinator does this if he or she is prohibited from contacting the court or court personnel. There probably needs to be an exception on an emergency basis with the idea that an immediate status conference would be held. It cannot be ex parte.

The Chair said that subsection (e)(1) allows the court to appoint a pendente lite parenting coordinator on the court's own initiative. Why is this in the Rule? The court may feel that it is a good idea to appoint a coordinator despite the fact that the parties do not want one. There is no motion filed, and no basis

for a hearing. Judge Sundt commented that *pro se* litigants may not even know that this service is available. The Chair remarked that even if the judge, based on ex parte conversations with the scheduling conference coordinator or anyone else, feels that a coordinator is a good idea, there is no provision for a show cause order as to why no parenting coordinator should be appointed. Even if the court feels that it is appropriate in a high-conflict case, someone has to pay for the parenting coordinator with no input into the appointment.

Ms. Potter noted that if there were a show cause order, and the court appoints a coordinator, but the *pro se* litigant does not like it, the litigant could file a motion to strike. The Chair responded that the person may not know how to do that or not even speak English. If it is a master's recommendation, parties can take exception to it and get it before a judge. If the judge is going to appoint a coordinator without that process or without a motion being filed, should there not be at least a show cause order? This would invite the parties to file a response. Judge Sundt answered that she did not have a problem with this. She did not recall ever putting in a parenting coordinator *sua sponte* except at the custody hearing itself. Generally, the appointment comes from someone below such as a master who puts it in the form of a recommendation subject to exceptions. The Chair said that before there is an order, the parties have an opportunity to object to it or to explain why

they do not think that this is a good idea. This would provide some guidance as to what the parenting coordinator will be authorized to do and who will be paying for it.

Judge Sundt commented that she was never opposed to someone taking a look at the matter. Her primary concern is requiring that there be an existing order, because that may not happen. A second part of this is prohibiting calling the parenting coordinator as a fact witness. The Chair asked if this would be as the court's own witness, and Judge Sundt replied affirmatively. All it would be is to put the coordinator on the stand and ask for the coordinator's observations. Examples of questions would be "How many times did you meet with the parties?" "Did everyone attend?" "What were the issues?" "Were any of the issues resolved?"

The Chair asked Judge Sundt if she had cases in which one party or the other called the parent coordinator as a witness, and the other party did not want the coordinator to testify. Judge Sundt responded that she had not had such a case, because she has called the coordinators as witnesses. The Reporter pointed out that there could be a custody evaluator in the case. If it is not high conflict, there may be an attorney representing the child, and the attorney can subpoena whomever he or she felt was necessary. Judge Sundt answered that this would be a one-time decision as to with whom the child should primarily reside. If the child is three years old, the parties have 15 years yet of decision-making and of access schedules. If the goal is to try

to keep this three-year-old out of conflict, it is important to figure out a way to accomplish this.

The Chair referred to Judge Sundt's second issue about the court calling the parenting coordinator as a fact witness. This assumes there is going to be a hearing before a judge or a master. This is not an order to appoint the person. There has to be a contested hearing. Judge Sundt responded that in a pendente lite case, there will be a contested hearing, or the parties may work out a solution. The Chair commented that if the testimony of the parenting coordinator is necessary to make a decision in the high-conflict cases, the person will be subpoenaed. The court does not have to do this on its own. Judge Sundt said that there are two reasons why the parenting coordinator should be a court witness. It involves the word "impartiality." When the mother calls someone like Dr. Berman as her witness, his effectiveness as a parenting coordinator is gone. If the court calls Dr. Berman and asks him about the parties and their roadblocks, there is a chance that he could continue in this role. The Chair pointed out that it is unusual for a court to call a witness. The concept of court witnesses disappeared when Rule 5-607, Who May Impeach, did away with providing for court witnesses so that the party would not have to vouch for the witness.

Master Mahasa commented that one issue is how early a parenting coordinator can be appointed. When is it that one should be appointed, and who should be able to be appointed?

Judge Sundt pointed out that in the Committee note after section (a), there is always an order for an action to modify an existing order or judgment as to custody or visitation and for a proceeding for constructive civil contempt by reason of noncompliance with an order or judgment governing custody or visitation. The parties should not be coerced into having an order before someone can request the appointment. Master Mahasa inquired as to who is to have the authority. Judge Sundt answered that it will be a court appointment, and it is either from a referral from a master, or in some of the smaller jurisdictions, scheduling is done by judges. The order may come straight out of the scheduling conference. She assumes it will come out of the scheduling conference and either be by referral from a master or the judge who is conducting the scheduling conference, probably no sooner than this.

The Chair noted that this may be appropriate. As long as the judge or the master has enough information, it is going to be a scheduling conference. If the pendente lite hearing is delayed, could this be revisited at that point? Judge Sundt responded affirmatively, and she added that it could be revisited at any time. The advantage of the parenting coordinator is that the parties might actually resolve the issues, and the parenting coordinator is out of a job.

The Reporter inquired as to whether there is a mediation order, also. Judge Sundt replied affirmatively, adding that the Rule provides that the parenting coordinator has nothing to do

with the regularly scheduled progress of the case. What is being referred to is not what the court addresses. It is not about access, it is about what makes one party angry at the other, and this is what the parenting coordinator addresses.

The Chair said that his concern was not whether there is an order (an order always exists in post-judgment cases), but that the parties have an opportunity for a hearing before the appointment of the parenting coordinator. Judge Sundt responded that she had no objection to this. The parties should have the opportunity to be heard on this subject. The Reporter asked Judge Sundt what kind of hearing she was referring to. Judge Sundt answered that it would follow the scheduling conference.

Master Mahasa questioned as to when the order for a parenting coordinator would be implemented. Judge Sundt replied that the masters in Montgomery County appoint the coordinators in any case where they think that it would be helpful. What usually happens is that in high-conflict cases, one attorney agrees to the appointment, and the other refuses, since they are extensions of their clients.

Mr. Patterson inquired as to how this concept is linked to CASA (Court Appointed Special Advocate) programs. Judge Sundt answered that it is not linked to that. The CASA program involves juveniles as either children in need of assistance (CINA) or in delinquency. Mr. Patterson explained that he asked this question, because in some cases, CASA advocates represent children who are the subject of acrimonious divorces. The

appointment of a parenting coordinator will eliminate this CASA representation. Judge Sundt told him that this would not happen. They also appoint attorneys for the children.

Mr. Patterson remarked that he was not referring to attorneys, he was referring to advocates. He noted that Judge Sundt had referred to child abuse situations which are often the type of case in which a CASA advocate gets appointed to report to the court. This is done irrespective of parents, social services, and attorneys to tell the judge directly what is in the best interest of the child. How does the child abuse already referred to relate to what CASA does? Judge Sundt responded that as soon as child abuse is alleged, there are reporting requirements for anyone involved in the case. The Department of Social Services will get involved and will conduct their own investigation. The difficulty in these high-conflict cases is when the parties are out of all other ammunition. Frequently, child abuse comes up as a last resort.

The Chair asked if the CASA representatives get involved in divorce court or only in juvenile court. Judge Sundt answered that they do not get involved in divorce proceedings. What happens is that if there is a report of abuse, then Child Protective Services will do their investigation and report to the court. At that point, the court may put the case into juvenile court or may find against both parents. It does not parallel the parenting coordinator situation.

Mr. Patterson observed that if abuse is alleged, Child

Protective Services investigates and confirms the allegation, and it comes in as a CINA petition before the court, it could be an acrimonious divorce situation with a parenting coordinator involved, but the court, at that point, can and often does go to the local CASA program and ask them to appoint an advocate to come in and report to the court on the best interest of the child irrespective of social services, attorneys, and parents. Is there a dovetailing with the parenting coordinator, or is the coordinator going to be out of the case at that point? Judge Sundt said that she was not sure. The case will probably continue on two separate tracks. One will be the divorce case. If the recommendation of Child Protective Services is that the child is in need of assistance, and they are going to petition to the juvenile court to take jurisdiction of the child, generally this means a finding that neither parent is suitable. They are looking at foster care. Judge Sundt stated that she had not seen such a case in any of her divorce proceedings. It is usually a matter of the father who uses a belt to punish the children, and Child Protective Services feels that the father should not have custody, but supervised visitation.

The Chair pointed out that mediation can be going on at the same time. If a parent coordinator has been appointed, what role, if any, does the coordinator play in the mediation? Judge Sundt responded that the coordinator has no role in court-ordered mediation. The parties are free to come back and continue their discussions with the parenting coordinator. The Chair asked

Judge Sundt if she anticipated the parenting coordinator participating in the mediation. Judge Sundt replied that she did not feel this would happen, because the mediation sessions are confidential and so highly protected. Nothing the parenting coordinator does with the parties is confidential. The parties are put on notice from the start about this.

Dr. Berman told the Committee that he was a psychologist practicing in Baltimore County. Most of his practice is family-court involved, including custody evaluations, and parenting-coordination work. He also works part-time with the American Psychological Association. He said that he wanted to discuss what parenting coordination is, what he has been doing as a parenting coordinator, and some issues that were raised earlier at the meeting. The e-mail read by Judge Eyler is a mild example of what he deals with each day. Parenting coordination has been in existence for 15 to 20 years. It started in California and Colorado. There are guidelines for parenting coordination. One set was promulgated by the Association of Family and Conciliation Courts. A second set is currently being promulgated by the American Psychological Association.

Dr. Berman noted that the purpose of a parenting coordinator is twofold: (1) to help parents make decisions, so that the courts do not have to make decisions that parents should and can be making and (2) to help parents make decisions in as conflict-free a way as possible. Research indicates that the best prediction as to how children fare post-divorce is the experience

in being exposed to their parents' conflict. This is the single best predictor. If something can be done to decrease parental conflict, then he can ensure that the children will have much better outcomes.

Dr. Berman said that he has been appointed as a parenting coordinator 20 to 30 times in Howard, Montgomery, and Baltimore Counties, both pre-judgment as well as post-judgment. Most of what he has done post-judgment is to help parents make decisions. If they cannot make decisions, then he has been authorized by court order to make certain decisions in certain circumscribed areas as defined by court order. The parties are people who not only cannot talk to one another, but their issues are dramatically interfering with their children's well-being. This past week, parents came into his office on Tuesday with a child who has asthma. One parent said that he or she just came from a physician's office, and the child was supposed to get Albuterol as needed every four hours, and the other parent disagreed, claiming that the child was supposed to get an Albuterol nebulizer every night. As a parent coordinator, Dr. Berman told the Committee that he called the physician with the parents present, and the physician told him on speaker phone what medication the child was supposed to get. This is a conflict that could have gone on and on indefinitely, dramatically impacting the child.

Mr. Maloney asked Dr. Berman what happens if a parent defies the coordinator. Dr. Berman replied that sometimes he issues

orders after trying to help parents make the decision themselves, which is what the parenting coordinator is trying to promote. If the parents defy him, he tries to talk with them and work with them. Sometimes he has to get a best interest attorney to file a motion with the court, stating that a parent is not complying with him, and some cases have gone to court for a hearing. In general, 50% of the time he is helpful. Sometimes, the parents are totally at war with one another, and for psychological reasons, need to stay at war, so he resigns. The research that has been done indicates that parents who use the parenting coordination process report greater satisfaction in the post-divorce relationship, and the court involvement following the use of a coordinator dramatically decreases compared to court involvement before the intervention of a parenting coordinator. Several studies have followed a number of families. Before the involvement of a coordinator, families were in court 1000 times; after the involvement of a coordinator, 40 times.

The Chair said that there is no question as to the value of parenting coordinators. At the last Rules Committee meeting where the subject was discussed, concern about the parenting coordinator guidelines was expressed in terms of what they permitted a coordinator to do. The Rule has reined this in consistent with the concerns of the Committee. What is being addressed is the structure and the details of this.

Dr. Berman said that he had a comment on the issue raised earlier concerning the ability of the judge to call a parenting

coordinator as a court's witness. At times, parents do not want him to come into court, because the situation is usually not black and white, with both parents contributing to the problems going on in the family. Neither parent wants him to come into court, because he will be presenting problems regarding both parents. Sometimes, he will get no subpoena from anyone. If the court does not ask him to come in as the court's witness, the information he has that may be helpful to the court ends up being lost.

The Chair noted that some judges could make a practice of calling witnesses. Judges move in and out of various court divisions often and may have very different views. The Chair inquired of Dr. Berman if he would ask the judge to call a witness, if a judge is one who is not likely to do so on his or her own initiative. Dr. Berman replied that he would not. The Chair said if the judge is not going to call witnesses routinely, Dr. Berman would not get called. Dr. Berman agreed, noting that if the judge does not decide to call him, he would not initiate the process. The Chair questioned as to whether other parent coordinators would do that. Dr. Berman answered that other parent coordinators might initiate, but he would hope that they would not do so. The Chair asked if they should be able to initiate a request to be called as a witness. High-conflict cases would be more likely to have attorneys, or at least an advocate for the child, and a child custody investigator. If all of that applies, and no one has asked for Dr. Berman to be

present in court, should he be there? Dr. Berman responded that in the cases he is involved with, custody evaluations are done in about one-quarter or less. That is not always available.

The Chair inquired as to whether in these kinds of cases, there is more likely to be a best interest attorney or child advocate representing the child. Dr. Berman replied that it is more likely that there would be a best interest attorney. The Reporter questioned as to whether Dr. Berman could ask the attorney if he or she could subpoena Dr. Berman. Dr. Berman answered that he could, but he sees his role as working with the parents to resolve issues. If the parents or the judge do not call him as a witness, he would not like to lose his neutrality and volunteer himself as a witness, because it would be very likely that he would lose the confidence of one or the other of the parents.

Master Mahasa inquired as to whether he might call the child's attorney. Dr. Berman responded that he might if it is a situation where he has the authority to make a decision. In a post-judgment case where he has the authority to make decisions, and he believes his decision is necessary for the child's health and safety, and a parent did not follow it, he would elicit the help of a best interest attorney if one were involved. He is involved in several cases now where certain insurance information is being requested from a parent because there is a conflict between the parents as to whose insurance is primary and whose is secondary. The case is taking up a tremendous amount of time.

One of the parents is not providing the necessary information. He is continuing to work with them on this issue, pointing out to them how not providing the information continues to increase the conflict.

Master Mahasa asked whether Dr. Berman saw health and safety as an exception. Dr. Berman answered affirmatively. As in the case with the medication issues, if one parent were handling the medication one way and the other parent were doing something different, and the parents were not able to work together, he would encourage them to work together and to try to see the child's physician together. In one case, they were still not working with him. He issued an order post-judgment, and one of the parents did not follow the order. In a case such as this where medications could be dangerous, he would go outside the system.

Master Mahasa questioned as to what happens if there is no attorney for the child. Dr. Berman replied that if that were the case, he would call his own attorney and ask for some help and some guidance. His role as the parenting coordinator is working with the family. His expertise is not working with attorneys and judges, and he would like some guidance as to this. The Chair told Dr. Berman that his job is to work with the parents to try to get them to cooperate. Anyone can call Dr. Berman as a fact witness in a proceeding that will affect custody or visitation, whether it is pendente lite or post judgment. The hearing before the judge is going to have some effect on custody and visitation.

This is the point of the hearing. If Dr. Berman can voluntarily ask to testify, or a judge can call him as a witness, does this take him outside of his role? He would no longer be helping the parents, he would be helping the judge make a custody decision as a fact witness, and the parties do not want him in court.

Dr. Berman remarked that he did think that he would be going outside of his role if he were coming into court responding to a subpoena. The Chair noted that in response to a subpoena, Dr. Berman is obligated to come to court. Dr. Berman said that if a court invites him to come in as the court's witness, then he would have to go. The Chair stated that the question is if this is a proper role for a parent coordinator whose job is to work with the parents and not work with the court. Dr. Berman responded that as long as he is staying true to the information that he has, all of this is his role. If he begins to move outside of this as if he were a custody evaluator, which he does, then that would be a problem. If he sticks clearly to the information that he has and prepares the parents before he goes to court, letting them know about information he might be giving, then it would be consistent with his role as a parenting coordinator.

The Chair said that he had a question about the qualifications of a parenting coordinator. Assuming that a juris doctor degree constitutes a doctorate, does this qualify as an advanced degree? These advanced degrees are not required for court-annexed mediation. But it is necessary to have this degree

to be a parent coordinator? The coordinator has to have the same qualifications as a mediator, 60 hours of mediation training, which is 40 hours of mediation training in a program meeting the requirements of Rule 17-106 (a) and 20 hours of training in a family mediation training program meeting the requirements of Rule 17-106 (b), but he or she also has to have the master's or doctorate degree. What separates this from mediation is the fact that a coordinator must have the special skill of working with parents from 12 hours of training, and that training is not necessary if the coordinator has taken some courses that are set out in the Rule. Why does a parent coordinator need a master's or doctorate degree that is not required for a mediator?

Dr. Berman replied that he could not speak to what is necessary to be a mediator. From his perspective, the 60 hours ensures that anyone who wants to be a parent coordinator is well-trained and would weed out others. The Chair noted that the 60 hours is for mediation training. Dr. Berman referred to a hybrid role involving mediation and psycho-education. The Chair cautioned that someone who obtains a law degree would not get this. An attorney who gets his or her 60 hours can do this, but a dentist who has the 60 hours cannot. He asked why this is the case. Dr. Berman responded that attorneys are very helpful in getting people to make decisions and in cutting out some of the emotional baggage that people bring in at times, including the attorney's experience combined with mediation training. The Chair commented that an attorney may not have taken a course in

family law while in law school. Dr. Berman remarked that he would hope that someone like this would not decide to be a parent coordinator.

Ms. Kratovil-Lavelle pointed out that subsection (c)(1) of the Rule requires that the parenting coordinator must have at least three years of related professional post-degree experience for a parenting coordinator. The Chair questioned as to why the advanced degree is required. Ms. Kratovil-Lavelle responded that, as Dr. Berman had described, the idea was that one would have one of the various mental-health-related advanced degrees that would allow the person to work with the parents on diffusing tension and on psycho-social techniques. The genesis of this is that when her office canvassed all of the jurisdictions, there were a number of attorneys who were providing these services in the courts and were doing an excellent job. They had more than the three years of experience required by the Rule by doing domestic cases and high-conflict cases and in facilitating agreements between the parties.

The Chair said that when the mediation rules were drafted, many mediators came to the Committee and provided the benefit of the mediators' experiences. Most of them felt that what was important, particularly in child access cases, was the experience and mediation training. They did not seem to think that advanced degrees were that important, even though some of them had advanced degrees. There were psychologists and attorneys who became mediators. Their view was that given the conflict between

the parents, the mediation training and experience was key.

Dr. Berman observed that the difference is that the role of the parenting coordinator is an ongoing relationship. It is not a limited circumscribed relationship. There is a dramatic benefit to a mental health professional or an attorney who has had experience working with children, in child development, and in being able to help parents understand that decisions are made based upon knowing the child and where the child is in terms of his or her development. With younger children, parents would make different kinds of decisions and have different skills than parents who have older children. He expressed the opinion that advanced training is necessary. The vast majority of people who use a parenting coordinator have significant personality problems. Mental health professionals or attorneys who are experienced and have the additional training can be helpful in dealing with these personality problems.

Ms. Kratovil-Lavelle referred to the point made earlier about why should a parenting coordinator be appointed when not enough information is available about the level of conflict or whether the parenting coordination service would be beneficial. When the court routinely orders mediation prior to an initial hearing, it has been proven anecdotally that ordering mediation has been very beneficial in the family law context. Parenting coordination is another helpful tool. If the judge, in his or her discretion, thinks that (a) not enough information is available to know if the case is high conflict, or (b) the case

is not that high a conflict, then the judge does not have to order parenting coordination. The courts are using parenting coordination in every county.

The Chair acknowledged Ms. Kratovil-Lavelle's comments, adding that this is why the Rule will be very helpful. When the Committee first worked on the mediation rules, it was a new concept both to the Committee and to the country. The discussion was very similar to the one today. The original mediation rule required that both sides had to be represented, and no mediation could be ordered if an attorney alleged that there was domestic violence. The rule was written very tightly to see how the concept would work out. Parent coordination is another tool, but the coordinator is not only helping parents. In a post-judgment case, the person can make decisions and can be called as a fact witness. There is no confidentiality. Should parenting coordination initially be very limited? Any judge can do whatever he or she chooses. It may well be that the judges will handle this properly. However, if the Rule is wide open, this is a concern. Some unintended bad situations could arise.

Judge Eyler commented that these issues were worked on in the Family and Domestic Subcommittee. The Rule has been substantially tightened from the way it appeared last January. Originally, it did not have the requirement of high-conflict cases. This was added in. Originally, there was going to be decision-making authority on the part of the parenting coordinator post-judgment without the consent of the parties.

They have tried to limit the scope of the Rule as much as possible and still have it workable. On the question of the court's calling the parenting coordinator as a witness, the custody-visitation cases are unusual in the court system in that the judge is going to have to make a best interest determination, no matter how helpful and participatory the parties are. Unlike most other situations where the court can sit back, and if no one advocates, the case will go away, this is not true for these cases. The decision as to custody has to be made. It is especially important that the judge have access to whatever factual information would be helpful in making that decision.

Judge Eyler said that, as Dr. Berman noted, there are situations where neither party wants the parenting coordinator to appear in court, because the parties have not been totally cooperative in their behavior. It is important for the court to know about it. The Reporter remarked that since no confidentiality exists, the custody evaluator should be able to call up the parenting coordinator and ask about the case. This information can go into the evaluator's report, and if either side does not like what the custody evaluator is going to say about the case, that party can subpoena the parenting coordinator. Judge Eyler responded that it is important to focus on neutrality and impartiality. It is a continuing role, so the parenting coordinator has to have the trust of both parties. If, at some point, the custody evaluator has referenced the opinion of the parenting coordinator or referenced discussions with the

coordinator, and the evaluation comes out in favor of one parent, the trust foundation for the parenting coordinator has been lost. This is a situation where the court should be able to call the coordinator as a witness, so that complete neutrality can be maintained.

The Chair pointed out that the dilemma is that judges can call their own fact witness and experts, but this rarely happens. When a judge does this, it takes them out of the system of the judge being an umpire into the judge being an investigator. This is why it is important to be careful every time that line is crossed.

Judge Eyler agreed, noting that custody cases where the court needs to get information to make a decision are one of the few situations where the court should be able to call a witness. Judge Sundt suggested that language could be added to the Rule that would provide that if neither party is going to call the parenting coordinator as a witness, the court may do so on its own initiative. To her, this is a red flag. If neither party is bringing this person in, where the person has been working with the parties all along, it is like a missing witness. The Chair noted that a witness is not missing if the person is available to both sides and neither has called the person. Judge Sundt responded that this scenario stands out in a case where the parties have worked with a parenting coordinator for six months, and the coordinator is not on either party's witness list.

The Chair inquired if Judge Sundt would agree to limit the

court's ability to call a witness, if both parties object to it. Judge Sundt expressed the view that this would be a perfect reason for the court to be able to call the parenting coordinator as a witness. If she has to decide an issue such as custody, it would be helpful to hear what the coordinator has to say. Ms. Potter noted that the judge is interested in the best interest of the child, and not in what the parties think is the best interest of the child. Judge Sundt remarked that this is not one of the times to limit the court's ability to get information. Judges have tremendous leeway in asking for information. Ordinarily, she sits in these cases and is very quiet. If she is not getting information about a child, notwithstanding getting information about finances or property, she will ask questions, and no court has ever held that this is inappropriate. To fashion a prohibition in an area where the judge may need that information and the parties do not want the judge to have it is not helpful.

Mr. Patterson said that he thought that he had heard earlier in the discussion that when someone issues a summons to the coordinator, his or her role becomes suspect because the person is being called by a party. If the parenting coordinator has done the study and has developed information that is 80% in favor of one parent, the one with the higher percentage would like the person to be in court. If the parenting coordinator has been appointed to do an evaluation, his or her viewpoint should not be discounted, no matter who calls them. Whether it is a court witness, or a party's witness, the coordinator has supposedly

done an impartial analysis. This does not mean that it is balanced, it is impartial, and the person will hopefully tell the court what is in the best interest of the child.

Judge Sundt responded that the coordinator is not making an evaluation. The role of the coordinator is separate from a court evaluator. The coordinator is trying to teach the parents how to communicate. The coordinator would come into court and state that he or she met with the parents once a week, and they have been very cooperative in attending the meetings. Or the coordinator may say that he or she tried to meet with them once a week, but the father has not come in yet. This is a factual reporting of whether the parents are able to communicate, and if so about what, and if not, why not.

Mr. Patterson referred to the example given about the medication. One parent was advocating for medication on a certain basis, and the other stated that it was different. The coordinator made the call and found out that Parent A was correct. Parent B will not listen and still is fighting on this issue. Parent A would like the court to know that this lack of communication exists to the detriment of the child, so Parent A would bring in the coordinator to confirm this. The testimony of the coordinator should not be discounted, just because he or she was brought in to talk about the breakdown in communication about something as important as medication.

Dr. Berman commented that it had not been stated that the information given by the parenting coordinator is discounted.

What had been said is that following the parent coordinator's involvement in court, it is less likely that the other parent is going to trust the coordinator's neutrality. The parent will see the parenting coordinator as having been the other parent's witness. The Chair asked if the father would ever trust the coordinator again if the coordinator testifies as the court's witness, and he or she describes the father in a terrible light. Dr. Berman replied that appearance in many ways is so much of what people base opinions on. If he is responding to a court subpoena, as opposed to one from the other parent, then it is much more likely that both parents will continue to be able to work with him. The Chair noted that the coordinator may not be able to testify as to what the physician had told him on the telephone regarding the appropriate medication. Judge Eyler pointed out that a risk always exists that when the parenting coordinator is testifying, one parent may feel that the coordinator is more on the other parent's side. The Rule provides that a different parenting coordinator can be appointed post-judgment.

The Chair said that Agenda Item 4 would be discussed, and Agenda Item 2 would be deferred until later in the meeting.

Agenda Item 4. Consideration of Rules changes proposed by the Probate/Fiduciary Subcommittee - Amendments to: Rule 6-153 (Admission of Copy of Executed Will), Rule 6-402 (Form of Inventory), Rule 6-403 (Appraisal), and Rule 6-405 (Application to Fix Inheritance Tax on Non-Probate Assets)

Mr. Sykes presented Rule 6-153, Admission of Copy of Executed Will, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 6 - SETTLEMENT OF DECEDENTS' ESTATES

CHAPTER 100 - GENERAL PROVISIONS

ADD new Rule 6-153, as follows:

Rule 6-153. ADMISSION OF COPY OF EXECUTED WILL

Without being required to notify other interested persons, an interested person may file a petition for the admission of a copy of an executed will with the court at any time before administrative or judicial probate if the original executed will is alleged to be lost or destroyed; a duplicate reproduction of the original executed will, evidencing a copy of the original signatures of the decedent and the witnesses, is offered for admission; and all the heirs at law and all legatees named in the will execute a consent in the following form:

[CAPTION]

CONSENT TO PROBATE OF COPY OF EXECUTED

LAST WILL AND TESTAMENT

The undersigned _____ and _____, being all the heirs at law of the decedent and all the legatees named in the will executed by the decedent on _____, hereby consent to the probate of a copy of that executed will, it having been determined, after an extensive search of the

decedent's personal records, that an original of the will cannot be located. By signing this consent each of the undersigned affirms that it is his or her belief that the will executed by the decedent on _____, is the last valid will executed by the decedent and was not revoked and that the copy of the will, as submitted with the petition for its admission, represents a true and correct copy of the will.

We affirm under the penalties of perjury that the facts set forth in this consent are true and correct to the best of our knowledge, information, and belief.

Date	Signature	Print Name and Relationship
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

_____
Attorney

_____
Address

_____

_____
Telephone Number

Rule 6-153 was accompanied by the following Reporter's Note.

The General Assembly enacted Chapter 37, Acts of 2009 (SB 154), which authorizes an

interested person to file a petition for admission of a copy of an executed will to probate if the original executed will is alleged to be lost or destroyed, a duplicate reproduction of the original executed will is offered for admission, and all the heirs at law and legatees named in the offered will execute a consent. The Probate/Fiduciary Subcommittee recommends adding a new Rule addressing the new statute, including the consent form set out by the legislature.

Mr. Sykes explained that the legislature enacted Chapter 37, Laws of 2009 (SB 154), which authorizes any interested person to file a petition to have a copy of an executed will admitted to probate if the original executed will is alleged to be lost or destroyed. All of the heirs and legatees named in the will have to consent. The legislature has provided a form of consent, so new Rule 6-153 adopts the language of the legislature. Charlotte Cathell, Register of Wills for Worcester County, who was a consultant to the Probate Subcommittee, said that she was in favor of the Rule.

There being no other comments, Rule 6-153 was approved as presented.

Mr. Sykes presented Rules 6-402, Form of Inventory, and 6-403, Appraisal, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 6 - SETTLEMENT OF DECEDENTS' ESTATES

CHAPTER 400 - ADMINISTRATION OF ESTATES

AMEND Rule 6-402 by adding a new cross reference, as follows:

Rule 6-402. FORM OF INVENTORY

Within three months after appointment, the personal representative shall file with the register (1) an inventory consisting of a summary and supporting schedules in the forms set forth in this Rule and (2) any required appraisal in conformity with Rule 6-403.

(a) Form of Summary

[CAPTION]

Date of Death _____

INVENTORY

Summary

Schedule	Type of Property	Appraised Value
A	Real _____	$_____
B	Leasehold _____	$_____
C	Tangible personal _____	$_____
D	Corporate stocks _____	$_____
E	Bonds, notes, mortgages, debts due to the decedent _____	$_____
F	Bank accounts, savings and loan accounts, cash _____	$_____
G	All other interests _____	$_____
	Total	$_____

I solemnly affirm under the penalties of perjury that the contents of the foregoing inventory are true to the best of my knowledge, information, and belief and that any property valued

by me which I have authority as personal representative to appraise has been valued completely and correctly in accordance with law.

Date: _____ _____

_____
Personal Representative(s)

_____
Attorney

_____
Address

_____

_____
Telephone Number

(b) Form of Supporting Schedules

Inventory of Estate of _____

Estate No. _____

SCHEDULE _____

Item No.	Description	Market Value

Total $ _____

Verification of appraiser other than personal representative, if not supplied separately:

I solemnly affirm under the penalties of perjury that I appraised the property listed on this schedule on the ____ day of _____, _____, and that the appraisal was

(month) (year)

done impartially and to the best of my skill and judgment.

_____
Signature of Appraiser

_____
Name and Address

Instructions:

Pursuant to Code, Estates and Trusts Article, §7-201,

1. Describe each item in reasonable detail, and indicate its appraised gross market value as of the date of death of the decedent.

2. If an item is encumbered, show the type and amount of any encumbrance in the description.

3. For real and leasehold property, give a description sufficient to identify the property and the title reference by liber and folio.

4. In listing tangible personal property it is not necessary to list wearing apparel other than furs and jewelry.

Cross reference: Code, Estates and Trusts Article, §7-201 and 7-202.

Rule 6-402 was accompanied by the following Reporter's Note.

> The legislature enacted Chapter 405, Acts of 2009 (HB 582), which went into effect on October 1, 2009. The new law provides an alternate method for the valuation of real and leasehold property. To draw attention to this, the Probate/Fiduciary Subcommittee recommends adding a cross reference to the new law at the end of Rules 6-402 and 6-403.

MARYLAND RULES OF PROCEDURE

TITLE 6 - SETTLEMENT OF DECEDENTS' ESTATES

CHAPTER 400 - ADMINISTRATION OF ESTATES

AMEND Rule 6-403 by adding a new cross reference, as follows:

Rule 6-403. APPRAISAL

(a) Required Content

When an appraisal is required, the appraisal shall be prepared and executed by each appraiser named in the Inventory, other than the personal representative. The appraisal shall (1) describe briefly the appraiser's qualifications, (2) list in columnar form each item appraised and its market value as of the date of death of the decedent and (3) be verified substantially in the following form:

I solemnly affirm under the penalties of perjury that I appraised the property listed in this appraisal on the _____ day of _____, _____, and that the appraisal
(month) (year)
was done impartially and to the best of my skill and judgment.

_____
Appraiser

_____
Address

_____

(b) Basis of Appraisal

The basis of appraisal need not be set forth in the appraisal, but, upon request of the register or order of the court, the personal representative shall produce the basis for inspection by the register.

Cross reference: Code, Estates and Trusts Article, §§2-301 through 2-303, and §7-202 (a) and (b). For valuation other than at fair market value, under certain circumstances, see Code, Estates and Trusts Article, §7-202 (c).

Rule 6-403 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 6-402.

Mr. Sykes told the Committee that the Subcommittee recommended the addition to these Rules of a cross reference to Code, Estates and Trusts Article, §7-202, because it was amended in Chapter 405, Laws of 2009 (HB 582), to provide for an alternate method for the valuation of real and leasehold property in an estate. Up until now, the valuation method has been the fair market value of the property. The new law provides that the property can be valued at the contract sales price if the sales price is set forth on a settlement statement for an arm's length contract of sale of the property and if the settlement on the contract occurs within one year after the decedent's date of death. The addition of a cross reference draws attention to the new law when real property is being valuated.

There being no comment, Rules 6-402 and 6-403 were approved as presented.

Mr. Sykes presented Rule 6-405, Application to Fix Inheritance Tax on Non-Probate Assets, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 6 - SETTLEMENT OF DECEDENTS' ESTATES

CHAPTER 400 - ADMINISTRATION OF ESTATES

AMEND Rule 6-405 by adding a new cross reference, as follows:

Rule 6-405. APPLICATION TO FIX INHERITANCE TAX ON NON-PROBATE ASSETS

An application to fix inheritance taxes on non-probate assets shall be filed with the register within 90 days after decedent's death, together with any required appraisal in conformity with Rule 6-403. The application shall be in the following form:

BEFORE THE REGISTER OF WILLS FOR _____, MARYLAND

In the matter of: File No. _____

_____, Deceased

APPLICATION TO FIX INHERITANCE TAX
ON NON-PROBATE ASSETS

The applicant represents that:

1. The decedent, a resident of _____,
(county)

died on _____, _____.
(month) (day) (year)

2. The non-probate property subject to the inheritance tax in

which the decedent and the recipient had interests, the nature of each interest (such as joint tenant, life tenant, remainderman of life estate, trustee, beneficiary, transferee), and the market value of the property at the date of death are:

PROPERTY	NATURE OF INTERESTS	DATE AND TYPE OF INSTRUMENT	MARKET VALUE
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

3. The name and address of the recipient of the property and the relationship to the decedent are: _____

_____.

4. Any liens, encumbrances, or expenses payable from the above property and their amounts are:

_____ $_____

_____ $_____

_____ $_____

5. Attached is a statement of the basis for valuation or, if required by law, an appraisal.

6. All other information necessary to fix inheritance tax is as follows: [ ] tax is payable from residuary estate pursuant to decedent's will; [ ] OTHER (describe): _____

_____

_____

_____

The applicant requests the Register of Wills to fix the amount of inheritance tax due.

I solemnly affirm under the penalties of perjury that the contents of the foregoing application are true to the best of my knowledge, information, and belief.

Date: _____ _____
Applicant

_____
Attorney

_____
Address
_____

_____
Telephone Number

(FOR APPLICANT'S USE - OPTIONAL)

Value of property as above ..... $_____

Less: Liens, encumbrances, and expenses as above .. $_____

Amount taxable ..... $_____

Direct Inheritance Tax due at ____% ..... $_____

Collateral Inheritance Tax due at ____% ..... $_____

Total tax due ..... $_____

Cross reference: Code, Tax-General Article, §§7-208 and 7-225 and Code, Estates and Trusts Article, §7-202.

Rule 6-405 was accompanied by the following Reporter’s Note.

> David Hayes, Esq., an Assistant Attorney General, pointed out that Code, Tax General Article, §7-225 pertains to appraisals of non-probate property for the purpose of determining inheritance tax. The trustees of this type of property have the responsibility to have the property appraised. The statute incorporates by reference procedures in the Estates and Trusts Article related to appraisals. Since there are no valuation procedures set out for trustees, Mr. Hayes suggests adding a cross reference at the end of Rule 6-405 to Code, Estates and Trusts Article, §7-202, which pertains to valuation of real and leasehold property.

Mr. Sykes said that David Hayes, Esq., the Assistant Attorney General who represents the Registers of Wills pointed out that Code, Tax General Article, §7-225 pertains to appraisals of non-probate property for purposes of determining inheritance tax, and the trustees of this type of property must have the property appraised. Nothing sets out the requirements for the appraisal. The statute incorporates by reference procedures in the Estates and Trusts Article related to appraisals. Since no valuation procedures are set out for trustees, Mr. Hayes had suggested the addition of a cross reference at the end of Rule 6-405 to Code, Estates and Trusts Article, §7-202, so that there is consistency between appraisals for fixed-income inheritance tax on non-probate assets and valuation procedures for trustees.

There being no comment, Rule 6-405 was approved as presented.

Continued Reconsideration of Agenda Item 2.

The Chair said that the discussion of Rule 9-205.2 would

resume. Judge Eyler told the Committee that some of the consultants had decided during the lunch break to draft some language changes that address the concerns raised at the meeting and send them to Ms. Ogletree, Chair of the Family and Domestic Subcommittee, and to the Chair of the Committee. This could be discussed at one of the upcoming Committee meetings. The Chair commented that the Rule did not have to be sent back to the Subcommittee. The Rule has been before the full Committee twice. Based on the discussion this morning, some language can be drafted, and the Rule can go back on the agenda for the full Committee.

Master Mahasa referred to subsection (e)(2), which states that a parenting coordinator shall be an individual who has the qualifications listed in section (c) of the Rule. According to the definition of the term "parenting coordinator," this may mean someone who has the qualifications but may not want a fee. The wording of this provision indicates that the parenting coordinator has to receive a fee. The Chair asked if a parenting coordinator would be allowed to serve *pro bono*. Master Mahasa responded that the Committee note at the end of the Rule addresses attorneys who serve as parenting coordinators *pro bono*, but other than that, the Rule seems to require that the coordinator must charge a fee. The Reporter remarked that the "fee agreement" referred to in the Rule could be that the coordinator charges one dollar for his or her services. Dr.

Berman said that mental health professionals are obligated under ethical guidelines to give informed consent, so there would have to be a fee agreement that could provide that no fee will be charged for the service. Master Mahasa observed that in most cases, the parenting coordinator would want to be paid. If a minister or aunt wants to be the coordinator, this should be allowed. The Chair suggested that subsection (e)(2)(C) could read as follows: "has entered into a written fee agreement with the parties or agrees to accept no fee or a fee not in excess...". By consensus, the Committee agreed to this change.

Master Mahasa referred to subsection (f)(1)(F) and inquired what this provision adds that is not covered under sections (a) and (b). Subsection (f)(1)(F) seems to be a summary of those other sections. Judge Sundt commented that the difference between the first few provisions of subsection (f)(1) are result-oriented to get through the impasse of drop-offs and pickups of the child. Subsection (f)(1)(F) gets more into the counseling aspect. This is part of what a parenting coordinator does. They actually sometimes monitor the e-mails of the parents.

Master Mahasa noted that this seems to be covered under subsection (f)(1)(D). Judge Sundt responded that those are aspirational, whereas subsection (f)(1)(F) addresses specific behavior that may not be irritating to one spouse, but it is to the other. Judge Eyler added that subsection (F) is somewhat broader, because it makes an express reference to reduction of "the impact of conflict." This is the overall purpose of the

parenting coordinator. Master Mahasa expressed the view that subsection (F) sounds like the summary of the purpose rather than adding anything substantive.

Dr. Berman pointed out that subsection (F) is the only place where parenting strategies are specifically noted. Master Mahasa referred to subsection (f)(1)(H) and asked what "temporary" means. It might be helpful to have a Committee note explaining the meaning of "temporary," so that a parent is informed as to how long this would be. Judge Eyler questioned whether the note should include examples. It is difficult to come up with language that covers everything. Master Mahasa responded that this is why she suggested a Committee note to give some direction. She added that she has the same concern in subsection (h)(2) where it refers to "promptly" after mailing the notice of resignation. Was this intentionally left vague by using the word "promptly?" Judge Eyler replied that the concern was that if a specific number were included, there could be an aberrant situation such as where the parenting coordinator has to resign two days before a trial, and this may not fit into a time frame of five days if that number had been chosen.

The Reporter pointed out that the word "promptly" is used in many other Rules and gave some examples, Rules 2-601 and 3-601, Entry of Judgment; Rules 4-403 and 4-705, Notice of Petition; Rules 2-126 and 3-126, Process - Return; and Rule 4-407, Statement and Order of Court. Master Mahasa remarked that she was wondering why the word was used, although it may not be that

important, since it is simply a matter of filing a notice with the court, and the court is trying to stay out of this matter as much as possible.

The Chair noted that Rule 9-205.2 is derived from the Title 17 Rules. He asked if the drafters of the Rule had given specific thought as to why in subsection (i)(1), fee schedules are developed and adopted by the circuit administrative judge as opposed to the county administrative judge. Judge Eyler replied that this was added by the Subcommittee. There had been some discussions with Ms. Ogletree, the Chair of the Subcommittee, about this. The Chair commented that there is a tendency to give the authority to the county administrative judges, and give the circuit administrative judges authority in subjects that are circuit-wide. Ms. Wohl observed that giving the circuit administrative judges authority to determine fee schedules makes more sense in Title 17.

The Chair questioned as to whether it might be more appropriate for the county administrative judges to determine fee schedules for parenting coordinators. Ms. Kratovil-Lavelle responded affirmatively. The Chair said that this issue does not have to be resolved at this time. He told Judge Eyler and the other consultants that the Committee will await their redrafted language. The Rules Committee does not meet in December, so the earliest the Rule can be discussed would be at the January meeting. Rules 16-204, Family Division and Support Services, and Rule 17-101, Applicability, can be discussed when Rule 9-205.2 is

brought back. The Reporter asked Judge Eyler to figure out what the Family Services Coordinator should do. Should there be an application process? The Chair added that the current draft seems to suggest that the application is filed automatically, and no one checks to see if the parenting coordinator really has the required qualifications.

Agenda Item 3. Reconsideration of proposed Rules changes pertaining to mediation in family law actions - Amendments to: Rule 9-205 (Mediation of Child Custody and Visitation Disputes), Rule 17-101 (Applicability), Rule 17-103 (General Procedures and Requirements), Rule 17-104 (Qualifications and Selection of Mediators), and Rule 17-109 (Mediation Confidentiality)

The Reporter presented Rule 9-205, Mediation of Child Custody and Visitation Disputes, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 200 - DIVORCE, ANNULMENT AND ALIMONY

AMEND Rule 9-205 to add a new section (c) concerning selection of a mediator, to clarify relettered subsection (d)(2), to add a Committee note following subsection (d)(2), and to delete a cross reference, as follows:

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

(a) Scope of Rule

This Rule applies to any case under

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

(b) Duty of Court

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

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

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

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

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

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

(c) Selection of Mediator

(1) In an order referring an action to mediation pursuant to this Rule, the court may tentatively designate any person qualified under the Rules in Title 17 to

conduct the mediation. The order shall be accompanied by a copy of the appropriate list maintained pursuant to Rule 17-103 and shall state that the parties may substitute another qualified person, whether or not the person's name is on the list, to conduct the mediation by filing with the court no later than 15 days after service of the order a stipulation substantially in the following form:

[Caption of Case]

Selection of Mediator by Stipulation

We agree to attend mediation proceedings pursuant to Rule 9-205 conducted by _____

_____,

(Name, address, and telephone number of mediator)

and we have made payment arrangements with the mediator.

_____	_____
(Signature of Plaintiff)	(Signature of Defendant)
_____	_____
(Signature of Plaintiff's Attorney, if any)	(Signature of Defendant's Attorney, if any)

I, _____,
(Name of Mediator)

agree to conduct mediation proceedings in the above-captioned case in accordance with Rule 9-205 (d), (e), (f), and (g).

I solemnly declare and affirm under the penalties of perjury that I have the qualifications prescribed by Rule 17-104 (a) and (b).

_____
(Signature of Mediator)

(2) If the stipulation is timely filed, the court shall enter an order designating the person selected by the parties to conduct the mediation, unless the court determines that the person does not have the qualifications prescribed by Rule 17-104 (a) and (b). If no stipulation selecting a qualified mediator is timely filed, the referral shall be to the person who had been tentatively designated.

~~(c)~~ (d) Scope of Mediation

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

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

Committee note: If the parties agree, and the mediator has the qualifications prescribed by Rule 17-104 (c), the parties may request that the court also designate the mediator to assist the parties in resolving marital property issues. This Rule and the Rules in Title 17 apply only to court-ordered alternative dispute resolution proceedings. Nothing in the Rules prohibits the parties from selecting any individual, regardless of qualifications, to assist them in the resolution of issues.

~~(d)~~ (e) If Agreement

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

shall submit it to the court.

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

~~(e)~~ (f) If No Agreement

If no agreement is reached or the mediator determines that mediation is inappropriate, the mediator shall so advise the court but shall not state the reasons. If the court does not order mediation or the case is returned to the court after mediation without an agreement as to all issues in the case, the court promptly shall schedule the case for hearing on any *pendente lite* or other appropriate relief not covered by a mediation agreement.

~~(f)~~ (g) Confidentiality

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

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

~~(g)~~ (h) Costs

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

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

Source: This Rule is derived in part from

former Rule S73A and is in part new.

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

> Proposed amendments to Rule 9-205 address the issue of whether the parties in child access litigation may, under the Rule, select a mediator of their choice in lieu of a mediator selected by the court.
>
> Based loosely upon the procedure set forth in Rule 17-103 (c)(4), new section (c) allows the court to tentatively designate a mediator who is qualified under the Rules in Title 17, and allows the parties by agreement to substitute another qualified person for the court's initial selection.
>
> The parties may select another mediator who is on the list maintained pursuant to Rule 17-103 or a mediator who is not on the list, provided the person has the qualifications prescribed by Rule 17-104 (a) and (b). The person selected must agree to comply with Rule 9-205 (d), (e), (f), and (g) and affirm that he or she has the qualifications prescribed by Rule 17-104 (a) and (b).
>
> New section (c) differs from Rule 17-103 (c)(4) in that: (1) the parties may not opt out of mediation altogether; (2) the court's order must provide to the parties specific information about their right to select someone else to conduct the mediation, including the form of stipulation to be filed and a copy of the list of mediators that the court maintains pursuant to Rule 17-103; (3) the time by which the stipulation must be filed is not later than 15 days [rather than 30 days] after service of the order; and (4) if the parties select their own mediator, they must select a person who has the applicable qualifications under Rule 17-104, regardless of whether the person is on the list maintained pursuant to Rule 17-103.
>
> If the parties select their own mediator, fee arrangements are as agreed to by the parties and the mediator; Rules 9-205

(h) and 17-108 do not apply.

If a stipulation is timely filed, the court must designate the person selected by the parties, if the person is qualified. Otherwise, the mediation will be conducted by the person who originally had been tentatively designated.

Relettered subsection (d)(2) is clarified by the addition of a specific reference to "child access," the deletion of the phrase "unless the parties agree otherwise in writing," and a Committee note following the subsection.

In light of new section (c), the cross reference at the end of Rule 9-205 is deleted as unnecessary.

The Reporter explained that the amendments to Rule 9-205 that the Subcommittee came up with were a compromise between the two schools of thought, one of which is that anyone, no matter what his or her qualifications are, could be a mediator if agreed to by the parties, as opposed to the other one which is that only people who are qualified and are picked by the court can serve as a mediator. This is the only type of mediation where parties can be ordered by the court to go and pay for two sessions. They can avoid this to a certain extent if they are alleging in good faith physical or sexual abuse, so that as a result, the mediation would be inappropriate. Otherwise, if the court feels that it is appropriate to have a mediator, and a qualified mediator is available, the parties must go to mediation.

The Reporter said that the idea was to model Rule 9-205

after Rule 17-107, Procedure for Approval, with the extra requirement that one cannot refuse to go to mediation. The court would tentatively designate someone from the approved list. If the parties know of some other qualified person, whether or not that person is on the list, the parties can submit to the court the form set out in section (c) with the signature of the mediator indicating that he or she is agreeing to what is in the form, and the court then must appoint the qualified person. The reference in subsection (c)(1) to "Rule 17-103" should be to "Rule 17-107." The form indicates that the parties and their attorneys agree to the chosen mediator, and the mediator agrees to conduct the mediation in accordance with Rule 9-205 (d),(e), (f), and (g). There are reporting requirements as to what to do if there is an agreement, what to do if there is no agreement. These are put into this form, so that a mediator who is not on the list, and is not familiar with this form, would be directed into those sections of the form, and the mediator would realize that he or she has to comply with the other sections of the Rule.

The Reporter noted that the mediator must declare under the penalties of perjury that he or she meets all of the necessary qualifications prescribed by Rule 17-104 (a) and (b), which is both the regular mediation training and the additional family training. If a stipulation is timely filed within the time allowed to change mediators, the court designates the selected person. If there is no stipulation filed, then the referral continues on to the person originally designated.

Master Mahasa thought that she had read somewhere that a judge could appoint a mediator even if the mediator did not fit the qualifications. The Reporter responded that the Subcommittee had discussed this. Master Mahasa added that this could have been in the background materials. Ms. Wohl commented that subsection (b)(4) of Rule 17-103, General Procedures and Requirements, provides that a judge in all cases can designate anyone to mediate if the parties agree whether the chosen person has the necessary qualifications. The provision in Rule 9-205 is different, because the family law practitioners object to the parties being able to choose their own mediator who lacks the required qualifications. If the court is going to order someone to mediation by a mediator who may or may not be on the list, the fees may be different. If a mediator is on the list, the fees are capped. If a mediator is not on the list, the fees are not capped. Mediators who are qualified may not choose to be on the list. The Reporter pointed out that the Committee note at the end of section (d) states: "Nothing in the Rules prohibits the parties from selecting any individual, regardless of qualifications, to assist them in the resolution of issues." This is not asking someone to be appointed under Rule 9-205.

Ms. Potter referred to the language of subsection (c)(1) that reads "...the court may tentatively designate any person...". Why is the word "tentatively" used? The court will designate someone to be the mediator unless a stipulation is filed to use someone else. The Chair responded that this was

taken from the language of Rule 17-103. Rule 9-205 went into effect a number of years before the Title 17 Rules. At that time, no set qualifications for mediators existed. The original Rule provided that if the court orders mediation, the court shall appoint the mediator from the list unless the parties agree on another mediator approved by the court. This is similar to what is in the Title 17 Rules. The Chair said that the reason the word "tentatively" is in the Rule is because the parties can say that they do not want the person selected and choose someone else.

Ms. Amy Womaski, a mediator in Carroll County, suggested that no one be tentatively designated, so that the parties have to make a selection for mediator. Many people suffer from some degree of inertia, and if the parties are given a name, many will not bother to look for someone else. Universities have graduated 200-300 students a year with degrees in mediation, but many counties are using only a handful of mediators. If the form is accompanied with a full and informative list, the forms are simple, and it would be easy for the parties to contact mediators. For the first seven days, the court will not take any action. It takes some time for the matter to be considered, and time for the mediators to set up a mediation. If the tentative mediator's name is left blank, mediation is being promoted, and using more mediators is being encouraged, which is one of the original goals of the Maryland Judiciary.

The Chair commented that his recollection was that this

language was taken from Title 17. There was a major difference between Title 17 and Rule 9-205, which was pointed out by the Reporter. In Title 17, the court cannot force mediation on the parties. In Rule 9-205, the court can force attendance at a minimum of two sessions and maybe more if good cause is shown. When Title 17 was adopted, the Chair's recollection of what took place before the Court of Appeals was that it was practical that the judge would decide that the case should go to mediation, although the parties could opt out. The judge would name a mediator off of the list.

The Chair said that the question arose as to what if the parties do not want this. In Baltimore City, the Honorable Ellen M. Heller, at the time the administrative judge, had noted that there were so many of these kind of cases, that it would be beneficial to enter an order subject to an opt-out. The language being discussed today was drafted by the Court of Appeals to provide that the court may tentatively name a mediator. It is a default situation, where if the parties do not object, this is the person that they get. Ms. Wohl agreed. She noted that the court can monitor the people whose names are on the list to make sure they are qualified. The majority of people who come into court will not have any basis to choose a mediator. If no name is offered, then it may be that the person whose name is at the beginning of the alphabet will be the one chosen.

The Chair observed that the substantive issue is that this Rule would require that if the parties want to choose someone

else, under a court appointment, it would have to be someone with the necessary qualifications that are in Title 17. This is a change, because currently this is not a requirement, except that the parties can state that they do not want anyone appointed by the court, and that they will get their own mediator. The Chair was not sure that the parties could choose their own person if the court has already issued an order. Ms. Wohl said that in many of the cases where parties get their own mediators, this is done pre-filing or after filing.

The Chair inquired as to what would happen if the parties get an order from the court stating that the parties will attend two mediation sessions with Mediator A. The parties respond that they do not want Mediator A, they want Mediator B. The parties hire Mediator B who agrees to mediate. However, there is a court order naming Mediator A. Ms. Wohl responded that the parties only have to notify the court of the new mediator. The Chair noted that Mediator B may not have the necessary qualifications. Ms. Womaski stated that this is the issue being discussed. Mediator B should be qualified. If the parties are given a form which has a list of qualified mediators attached to it from whom the parties can select, and the parties take the initiative to contact someone from the list, it would take care of the qualification issue, because the people on the list would be qualified.

The Chair said that the question is if the parties can pick someone who is not on that list. So far, the court has said that

this is allowed. Ms. Wohl agreed, pointing out that the person can be anyone the parties choose. The original issue arose at a time when people wanted to call themselves mediators. The Chair observed that it was more a situation of people wanting to choose someone like their pastor, because they had confidence in that person. The pastor would not have the requisite qualifications. Ms. Wohl expressed the opinion that if it is not a mediation, the court should not refer to it as one. The Chair inquired as to whether it could be seen as a different form of Alternative Dispute Resolution ("ADR"). Ms. Wohl remarked that currently anyone can call themselves a mediator. The court orders a mediation and a mediator, the parties decide on someone else, and the court then agrees. What is being suggested now is that if the court designates anyone to be a mediator, whether chosen by the court or by the parties, the mediator must meet the qualifications set out in the Rules. This does not prevent the parties from going to an alternative form of ADR, such as where the pastor mediates the case. The Chair said that this issue had been discussed. If the parties agree on someone to be a mediator, this should be allowed.

Ms. Wohl noted that is somewhat touchy, because the courts are ordering a certain mediator based on his or her qualifications, but if the parties want someone else, the court will agree. The Chair questioned whether this can be addressed by the Rule providing that the parties can go to someone else, but it is not called "mediation." If the parties want to use

another person, then the Rule could provide that the court rescinds its order, and there is no court-ordered mediation. Master Mahasa asked if the court can order the parties to go see "Aunt Mary." The Chair answered negatively.

Ms. Kratovil-Lavelle remarked that there could be an order of mediation, but the parties have not complied with that order yet. They go to "Aunt Mary" and get an agreement. The court can always hear an agreement on the record. There would no longer be a need for the order for mediation. The Chair inquired as to what happens to that order which is outstanding. Ms. Kratovil-Lavelle replied that the court could vacate or rescind the order. The Chair remarked that a judge who issues an order may not want to rescind it.

Ms. Wohl observed that if the parties come to a settlement, the order is moot. The Chair said that a settlement may not be reached. Ms. Wohl responded that if the parties do not reach a settlement, they would have to then go to mediation. There are two issues. One is whether the court should name someone from the court's list. The other is whether the person should have the required qualifications. The Chair referred to the Committee note at the end of section (d), pointing out that no one seems to allow the parties to say that they do not want the court's chosen mediator or anyone on the list, but they would like Aunt Mary, who has a high school education and no mediation training, to do the mediation. Ms. Wohl said that the mediator should have the prescribed qualifications.

The Chair again pointed out the last sentence of the Committee note after section (d) which reads: "Nothing in the Rules prohibits the parties from selecting any individual, regardless of qualifications, to assist them in the resolution of issues." Ms. Wohl noted that the form provides that the person selected must agree to comply with Rule 9-205 (d), (e), (f), and (g), and the court shall enter an order designating the person selected by the parties unless the court determines that the person does not have the qualifications prescribed by Rule 17-104 (a) and (b). This Rule and the Rules in Title 17 apply only to court-ordered ADR. Ms. Kratovil-Lavelle observed that the Family Law Committee did not propose this Rule. It was proposed by the Family and Domestic Subcommittee of the Rules Committee. The Family Law Committee had expressed the view that if the court orders mediation, the mediators need to be qualified under Title 17 whether they are on the list or not.

The Chair expressed the view that the sentence in the Committee note indicates a different policy. Mr. Karceski inquired as to whether the Rule means that if the parties would like to seek other assistance to help them make decisions, they can do so. The Reporter said that this was what was intended. The Chair asked if the parties still have to go to mediation if they seek other assistance. The Reporter answered that Rule 9-205 would require it. Mr. Karceski remarked that he did not know how the last sentence of the Committee note after section (d) would be interpreted. The Chair stated that the issue is whether

the court should be ordering the parties to do something else at their expense, even if the parties want to find someone not ordered by the court to help them resolve their dispute, and they agree on this. This is the policy question, and so far, the answer has been "no." Now, this is a proposed change.

Mr. Karceski said that he was looking at this from the point of view of someone who is not involved in mediation. He could not agree that if the two parties choose someone, it supersedes the necessity of a mediator who has the necessary qualifications pursuant to Title 17. Either the last sentence of the Committee note should be deleted, or it should be rewritten to say that it is not that the parties can supersede the order by the court for a mediator, but it is permissible to get some help on the side. Master Mahasa added that if Aunt Mary tries first to resolve the argument and is unsuccessful, there will be another court hearing that the parties have to attend, and another order that is issued.

Mr. Patterson remarked that the parties may say that they think that they can come to an agreement if they can have the chance to sit down and talk without anyone. They would like one more opportunity to resolve the differences on their own. Will the court refuse to allow this and order mediation? The parties should be given the chance to resolve the issues. What is the difference between the parties wanting to try to do this on their own, or wanting to use Aunt Mary to help them? Master Mahasa replied that the parties could go to Aunt Mary first, and if the

issues are not resolved, then they do not have to go to the mediator. The Chair argued that they would still have to go to the mediator if the court has issued an order.

Judge Norton expressed the concern that Aunt Mary may not know about all of the different issues that need to be resolved, whereas the mediator will be familiar with all of the different aspects of the case. The parties themselves may not know about all of the issues, but the mediator would. It would be preferable to resolve all of the issues in advance, rather than having to go back to it later. The Chair stated that the last sentence of the Committee note at the end of section (d) is not necessary, because the parties can always go to Aunt Mary or anyone else they choose. Ms. Wohl added that the mediation order does not preclude the parties from entering into self-negotiations without a mediator.

The Chair said that the only issue that is presented is the question of whether the parties on their own can agree to someone to mediate the case who does not have the qualifications, and if they do so, that ends the court order. Mr. Leahy remarked that if the parties can go to someone else, they can do it pre-filing, or it has already been done. Ms. Wohl observed that if Aunt Mary or anyone else settles the matter, or if it is settled in face-to-face negotiations, the court will not require mediation. Mr. Karceski noted that someone should be qualified to do the mediation. Master Mahasa said that if all of the parties agree, Aunt Mary can be brought in.

The Chair referred to the Committee note at the end of section (e). The last sentence reads as follows: “Mediators should act only as scribes recording the parties’ points of agreement, and not as drafters creating legal memoranda.” He questioned the meaning of the phrase “creating legal memoranda.” He suggested that the wording should be “not as drafters of binding agreements.” Ms. Wohl remarked that mediators can do binding agreements. The Chair stated that the Court of Appeals was absolutely clear that mediators were not able to do binding agreements. In the first place, a mediator may not be an attorney, and if he or she tries to draft binding agreements for a fee, this is practicing law. If the mediators are attorneys, they are representing parties with conflicting interests. This is exactly why the Court added this language indicating that mediators cannot draft binding agreements. They can act as a scribe recording points of agreement that the parties have reached. This original language came from the original rule that only applied where the parties had counsel. The original rule provided that what the mediator would do would be to record the points of agreement and send it to the attorneys. Now, attorneys are no longer required. Should a mediator who is not an attorney be drafting binding agreements for anyone, and even if the mediator is an attorney, should he or she be doing this for parties in conflict? The mediator is getting paid for this service, and it is a violation of the Code of Ethics. Ms. Womaski remarked that she always adds to her mediation contract

that any agreement is not binding until the judge approves it.

The Chair reiterated that he was not sure what the phrase "creating legal memoranda" meant. Ms. Wohl said that in legal documents, the mediator is not allowed to add clauses and words to make the document a formal legal document. The Chair responded that this is not the meaning of "legal memoranda." Mediators are not supposed to change any documents. He suggested that the language could be "not as drafters of binding agreements." Mediators are not supposed to be drafting contracts for parties. Ms. Wohl said that what happens when the parties are *pro se* is that the mediators will act as scribes to record the points of agreement and hand the writing to the parties.

The Chair agreed that this is all that the mediators should be doing. They do not have to sign anything. Master Mahasa said that they do not have to sign, but the goal is for them to sign, and the agreements of the parties can be submitted to the court. The Chair said that the original rule was that the mediator was to send his or her notes to the attorneys, because both parties had to be represented. The attorneys would then draft the agreement and present it to the court. Now, attorneys are no longer required. If a non-attorney drafts what will be a binding agreement, he or she may not do it correctly.

Ms. Womaski noted that in Carroll County, a copy of the agreement is to be sent to the attorneys, and if there are no attorneys, to the participants. Once the agreement is signed,

the mediator submits it to the clerk of the court as a consent order. The Carroll County Differentiated Case Management program is directing the mediators to submit them to the courts. There are many inconsistencies throughout the State.

The Chair stated that when the Court of Appeals adopted the language that a mediator should not be drafting binding agreements, there was no inconsistency. The Court was unanimous on this point. The language in the Rule would change this. At the hearing before the Court, the mediators requested that they be able to do this, and the Court refused. Ms. Wohl pointed out this only applies to Rule 9-205, but not to Title 17, which does not provide that the mediator cannot have the parties sign a binding agreement. Section (d) of Rule 17-102, Definitions, states that a mediator may "...record points of agreement reached by the parties." Ms. Wohl responded that mediators do this, and the parties sign it. The Chair suggested that a period should be added after the words "points of agreement" in the Committee note at the end of section (e), and the rest of the language that reads: "and not as drafters creating legal memoranda" should be deleted. This would make it consistent with Title 17. By consensus, the Committee agreed to this change.

Ms. Wohl commented that in the family context, a master or a judge always looks at the agreement to make sure that it is in the best interest of the child. The Reporter inquired as to whether the last sentence of the Committee note after section (d) is being deleted, or whether the language "in addition to any

court-ordered ADR," should be added before the word "nothing" By consensus, the Committee agreed to the addition of the language suggested by the Reporter.

Ms. Womaski reiterated her point that the selection of the mediator should be left blank to encourage people to take the initiative to use more of the mediators available to them as long as they meet the qualifications and are chosen off the list. Ms. Wohl noted that in most jurisdictions, unless the mediator is named in the court order, the mediators at the top of the list will be chosen. The Chair asked if there was a motion to alter the language, and none was forthcoming.

By consensus, the Committee approved Rule 9-205 as amended.

The Reporter presented Rule 17-101, Applicability, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

AMEND Rule 17-101 to add a cross reference following section (b), as follows:

Rule 17-101. APPLICABILITY

(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.

Cross reference: For prohibition of a waiver of the prescribed qualifications of a mediator designated by the court with respect to child access or marital property issues, see Rule 17-104 (a)(2).

Source: This Rule is new.

Rule 17-101 was accompanied by the following Reporter's Note.

A cross reference following section (b) is proposed to be added to Rule 17-101 to highlight the proposed new prohibition of a waiver by agreement of the prescribed qualifications of mediators designated by the court with respect to child access or marital property issues.

The Reporter told the Committee that a cross reference has been proposed to be added at the end of Rule 17-101 referring to what was discussed earlier. Ms. Wohl noted that there is no waiver of prescribed qualifications. The Reporter said that the person with the qualifications would have to be chosen in a child access case. The parties are prohibited from waiving the

prescribed qualifications. The Style Subcommittee can redraft this language to be clearer. Ms. Wohl commented that one would notify the court that he or she would like a different mediator. Her hope is that Title 17 will be changed, so that all mediators have to be qualified. The Chair remarked that this has been done, but not openly. Rule 17-103 (c)(4) states: "If, within the time allowed by the court, the parties inform the court of their agreement on another person willing and able to conduct the proceeding, the court shall designate that person." But if the court designates the person, he or she has to have the qualifications. This is big change from the current practice.

Ms. Wohl responded that these issues will be brought to the ADR Subcommittee of the Rules Committee. Until then, this change is unnecessary. The Chair disagreed, noting that this addresses general, civil cases. This is not addressing family cases. If the parties in a general, civil case would like to have someone act as a mediator who does not have the qualifications, should they be able to do so? Ms. Wohl answered that the parties should be able to go to anyone they want for any kind of dispute resolution process. However, if they are going to someone for mediation, and the person does not have training as a mediator, it makes no sense.

The Chair inquired whether there is any history or data to show (1) how many times people do this, and (2) whether the results when they do this are any better or worse than using a court-ordered mediator. Ms. Wohl replied that no data exists,

but she could try to gather this information. The Chair asked why should this change should be made if there is no data to support the need for this change. Ms. Wohl responded that it is because the court is calling someone a "mediator" who does not have training. The Chair remarked that this has been the practice for 15 years. Ms. Potter expressed the view that she would like to be able to use someone who she feels understands the issues of the case, whether or not that person is a trained mediator. The Chair added that the person does not call himself or herself a "mediator."

The Reporter said that it would be appropriate to discuss Rule 17-104, Qualifications and Selection of Mediators, at this point, and she presented the Rule for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

AMEND Rule 17-104 to add a new subsection (a)(1)(G) pertaining to removal from the approved list of any county, to add a new subsection (a)(2) that prohibits waiver of the prescribed qualifications under certain circumstances, to add a cross reference following section (b), and to reorganize the Rule, as follows:

Rule 17-104. QUALIFICATIONS AND SELECTION OF MEDIATORS

(a) Qualifications ~~in General~~ –All Court-Designated Mediators

(1) Generally

Except as otherwise provided in subsection (a)(2) of this Rule, ~~To~~ to be designated by the court as a mediator, ~~other than by agreement of the parties,~~ a person must:

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

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

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

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

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

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

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

(G) unless reinstated, not have been removed for good cause from the approved list of any county after notice and an opportunity to be heard in accordance with Rule 17-107 (a)(4).

(2) Waiver of Qualifications by Agreement; Exception

A mediator designated by the court with respect to issues concerning child access or marital property shall have the qualifications prescribed by this Rule. In all other cases, the court, by agreement of the parties, may designate a mediator who does not have the prescribed qualifications.

(b) Additional Qualifications - Child Access Disputes

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

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

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

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

Cross reference: See Rule 9-205.

~~(d)~~ (c) Additional Qualifications - Marital Property Issues

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

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

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

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

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

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

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

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

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

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

(e) Additional Qualifications - Health Care Malpractice Claims

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

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

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

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

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

(f) Additional Qualifications - Proceedings to Foreclose Lien Instruments

To be designated by the court as a mediator in a proceeding to foreclose a lien instrument, other than by agreement of the parties, the person must:

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

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

(3) be knowledgeable about lien instruments and foreclosure proceedings because of experience, training, or education; and

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

Cross reference: Code, Courts Article, §3-2A-06C (c).

Source: This Rule is new.

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

Proposed new subsection (a)(1)(G) adds to Rule 17-104 a requirement that to qualify for designation by a court in any action, an individual must not have been removed for good cause from the approved list of mediators in any county in the State. The ineligibility applies only if the mediator was given notice and the opportunity for a hearing prior to the removal and has not been reinstated on the list.

> New subsection (a)(2) allows the court, upon agreement of the parties, to designate a mediator who does not have the qualifications prescribed by the Rule; however, the court may not do so if the mediation involves issues of child access or marital property.
>
> A purely stylistic change also is made. Sections (c) and (d) of the Rule are switched, so that the two sections pertaining to mediation in family law actions are not separated by the section pertaining to mediation in the Business and Technology Case Management Program.

The Reporter noted that the change to Rule 17-104 was drafted by the Family and Domestic Subcommittee and was only meant to make a change to family law mediation. The change to child access cases has been discussed. This is a family-law type of mediation. Subsection (a)(2) contains the only change, which is whether, with respect to marital property, the mediator has to have the mandatory requirements set out in Title 17. In child access cases, there seems to be a general consensus that a child access mediator has to meet those requirements. The question raised by the Family and Domestic Subcommittee in subsection (a)(2) is if the mediator has to have the special marital property qualifications in addition to the general mediation requirements when there is marital property. If two people have a dispute, and they want to take it to a person of their choice, under the other Rules of Title 17, it is allowed even though the person chosen does not meet the qualifications.

The Chair commented that this is the way it should be. However, Rule 17-103 (b) provides that the court may not require

a party to participate unless that person possesses the minimum qualifications, and the parties agree. The court cannot designate someone who does not have the qualifications. The Reporter said that the Subcommittee was only trying to address child access and marital property mediation. The Chair suggested that the third sentence of subsection (b)(4) could read as follows: "If, within the time allowed by the court, the parties inform the court of their agreement on another person willing and able to conduct the proceeding, that person shall serve as a mediator in place of the person designated by the court." The parties can agree to anyone they want.

Master Mahasa said that this was the language that she referred to earlier in the discussion. The Chair noted that what was intended, at least in the general, civil context, is that the parties can agree on anyone they want. If they agree on someone, this is the person. However, the person should not be called a "mediator."

Ms. Wohl remarked that when this was drafted 10 years ago, there were not many trained mediators. Now, the training is very accessible. If one holds oneself out as a mediator, the person should be trained as one. The Chair suggested that the Rule could state: "If... the parties inform the court of their agreement on another person willing and able to conduct the proceeding, the court shall rescind the order." Master Mahasa inquired as to what the word "able" meant. Is it people who have the qualifications? The Chair responded that it means people who

are willing to do it and are available.

Ms. Wohl referred to section (b) of Rule 17-103 where it provides that a court may not require a party or the party's attorney to participate in an ADR proceeding conducted by a person designated by the court unless: "(1) that person possesses the minimum qualifications prescribed in the applicable rules in this Chapter, or (2) the parties agree to participate in the process conducted by that person." The Chair asked why Ms. Wohl is so concerned. She answered that they are trying to raise the quality of practice in the State. They have a program on mediator excellence and are putting a great amount of energy into raising the quality of practice.

The Chair commented that the word "mediator" has a very common meaning like the words "kleenex" or "xerox," but not to mediators. The point of the qualifications was that the court should not be forcing people to go to an extra-judicial proceeding with someone who is not minimally qualified and make the parties pay for it. Ms. Wohl remarked that people can opt out in civil cases. If the court is designating someone as a mediator and that person is not trained, it is not appropriate. The Chair commented that mostly the mediators have this concern. The important concept is that if the court orders the parties to go to mediation, and the parties do not want to use the person selected by the court, it does not matter what the title of the person is that the parties choose, as long as they have the right to select someone else. The Rule can provide that at that point,

the court will rescind the order, because it is no longer a court-mandated process.

Ms. Wohl observed that if the parties choose someone else, she would have no objection in a civil case. However, it is not the same for family cases. The Chair pointed out that general, civil cases would also pick up the money issues in a family case, because the Title 9 Rules only apply to child access. If the parties want to go to an accountant or a chartered life underwriter (c.l.u.). in a case with a pension issue who has no mediation training, they should be able to do this. Ms. Wohl and Ms. Kratovil-Lavelle agreed that they are able to do this.

Ms. Kratovil-Lavelle observed that there are national standards for mediation. In her department, they have been working on minimum qualifications for all of the services ordered by the court. They just finished a pilot project where the mediators have to qualified almost to the extent of what would be required if there were a certification of mediators. If the parties want to go to Aunt Mary or whoever, they have policies to encourage them to do this at any time. If the parties are going to a mediator, they feel that mediators should have minimum qualifications from basic reasons to safety reasons, including being able to screen for domestic violence.

The Chair asked Ms. Kratovil-Lavelle if she agreed that except in child access cases, the parties would be free to pick anyone they want to conduct an ADR proceeding, and if they do, the court rescinds the order of mediation. Ms. Kratovil-Lavelle

answered negatively. If there are domestic violence issues involved, and the parties decide to go to Aunt Mary, typically the woman would agree whether or not she was actually in favor of this, because there are no quality controls.

The Chair inquired about money issues. He reiterated that this would apply to cases other than child access. Ms. Kratovil-Lavelle questioned whether marital property cases would be included. The Reporter remarked that the other side would be that in marital property cases, issues arise concerning family use and possession of the home and property, and this ties in with the best interest of the children. The decision has been made that in child access cases, the mediators must have the Title 17 qualifications. The issue that came out of the Subcommittee involving marital property was because it is so tied to child access issues. Ms. Kratovil-Lavelle added that there are other complicated issues, including qualified domestic relations orders (qdros) and pensions. Judges around the State have been concerned about some of the agreements in which people unwittingly have waived major property rights, such as 50 years of pension benefits. The Reporter asked if this took place during mediation, and Ms. Kratovil-Lavelle replied affirmatively.

Ms. Wohl observed that some of these are people who chose a mediator other than the one chosen by the court, and the court agreed to the parties' choice. The Chair stated that he was suggesting that to resolve this, other than in child access cases, if the court orders mediation, and the parties reject the

person chosen by the court and choose another person, the court simply rescinds the order. Ms. Wohl responded that she would like for the ADR Subcommittee to consider this and other issues. Are other new aspects going to arise? The Chair answered that the proposed changes maintain what is the status quo. Since the Rules were first adopted, the parties could always refuse mediation. Ms. Wohl said that they still can refuse.

The Chair pointed out that the parties cannot choose anyone who does not have these qualifications. Ms. Wohl said that it would not be mediation. The Chair agreed but added that if the parties would go to someone else, then the court would rescind the order. Ms. Wohl inquired as to whether this would undermine the court's use of mediation. The Chair said that it would not, because this option already exists. Parties can go to Aunt Mary now, if they so choose, to mediate any issue, including child access. Ms. Wohl remarked that most people generally do not choose their own person and go to reputable mediators who have mediation training. She expressed some concern about providing for a rescission of the order. The Chair stated that this issue will have to be revisited, as a quorum was no longer present.

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