COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 1 & 2, Judiciary Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, on November 18, 2011.

Members present:

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

F. Vernon Boozer, Esq.
Robert R. Bowie, Jr., Esq.
Albert D. Brault, Esq.
James E. Carbine, Esq.
Harry S. Johnson, Esq.
Richard M. Karceski, Esq.
J. Brooks Leahy, Esq.
Hon. Thomas J. Love
Zakia Mahasa, Esq.
Timothy F. Maloney, Esq.
Robert R. Michael, Esq.
Hon. W. Michel Pierson
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
Hon. Julia B. Weatherly
Hon. Robert A. Zarnoch

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Kara K. Lynch, Esq., Assistant Reporter
Jeffrey Fisher, Esq.
D. Robert Enten, Esq.
Steven W. Boggs, Esq., Secretary, State Board of Law Examiners
Barbara Gavin, Esq., Director, Character and Fitness, State Board of Law Examiners
Wayne Willoughby, Esq., Maryland Association for Justice
Michael J. Winkelman, Esq.
Ms. Michele Gaynor
Debra Gardner, Esq., Public Justice Center
John Connolly, Esq.
Richard Montgomery, Director, Legislative Relations, MSBA

The Chair convened the meeting. He announced that Judge Weatherly had been honored with the Rosalyn Bell award from the Women’s Law Center. The Committee congratulated Judge Weatherly.

The Chair also announced that Mr. Sykes had been named the Best Lawyers' Appellate Practice Lawyer for 2012. He had received a lifetime achievement award from the Maryland Fellows of the American College of Trial Lawyers in 2006, and has deservedly won many other awards. Mr. Sykes has been on the Committee for more than 50 years and is one of the Committee's cherished members.

The Chair told the Committee that they had been sent many sets of Rules Committee minutes. The Reporter added that more will be sent. The Chair said that Ms. Libber, an Assistant Reporter, prepares the minutes from the tapes of the meetings. Either the Chair or the Reporter or both of them go over the minutes and edit them. They are trying to bring the minutes up to date. The Reporter commented that Mr. Klein, a member of the Committee who was not present, had suggested one correction to the March, 2010 minutes on page 79. He had changed the sentence to read, "The way to handle this is to confiscate the phone and make the person with the phone pay a fine in order to redeem it." This is a change pertaining to Rule 16-110, Cell Phones; Other Electronic Devices; Cameras. The Chair noted that this procedure had not been adopted. By consensus, the Committee approved this change.

The Chair said that hearing no objection, the minutes that had been sent to the Committee, which were: May, 2009; June, 2009; September, 2009; October, 2009; November, 2009; January, 2010; March, 2010; April, 2010; May, 2010; and June, 2010, would be approved as presented, except for the one change to the March,

2010 minutes. More minutes will be sent soon. Rules Committee meetings are unusual in the sense that the minutes of an average meeting can run well over 100 pages, sometimes as many as 150 or 200 pages. They are not a verbatim transcript, but the attempt is to capture as much as possible, since it is the legislative history of the Rules. Attorneys and judges ask for these minutes when they have an issue. It is important to make sure that the minutes are complete and accurate. Starting from now, they will be timely, also.

The Chair stated that Agenda Item 3, Reconsideration of Reply Memoranda issue, had been withdrawn from the agenda. One of the circuit administrative judges had requested that the Conference of Circuit Court Judges be allowed to weigh in on this. It is a collateral issue to what had been discussed -- what impact specifically allowing time for reply memoranda will have on the time standards to which the circuit court judges are required to conform. The Conference of Circuit Court Judges will look at this issue and give the Committee its recommendation. Otherwise, the Conference will give its opinion when the Court of Appeals considers the Rule, so it is useful to know what the Conference thinks.

The Chair said that Agenda Item 4 would be considered first, because representatives of the State Board of Law Examiners have another commitment.

Agenda Item 4. Consideration of a proposed amendment to Rule 19 of the Rules Governing Admission to the Bar of Maryland (Confidentiality)

Mr. Brault presented Rule 19 of the Rules Governing Admission to the Bar of Maryland, Confidentiality, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

RULES GOVERNING ADMISSION TO THE BAR OF MARYLAND

AMEND Rule 19 of the Rules Governing Admission to the Bar of Maryland to add to subsection (c)(7) language regarding the disclosure of applicant information to bar associations, and to make stylistic changes, as follows:

Rule 19. CONFIDENTIALITY

(a) Proceedings Before Committee or Board; General Policy

Except as provided in sections (b), (c), and (d) of this Rule, the proceedings before the Accommodations Review Committee and its panels, a Character Committee, and the Board and the related papers, evidence, and information are confidential and shall not be open to public inspection or subject to court process or compulsory disclosure.

(b) Right of Applicant

(1) Except as provided in paragraph (2) of this section, an applicant has the right to attend all hearings before a panel of the Accommodations Review Committee, a Character Committee, and the Board pertaining to his or her application and to be informed of and

inspect all papers, evidence, and information received or considered by the panel, Committee or the Board pertaining to the applicant.

(2) This section does not apply to (A) papers or evidence received or considered by a Character Committee of the Board if the Committee or Board, without a hearing, recommends the applicant's admission; (B) personal memoranda, notes, and work papers of members or staff of a Character Committee or the Board; (C) correspondence between or among members or staff of a Character Committee or the Board; or (D) an applicant's bar examination grades and answers, except as authorized in Rule 8 and Rule 13.

(c) When Disclosure Authorized

The Board may disclose:

(1) statistical information that does not reveal the identity of an individual applicant;

(2) the fact that an applicant has passed the bar examination and the date of the examination;

(3) any material pertaining to an applicant that the applicant would be entitled to inspect under section (b) of this Rule if the applicant has consented in writing to the disclosure;

(4) any material pertaining to an applicant requested by

(A) a court of this State, another state, or the United States;

(B) Bar Counsel, the Attorney Grievance Commission, or the attorney disciplinary authority in another state;

(C) the authority in another jurisdiction responsible for investigating the character and fitness of an applicant for admission to the bar of that jurisdiction, or

(D) Investigative Counsel, the Commission on Judicial Disabilities, or the judicial disciplinary authority in another jurisdiction for use in:

(i) a pending disciplinary proceeding against the applicant as an attorney or judge;

(ii) a pending proceeding for reinstatement of the applicant as an attorney after disbarment; or

(iii) a pending proceeding for original admission of the applicant to the Bar;

(5) any material pertaining to an applicant requested by a judicial nominating commission or the Governor of this State, a committee of the Senate of Maryland, or a committee of the United States Senate in connection with an application by or nomination of the applicant for judicial office;

(6) to a law school, the names of persons who graduated from that law school who took a bar examination and whether they passed or failed the examination;

(7) to the Maryland State Bar Association and any other bona fide bar association in the State of Maryland; ~~and~~

(8) to each entity selected to give the course on legal professionalism required by Rule 11, the name and address of a person recommended for bar admission pursuant to Rule 10;

~~(8)~~ (9) to the National Conference of Bar Examiners, the following information regarding persons who have filed applications for admission pursuant to Rule 2 or petitions to take the attorney's examination pursuant to Rule 13: the applicant's name and aliases, applicant number, birthdate, Law School Admission Council number, law school, date that a juris doctor degree was conferred, bar examination results and pass/fail status, and

the number of bar examination attempts;

~~(9)~~ (10) to any member of a Character Committee, the report of any Character Committee or the Board following a hearing on an application; and

~~(10)~~ (11) to the Child Support Enforcement Administration, upon its request, the name, Social Security number, and address of a person who has filed an application pursuant to Rule 2 or a petition to take the attorney's examination pursuant to Rule 13. Unless information disclosed pursuant to paragraphs (4) and (5) of this section is disclosed with the written consent of the applicant, an applicant shall receive a copy of the information and may rebut, in writing, any matter contained in it. Upon receipt of a written rebuttal, the Board shall forward a copy to the person or entity to whom the information was disclosed.

(d) Proceedings and Access to Records in the Court of Appeals

(1) Subject to reasonable regulation by the Court of Appeals, Bar Admission ceremonies shall be open.

(2) Unless the Court otherwise orders in a particular case:

(A) hearings in the Court of Appeals shall be open, and

(B) if the Court conducts a hearing regarding a bar applicant, any report by the Accommodations Review Committee, a Character Committee, or the Board filed with the Court, but no other part of the applicant's record, shall be subject to public inspection.

(3) The Court of Appeals may make any of the disclosures that the Board may make pursuant to section (c) of this Rule.

(4) Except as provided in paragraphs (1), (2), and (3) of this section or as otherwise required by law, proceedings before the Court of Appeals and the related papers, evidence,

> and information are confidential and shall not be open to public inspection or subject to court process or compulsory disclosure.
>
> Source: This Rule is new.

Bar Admission Rule 19 was accompanied by the following Reporter's note.

> The State Board of Law Examiners has requested an amendment to Bar Admission Rule 19, Confidentiality, which would allow it to disclose to local and State bar associations the names and addresses of applicants who have passed the bar examination. The purpose of disclosure is to enable bar associations to mail to applicants information regarding membership, networking events, programs, and receptions.
>
> The Court amended Rule 19 on March 7, 2011 to allow disclosure to the Maryland State Bar Association. The proposed amendment is broader and permits disclosure to any bona fide bar association in the State of Maryland.

Mr. Steven W. Boggs, Secretary of the State Board of Law Examiners, explained that he was asking for the change to Bar Admission Rule 19 to give him the authority under the Rule to disclose names and addresses to bona fide bar associations in the State of Maryland. This means local and specialty bar associations, which seem to fall under the auspices of the Maryland State Bar Association. His predecessor, Bedford T. Bentley, Esq., had been providing this information under his tenure, but when Mr. Boggs looked at Bar Admission Rule 19, he did not see where he had the authority to do so. He asked that the proposed amendment be approved. The Chair asked the

Committee if anyone had any other comments on the proposed change. He said that because the proposed change was a recommendation of the Attorneys Subcommittee, it would take a motion to not approve the change. Hearing no motion, the Chair stated that the proposed change to Bar Admission Rule 19 was approved as presented.

Agenda Item 1. Reconsideration of proposed new: Title 2, Chapter 700 (Claims for Attorneys' Fees and Related Expenses) and Rule 3-741 (Attorneys' Fees) - Amendments to: Rule 2-341 (Amendment of Pleadings) and Rule 2-504 (Scheduling Order)

The Chair said that the next item was a major one, involving attorney fee-shifting. Before he asked Mr. Brault to present this item, the Chair clarified that the purpose of the meeting was not for de novo review of all of the Rules pertaining to this issue. The Rules had been before the Committee countless times, most recently in April of 2011. After much debate, the Committee had approved almost all of the Rules, but they made a number of amendments, some of which were in the form of specific language or specific deletions. Some were more conceptual and left to be drafted. The Reporter and the Chair went through the minutes of that meeting and tried as best they could to incorporate into the Rules now before the Committee all of the changes that had been approved by the Committee in April. This included both deletions and additions as well as changes in language. Some of the decisions made by the Committee required that language be drafted. The Chair and the Reporter had tried to conform the

language to what the Committee had decided. Several issues still remain to be addressed. They are flagged either by alternative language or by drafter's notes. This is what is before the Committee today. It is the articulation of those changes that are shown either by underlined language or bracketed and stricken material. The few remaining issues presented in the drafter's notes are in bracketed alternative language. The Committee would not be debating what had already been decided.

The Chair said that D. Robert Enten, Esq., had asked and been granted for permission to speak once again on an issue that is of concern to the bankers. Subject to that and to any matter that a member of the Committee thinks is so egregious or so unconstitutional in the Rules, the Committee would not go back and look at all of the Rules again.

Mr. Brault presented new Rules 2-701 (Definitions) 2-702 (Scope of Chapter), 2-703 (Procedure Where Attorneys' Fees Allowed by Statute), 2-704, (Procedure Where Attorneys' Fees Allowed by Contract), 3-741 (Attorneys' Fees), and proposed amendments to Rules 2-341 (Amendment of Pleadings) and 2-504 (Scheduling Order) for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 – CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 700 – CLAIMS FOR ATTORNEYS' FEES AND RELATED EXPENSES

ADD new Rule 2-701, as follows:

Rule 2-701. DEFINITIONS

In this Chapter, except as otherwise provided or necessary implication requires:

(a) "Attorneys' fees" include related expenses; and

(b) "Related expenses" means those expenses that are related to and incurred as part of the provision of legal services, including compensation for the services of paralegals and law clerks.

Committee note: In *Friolo v. Frankel*, 373 Md. 501, 530 (2003), the Court held ~~that~~, for purposes of a claim under the Wage Payment Law, which allowed an award of reasonable "counsel fees," that charges for paralegals and law clerks were subsumed within the attorneys' fees and should not be separately charged as attorneys' fees. It appears that most courts do allow compensation to paralegals and law clerks to be included in a statutory fee-shifting claim. The intent of this Rule is to allow the compensation paid to paralegals and law clerks for work done in connection with a claim permitting the recovery of attorneys' fees to be included as a separately identified related expense. This would serve the beneficent purpose of reducing claims for attorneys' fees by encouraging attorneys to permit lower-paid paralegals and law clerks to perform tasks they properly can perform that otherwise would have to be done by the attorneys and yet avoid the anomaly of regarding compensation paid to non-attorneys as attorneys' fees.

Source: This Rule is new.

CHAPTER 700 – CLAIMS FOR ATTORNEYS' FEES AND RELATED EXPENSES

ADD new Rule 2-702, as follows:

Rule 2-702. SCOPE OF CHAPTER

(a) Generally

Subject to section (b) of this Rule, the Rules in this Chapter apply ~~only~~ to actions in which, by law or contract, a party is or may be entitled to claim attorneys' fees from another party ~~by virtue of prevailing in an underlying claim that is separate from the claim for attorneys' fees~~. ~~They do not apply to a dispute between an attorney and the attorney's client over an attorney's fee or where the entitlement to attorneys' fees is an element of damages~~.

Committee note: ~~The Rules pertaining to the recovery of attorneys' fees are structured to deal with claims based on statutory allowances of attorneys' fees and (Rule 2-703) and contractual provisions allowing the recovery of attorneys' fees (Rule 2-704), whereas District Court Rule 3-741 deals with both.~~

~~Examples of actions in which the entitlement to attorneys' fees is an element of damages to be resolved at trial by the trier of fact are malicious prosecution cases and actions to recover attorneys' fees because of an insurance company's failure to defend its insured under a policy of liability insurance.~~

Maryland generally follows the "American Rule" under which a party is not liable for the attorneys' fees of another party unless such liability is provided for either by statute or by a contract between the parties.

That principle ordinarily applies only to fees incurred in the preparation and

litigation of the instant or an allied action and not, for example, to an action against an insurer for attorneys' fees incurred by an insured in defending a claim that, under the policy, the insurer was obliged to defend, or to attorneys' fees incurred by the plaintiff in defending a malicious prosecution brought by the defendant. The Rules in this Chapter apply only to claims subject to the "American Rule," with the additional exceptions set forth in this Rule.

Under prevailing case law, the procedure for resolving claims for attorneys' fees, the standards for determining the amount of such fees that may be awarded, and the kind of evidence required to satisfy the applicable standard may vary, depending, in part, on whether the basis for the claim is statutory or contractual. *See Monmouth Meadows v. Hamilton*, 416 Md. 325 (2010); *G-C Partnership v. Schaefer*, 358 Md. 485 (2000); *Accubid v. Kennedy*, 188 Md. App. 214 (2009). These Rules recognize those differences, as well as the fact that much of the formality and detail that may be appropriate in some of the more complex cases is not necessary in all cases.

The Rules in this Chapter govern claims made in circuit court actions. Rule 2-703 deals with attorneys' fees allowed by statute as an additional remedy in actions based on a violation of the statute or an allied statute. Examples are a claim for attorneys' fees under 42 U.S.C. §1988 or under Code, Labor and Employment Article, §3-507.2. In those cases, even though a demand for such fees must be pled, the court, in appropriate cases, may defer the presentation of evidence and argument regarding the fees and the determination of whether and in what amount such fees should be awarded until the underlying claim has been adjudicated. If practicable, they may be included in the judgment entered on that claim or determined later and entered as a separate judgment. In contrast, where the claim for attorneys' fees is based on a contractual provision allowing such fees in the event of a breach of the

contract, the fees must be pled and proved as part of underlying claim for the breach and, if awarded, form part of the judgment entered on that claim. Rule 2-704 deals with that situation.

The comparable Rule for District Court cases appears as Rule 3-741. Unlike the circuit court Rules, that Rule deals with both statutory and contractual claims.

(b) Particular Claims

The procedural requirements of these Rules do not apply to claims or demands for counsel fees (1) in an action under Code, Family Law Article where the allowance of an award is not dependent on the party seeking recovery of the attorneys' fee having prevailed in the action or on any particular claim or issue in the action; ~~or~~ (2) in a proceeding under Rules 1-341 or 2-433, or other Rule permitting the award of reasonable attorneys' fees as a sanction or remedy for the violation of a Rule or court order; (3) in a proceeding that involves a dispute between an attorney and the attorney's client over the attorney's fee; or (4) in an action to foreclose a lien under Title 14 of these Rules. In those proceedings, the court, in determining the reasonableness of any requested fee, may apply some or all of the evidentiary requirements set forth in these Rules, as appropriate under the circumstances.

Cross reference: For the procedure to be followed in claiming attorneys' fees in foreclosure cases, see Rules 14-215, 14-305, and 14-306.

Query: Should any changes be made to Title 14? See [deleted] subsection (c)(2) of Rule 2-704.

~~Committee note: Maryland generally follows the so-called "American Rule," under which a party is not liable for the attorneys' fees of another party unless such liability is provided for either by law or by a contract~~

~~between the parties. Under prevailing case law, some aspects of both the procedure for asserting a claim for attorneys' fees from another party and the standard for determining the amount of fee to be awarded differ, depending on whether the basis for the award is statutory or contractual. *See Monmouth Meadows v. Hamilton*, 416 Md. 325 (2010); *G-C Partnership v. Schaefer*, 358 Md. 485 (2000); *Accubid v. Kennedy*, 188 Md. App. 214 (2009). These Rules are structured to take account of those distinctions and also to recognize that much of the formality and detail that may be appropriate in some of the more complex cases is not necessary in all cases. The Rules provide discretion for the court, in an appropriate case, to require more, or less, formality and detail than the applicable Rule otherwise would dictate.~~

Source: This Rule is new.

MARYLAND RULES OF PROCEDURE

TITLE 2 – CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 700 – CLAIMS FOR ATTORNEYS' FEES AND RELATED EXPENSES

ADD new Rule 2-703, as follows:

Rule 2-703. PROCEDURE WHERE ATTORNEYS' FEES ALLOWED BY STATUTE

(a) Scope of Rule

This Rule applies only to a claim or demand made ~~in an action in a circuit court~~ for attorneys' fees allowed by statute.
Cross reference: See Rule 2-702 (b).

(b) Pleading Requirement

A party who ~~intends to~~ seek<u>s</u> attorneys' fees from another party ~~pursuant to this Rule~~ shall <u>demand</u> ~~make a claim for~~ the attorneys' fees in the party's initial pleading or, if the grounds for such a ~~claim~~ <u>demand</u> arise after the initial pleading is filed, in an amended pleading filed promptly after the grounds for the ~~claim~~ <u>demand</u> arise.

(c) Motion for Special Documentation and Quarterly Statements; Order

(1) Generally

In any case in which a ~~claim~~ <u>demand</u> for attorneys' fees has been made and, due to the complex nature of the case, that ~~claim~~ <u>demand</u> likely will be substantial and will cover a significant period of time, a party against whom the ~~claim~~ <u>demand</u> is made may move for an order that (A) records be kept in accordance with subsection (c)(3) of this Rule and that the memorandum required under section (e) of this Rule be accompanied by the documentation listed in subsection (e)(4), and (B) the claimant send to the moving party quarterly statements in conformance with subsection (c)(4) of this Rule.

(2) Timing

A motion under this section shall be filed within 30 days after the moving party files an answer to the pleading in which the ~~claim~~ <u>demand</u> for attorneys' fees was made.

(3) Litigation Phase Format Record Keeping

If so ordered by the court, counsel for the ~~claimant~~ <u>party making the demand</u> shall keep time records that are recorded by specific task and attorney, paralegal, or other professional performing the task. The records shall include sufficient detail to enable counsel to submit to the court the "litigation phase format" documentation

required by subsection (e)(4) of this Rule.

DRAFTER'S NOTE:
The Committee voted to add a cross-reference to this section in Rules 2-341 and 2-504.

(4) Quarterly Statements

If so ordered by the court, counsel for the claimant shall submit to the moving party quarterly statements showing the amount of time all counsel, paralegals, and law clerks have spent on the case and the total value of that time. Quarterly statements shall not be filed with the court. Unless otherwise ordered by the court, the statements need not be in any particular format or reflect how the time was spent. Failure to submit quarterly statements as ordered may **[result in] [justify]** a denial or reduction of an award of attorneys' fees.

(5) Order

Whenever practicable, an order entered on the motion shall be part of a scheduling order entered under Rule 2-504.

Committee note: Relief under this section should be reserved for the more complex cases that will remain in litigation for an extended period. In those cases, it is important that counsel know in advance what will be required in order to conform their record keeping.

(d) Motion for Award of Attorneys' Fees; Request for Bifurcation

(1) Requirement

Upon resolution of the underlying cause of action OR SUCH EARLIER TIME PERMITTED BY THE COURT, a party who has made a ~~claim~~ demand for attorneys' fees pursuant to section (b) of this Rule and seeks an award of such fees shall file a motion for an award of attorneys' fees. If bifurcation

pursuant to subsection (e)(2)(B) of this Rule is sought, the motion shall include a request for bifurcation and that request shall be noted in the caption of the motion. ~~The motion shall be filed in the circuit court.~~

DRAFTER'S NOTE: The underlined clause was approved by the Committee at its April meeting. Presented for Committee consideration is whether, in a particular case, the court could allow the motion to be filed and proceedings on it to occur during the case-in-chief so that any award could be made as part of the judgment. That would not be likely to occur where there will be a significant dispute about either entitlement to or of the amount of requested fees, but there may be cases in which the parties can agree on the fees if the party requesting them prevails or where any dispute will be limited. Conforming language would be added to subsections (e)(2)(B) and (i) in the event the Committee agrees with this approach.

(2) Timing

(A) If the motion seeks an award for attorneys' fees incurred in connection with preparing or litigating the action in the circuit court, the motion shall be filed ~~within~~ no later than 15 days after the later of ~~(1)~~ (i) entry of judgment in the action, or ~~(2)~~ (ii) entry of an order disposing of a motion filed under Rules 2-532, 2-533, or 2-534.

Committee note: In subsection (d)(2)(A), the term "judgment" refers to an appealable judgment on the underlying cause of action. Any award of attorneys' fees would be entered in a separate, appealable judgment.

(B) If the motion seeks an award for attorneys' fees incurred in connection with an appeal, application for leave to appeal, or petition for certiorari, the motion shall be filed in the circuit court within 15 days after entry of the last mandate or order disposing of the appeal, application, or

petition. Proceedings on the motion shall be in the circuit court.

(e) Memorandum

(1) Requirement

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

(2) Time for Filing

(A) If No Bifurcation

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

(B) Bifurcation; Initial and Supplemental Memoranda

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

(3) Contents

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

(A) the nature of the case;

(B) the legal basis for the claimant's

right to recover attorneys' fees from the other party;

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

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

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

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

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

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

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

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

(vi) the fee customarily charged for

similar legal services in the geographic area where the action is pending;
Committee note: Geographic area is not necessarily limited to a single county but may include adjacent or nearby jurisdictions.

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

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

(4) Additional Documentation in Complex Cases

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

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

(B) preparing pleadings;

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

(D) preparing for and attending depositions;

(E) preparing and responding to pretrial motions;

(F) attending court hearings;

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

(H) preparing for trial;

(I) attending trial;

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

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

(L) attending post-trial motion hearings.

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

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

Unless extended by the court, any response to a motion for an award of attorneys' fees shall be filed no later than 15 days after service of the motion, and any response to a memorandum or supplemental memorandum shall be filed no later than 15 days after service of the memorandum or

supplemental memorandum.

(g) Hearing

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

(h) Use of Guidelines

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

(i) Judgment

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

(j) Stay Pending Appeal

Upon the filing of an appeal of the judgment entered in the underlying cause of action, the court may stay (1) proceedings on the demand for attorneys' fees, (2) the entry of an order relating to attorneys' fees, or (3) the entry or enforcement of a judgment awarding attorneys' fees, until the appeal on the underlying cause of action is concluded.

Committee note: If a judgment for attorneys' fees is entered and its enforcement is stayed pending appeal on the underlying cause of action, a party may appeal the judgment for

attorneys' fees and may seek to consolidate the appeals.

Source: This Rule is new.

MARYLAND RULES OF PROCEDURE

TITLE 2 – CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 700 – CLAIMS FOR ATTORNEYS' FEES AND RELATED EXPENSES

ADD new Rule 2-704, as follows:

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

(a) Scope of Rule

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

(b) Part of Underlying Claim

(1) Generally

~~A claim for attorneys' fees under this Rule shall be regarded as part of the underlying claim for relief based on the alleged default or breach and,~~ Except as provided in subsection (c)(2) of this Rule, a claim must be asserted and proved prior to entry of the jury's verdict or court's findings in the action.

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

(2) Assertion and Determination of Claim

(A) Except as provided in section (c) of this Rule:

(i) a claim for attorneys' fees subject to this Rule shall be made in a complaint or other appropriate pleading; and

(ii) the court may require the party making the claim to present evidence in support of it in the form set forth in Rule 2-703 (e)(3) and, in a complex case, (e)(4).

Alternative A

(B) Subject to review by the court of the reasonableness of the amount of any attorneys' fees awarded by a jury, the issue of entitlement to an award of attorneys' fees and the amount of any award shall be presented to and determined by the finder of fact.

Alternative B

(B) The issue of entitlement to an award of attorneys' fees shall be presented to and determined by the finder of fact. The amount of any award shall be presented to and determined by the court.

~~(B)~~ (C) Any award of attorneys' fees shall be part of the judgment entered in the action but shall be separately stated.

(c) Exceptions~~:~~

~~(1) Claims for 15% or Less~~

If the claim for attorneys' fees is based on contractual undertaking to pay, on default, an attorneys' fee of 15% or less of the principal amount of the debt due and owing **[and the requested fee does not exceed**

$4,500], the court ~~may~~ shall dispense with the need for evidence in the form set forth in Rule 2-703 (e)(3), provided that ~~evidence is admitted establishing~~ the party seeking the fees proves at least the following:

DRAFTER'S NOTE: The Committee voted to send section (c) to the Court in alternative forms – with and without the bracketed language.

~~(A)~~ (1) the legal basis for the party's right to recover the requested attorneys' fees from the other party;

~~(B)~~ (2) facts sufficient to demonstrate that the requested fee is reasonable; and

~~(C)~~ (3) that the fee sought does not exceed the fee that the claiming party has agreed to pay that party's lawyer.

Committee note: The purpose of subsection (c)(1) is to apply to this limited class of cases, in which the liability for attorneys' fees is set in the contract as a percentage, not exceeding 15%, of the underlying debt due and owing, the simplified rule applicable in the District Court in those kinds of cases. *See* Rule 3-741 (d)(2). The ceiling of $4,500 represents 15% of the current $30,000 limit on the general civil jurisdiction of the District Court.

Query: Should subsection (c)(2), which the Committee deleted from this Rule, be moved to Title 14? If so, where?

~~(2) Attorneys' Fee Claim In Foreclosure Action~~

~~(A) Filing Claim~~

~~A claim for attorneys' fees in an action under the Rules in Title 14, Chapter 200 shall be made to the auditor following ratification of the sale.~~

~~Cross-reference: *See* Rules 14-215 (a) and 14-305 (f).~~

~~(B) Consideration in Determining Reasonableness~~

~~In determining the reasonableness of the requested fee, the court may give significant weight to whether the requested fee does not exceed a maximum fee for the services rendered established by law or by a government or quasi-government agency having regulatory authority over the transaction from which the lien instrument arose.~~

Source: This Rule is new.

MARYLAND RULES OF PROCEDURE

TITLE 3 – CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 700 - SPECIAL PROCEEDINGS

ADD new Rule 3-741, as follows:

Rule 3-741. ATTORNEYS' FEES

(a) Definitions

In this Rule, except as otherwise provided or necessary implication requires, "attorneys' fees" and "related expenses" have the meanings set forth in Rule 2-701.

(b) Scope of Rule

This Rule applies to claims <u>or demands</u> made in an action in the District Court for attorneys' fees allowed by law or by contract. The Rule does not apply to a dispute between an attorney and the attorney's client over an attorney's fee and it does not apply to a proceeding under Rule 1-341 or other Rule permitting the award of reasonable counsel fees as a sanction or remedy for violation of a court order.

(c) Request

A ~~request~~ demand for attorneys' fees shall be made in the complaint, other pleading allowed by Rule 3-302, or amendment to a pleading allowed by Rule 3-341.

(d) Presentation of Supporting Evidence

(1) Generally

Except as provided in subsections (d)(2) or (d)(3) of this Rule or otherwise ordered by the court, evidence establishing the right to such fees and the reasonableness of the requested fee shall be presented at trial on the underlying claim.

(2) Judgment on Affidavit

If the party seeking attorneys' fees filed a motion for judgment on affidavit pursuant to Rule 3-306, evidence establishing the right to such fees and the reasonableness of the requested fee shall be included in an accompanying affidavit. If the action proceeds to trial, the evidence may be supplemented at trial.

Cross reference: See Rule 3-306(d) for additional requirements if the action is based on an assigned consumer debt.

(3) Judgment by Confession

If the party seeking attorneys' fees has requested judgment by confession pursuant to Rule 3-611, evidence establishing the right to such fees and the reasonableness of the requested fee shall be included in the affidavit required by Rule 3-611 (a). If judgment by confession is not entered or is stricken and the action proceeds to trial, the evidence may be supplemented at trial.

(e) Required Evidence

(1) Generally

Except as provided in subsection (e)(2) of this Rule or unless otherwise

ordered by the court, an award of attorneys' fees may not be made unless evidence in support of the request as set forth in Rule 2-703 (e)(3) is admitted.

(2) Exception

If the claim for attorneys' fees is based on a contractual undertaking to pay on default or breach of contract an attorneys' fee of 15% or less of the principal amount of the debt due and owing **[and the requested fee does not exceed $4,500]**, the court may dispense with the need for evidence as set forth in Rule 2-703 (e)(3), provided that evidence is admitted establishing:

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

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

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

DRAFTER'S NOTE: See DRAFTER'S NOTE to Rule 2-704 (c) with respect to the bracketed language.

(f) Judgment

An award of attorneys' fees shall be part of the judgment entered in the action but shall be separately stated.

Source: This Rule is new.

AMEND Rule 2-341 to add a cross reference and a Committee note following section (c), as follows:

Rule 2-341. AMENDMENT OF PLEADINGS

(a) Without Leave of Court

A party may file an amendment to a pleading without leave of court by the date set forth in a scheduling order or, if there is no scheduling order, no later than 30 days before a scheduled trial date. Within 15 days after service of an amendment, any other party to the action may file a motion to strike setting forth reasons why the court should not allow the amendment. If an amendment introduces new facts or varies the case in a material respect, an adverse party who wishes to contest new facts or allegations shall file a new or additional answer to the amendment within the time remaining to answer the original pleading or within 15 days after service of the amendment, whichever is later. If no new or additional answer is filed within the time allowed, the answer previously filed shall be treated as the answer to the amendment.

(b) With Leave of Court

A party may file an amendment to a pleading after the dates set forth in section (a) of this Rule only with leave of court. If the amendment introduces new facts or varies the case in a material respect, the new facts or allegations shall be treated as having been denied by the adverse party. The court shall not grant a continuance or mistrial unless the ends of justice so require.

Committee note: The court may grant leave to amend the amount sought in a demand for a money judgment after a jury verdict is returned. See *Falcinelli v. Cardascia*, 339 Md. 414 (1995).

(c) Scope

An amendment may seek to (1) change the nature of the action or defense, (2) set forth a better statement of facts concerning any matter already raised in a pleading, (3) set forth transactions or events that have occurred since the filing of the pleading sought to be amended, (4) correct misnomer of a party, (5) correct misjoinder or nonjoinder of a party so long as one of the original plaintiffs and one of the original defendants remain as parties to the action, (6) add a party or parties, (7) make any other appropriate change. Amendments shall be freely allowed when justice so permits. Errors or defects in a pleading not corrected by an amendment shall be disregarded unless they affect the substantial rights of the parties.

Cross reference: For pleading requirements and other procedures when attorneys' fees are claimed, see the Rules in Title 2, Chapter 700.

Committee note: If an amendment to a pleading adds a demand for attorneys' fees pursuant to Rule 2-703, the time for filing the amended pleading is governed by sections (a) and (b) of this Rule, Rule 2-703 (c), and any scheduling order entered pursuant to Rule 2-504.

(d) If New Party Added

If a new party is added by amendment, the amending party shall cause a summons and complaint, together with a copy of all pleadings, scheduling notices, court orders, and other papers previously filed in the action, to be served upon the new party.

(e) Highlighting of Amendments

Unless the court orders otherwise, a party filing an amended pleading also shall file at the same time a comparison copy of the amended pleading showing by lining through or enclosing in brackets material

that has been stricken and by underlining or setting forth in bold-faced type new material.

Source: This Rule is derived as follows:
Section (a) is derived in part from former Rule 320 and is in part new.
Section (b) is new and is derived in part from former Rule 320 e.
Section (c) is derived from sections a 2, 3, 4, b 1 and d 5 of former Rule 320 and former Rule 379.
Section (d) is new.
Section (e) is derived from the 2001 version of L.R. 103 (6)(c) of the Rules of the United States District Court for the District of Maryland.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-504 to add a Committee note following subsection (b)(1) and a cross reference following subsection (b)(2), as follows:

Rule 2-504. SCHEDULING ORDER

(a) Order Required

(1) Unless otherwise ordered by the County Administrative Judge for one or more specified categories of actions, the court shall enter a scheduling order in every civil action, whether or not the court orders a scheduling conference pursuant to Rule 2-504.1.

(2) The County Administrative Judge shall

prescribe the general format of scheduling orders to be entered pursuant to this Rule. A copy of the prescribed format shall be furnished to the Chief Judge of the Court of Appeals.

(3) Unless the court orders a scheduling conference pursuant to Rule 2-504.1, the scheduling order shall be entered as soon as practicable, but no later than 30 days after an answer is filed by any defendant. If the court orders a scheduling conference, the scheduling order shall be entered promptly after conclusion of the conference.

(b) Contents of Scheduling Order

(1) Required

A scheduling order shall contain:

(A) an assignment of the action to an appropriate scheduling category of a differentiated case management system established pursuant to Rule 16-202;

(B) one or more dates by which each party shall identify each person whom the party expects to call as an expert witness at trial, including all information specified in Rule 2-402 (g) (1);

(C) one or more dates by which each party shall file the notice required by Rule 2-504.3 (b) concerning computer-generated evidence;

(D) a date by which all discovery must be completed;

(E) a date by which all dispositive motions must be filed, which shall be no earlier than 15 days after the date by which all discovery must be completed;

(F) a date by which any additional parties must be joined;

(G) a date by which amendments to the pleadings are allowed as of right; and

(H) any other matter resolved at a scheduling conference held pursuant to Rule 2-504.1.

Committee note: If an amendment to a pleading adds a demand for attorneys' fees pursuant to Rule 2-703, the time for filing the amended pleading is governed by the scheduling order, Rule 2-341 (b), and Rule 2-703 (c).

(2) Permitted

A scheduling order may also contain:

(A) any limitations on discovery otherwise permitted under these rules, including reasonable limitations on the number of interrogatories, depositions, and other forms of discovery;

(B) the resolution of any disputes existing between the parties relating to discovery;

(C) a specific referral to or direction to pursue an available and appropriate form of alternative dispute resolution, including a requirement that individuals with authority to settle be present or readily available for consultation during the alternative dispute resolution proceeding, provided that the referral or direction conforms to the limitations of Rule 2-504.1 (e);

(D) an order designating or providing for the designation of a neutral expert to be called as the court's witness;

(E) in an action involving child custody or child access, an order appointing child's counsel in accordance with Rule 9-205.1;

(F) a further scheduling conference or pretrial conference date;

(G) provisions for discovery of electronically stored information;

(H) a process by which the parties may assert claims of privilege or of protection

after production; and

(I) any other matter pertinent to the management of the action.

Cross reference: See section (c) of Rule 2-703 for provisions concerning special documentation and quarterly statements that may be included in a scheduling order when a demand for attorneys' fees governed by that Rule is made.

(c) Modification of Order

The scheduling order controls the subsequent course of the action but shall be modified by the court to prevent injustice.
Cross reference: See Rule 5-706 for authority of the court to appoint expert witnesses.

Source: This Rule is in part new and in part derived as follows:
Subsection (b)(2)(G) is new and is derived from the 2006 version of Fed. R. Civ. P. 16 (b)(5).
Subsection (b)(2)(H) is new and is derived from the 2006 version of Fed. R. Civ. P. 16 (b)(6).

Mr. Brault asked if the Committee had before them the proposed change suggested by Mr. Enten to Rule 2-704 (c), which had been distributed at the meeting. (See Appendix 1). The Chair clarified that this change was an attempt to articulate a point that had been made by Judge Love with respect to the District Court Rules but which also had to be conformed to the circuit court Rule. The handout picks up what Judge Love wanted to do with the District Court Rule to make it clear that the issue of not having to produce evidence of reasonableness would apply in contractual fee-shifting where the contract provides for

an attorney's fee and the claim for the fee does not exceed either the lesser of 15% or $4,500. This is the issue at the circuit court level that Mr. Enten would like to address.

Mr. Enten thanked the Chair for letting him speak. He noted that the banking industry had approved of the changes to the District Court Rules. He had spoken with Ron Canter, Esq, a consultant to the Subcommittee. The sense among practitioners was that the judges in the District Court would decide if the amount is $4,500 or less, which in most cases it would be, whether this is relevant information. Some judges will agree with this, and some will not. Mr. Enten said that as a young attorney, he had worked with many banks, but now the banking atmosphere had changed. There may be a promissory note that has been negotiated with a sophisticated borrower for $10,000,000, the borrower is represented by counsel, and the entire matter is in negotiation, including provisions concerning attorneys' fees. The provisions and notes may have a percentage, and they may use the term "reasonable," but it is negotiated and many negotiations go on typically before these cases go to suit. When a commercial loan goes to suit, it is often because negotiations have broken down and cannot be worked out, or the borrower is gone. If there is any money left, the borrower would be in Chapter 11.

Regarding the proposed Rule, Mr. Enten had spoken with a leading attorney from Miles & Stockbridge, who does this kind of work and who was very concerned about the Rule. They had discussed at length the practice in the District Court and fee-

shifting. They had discussed very minimally what happens in circuit court cases where there is an agreed-upon rate. A major issue is judgments by confession. Almost all of the commercial notes have a confessed judgment clause. The way they are usually negotiated is that at the time the note is drawn up, the borrower is not concerned about whether there would be a judgment by confession. The borrowers are represented by counsel, and they know that if they file a motion to vacate, and they say that they have a defense, the motion is granted. There will be a trial, and fees will be part of the trial.

Mr. Enten said that he had already spoken with the Chair about this issue. Mr. Enten urged the Committee to have a different rule for judgment by confession where the confessed judgment note calls for a fee of 15% or less. These are commercial loans that are negotiated between parties who are almost on an equal footing. These are not consumer loans, and they are not small business loans. If there is a dollar threshold that makes a distinction between a $50,000 loan and a $50,000,000 loan, this is the real world. In Rule 2-704 as presented, the $4,500 is included as an alternative for circuit court cases, and this amount is meaningless in a circuit court case where millions of dollars are at stake. If the objective was to address a District Court case that goes to the circuit court on appeal, then the Rule should so state, so that the number has meaning. To include the amount is meaningless for a large commercial loan case. It will never be anything like

$4,500. The circuit court is very different.

Mr. Enten expressed his preference for taking that amount out of the Rule and discussing it further. In addition, *Suntrust v. Goldman*, 201 Md. App. 390 (2011), a recent case that Mr. Maloney had sent to Mr. Enten, had been decided on September 30, 2011. Mr. Enten did not know if the case had been appealed further. The case raises many issues for large cases, such as whether attorneys' fees merge into the judgment, and it lays out a roadmap to inform attorneys, who do this type of work, that a non-merger clause should be put into the loan agreements that they draw up. How would this be addressed?

Mr. Enten said that he respected all of the work that the Committee had done on these Rules, but he felt that judgments by confession should be taken out where they are based upon a note that calls for a fee of 15% or less. "Judgment by confession" clauses are typically only in a commercial promissory note. They are illegal for consumer notes. This matter is negotiated. The $4,500 amount has no real meaning in a case that did not originate in the District Court. The $4,500 is based on 15% of the $30,000 District Court jurisdictional limit. Rule 2-704 has an alternative that provides that the trier of fact decides both the entitlement to and the amount of the award of attorneys' fees. The other alternative is that the trier of fact decides the entitlement to attorneys' fees, but the court decides the amount. In the cases involving large amounts of money, he and

his colleagues would prefer to see the jury make the decision on whether, according to the documents, the plaintiff is entitled to fees, and the court determine the amount and whether it is reasonable. The court will obviously be much more familiar than the jury with what is in the current Code of Professional Conduct as to the criteria for these awards.

Mr. Enten commented that the District Court is swamped with collection cases, and this is a pressing issue at the District Court level. He said that he was not there to argue about the District Court cases, but he would like for the Committee to reconsider the circuit court Rule, particularly in light of *Suntrust*. Some of the attorneys who do this type of work in the circuit court could be consulted before the issue is brought back before the Committee. Because the circuit court is so different than the District Court, the circuit court Rule needs to be treated differently.

The Chair said that he would give a brief history of the Rules changes. When all of the work on the Rules started, it was focused on the complex cases in the circuit court, mostly pertaining to statutory fee-shifting. Soon the problem arose that most of these cases are in the District Court. They are collection cases that provide for attorneys' fees, and what was proposed for the circuit court was not going to work, such as producing a great deal of evidence and time records. As the work began on the District Court Rules, the case of *Monmouth Meadows*

Homeowners Ass'n v. Hamilton, 408 Md. 487 (2009) was decided. It raised some issues, and then on reconsideration, a new opinion, *Monmouth Meadows Homeowners Ass'n v. Hamilton*, 416 Md. 325 (2010), which was fairly similar, was issued. However, the second case had a footnote in it that created some ambiguity as to what the court actually meant.

The Chair commented that the issue was whether it was permissible for the judge in the District Court or in any court to hold that he or she was required to use the 15% in a contractual provision and not go behind it to look at reasonableness. Mr. Enten and the Chair had some disagreement about what the court meant in that case when the footnote is considered on one hand, and the textual language is considered on the other hand. *Suntrust* was decided the way that most of the Committee interpreted *Monmouth,* which was that the footnote does not change the text.

Mr. Brault remarked that he was unsympathetic to Mr. Enten's viewpoint. Mr. Brault said that his history goes back to *Jacques v. First National Bank of Maryland*, 307 Md. 527 (1986). In that case, the bank had sent a letter stating what their current rate for mortgage interest was. By the time, the borrower had sent in his application, the bank told him that the interest rate had been raised by 3 percent and that they were not bound by the terms of their letter. Mr. Brault had represented the borrower, and the borrower eventually won. In an opinion written by the

Honorable John F. McAuliffe, the Court of Appeals held that the relationship, albeit not a formal contract as the borrower had alleged, was between the bank and a customer, which established a duty. The banking industry almost collapsed from the pressure of that decision. It appeared that the case had made a "sea change" in the banking industry's mortgage conduct. Mr. Brault had not realized that the banks were busily rewriting their procedures and conformed their language to the Jacques case, which was not improper.

Mr. Brault expressed the view that in light of *Suntrust,* the banks will change the language in their documents. The language in the notes will change. The banks will make provision for the costs of collection. Confessed judgments that are not consumer loans are not limited to being negotiated. Although Mr. Brault's experience had been somewhat limited, one experience he had with the banks was a negotiation that basically was "take it or leave it." His view was that the banks control the money, and they are capable of controlling the negotiation and usually do. If the borrower wants the money, he or she has to do it the bank's way. Mr. Brault was not convinced that a provision in a confessed judgment note is written because the contractor, builder, or buyer negotiated to have the confessed judgment included in the contract. It is usually present, because the bank demanded that it be there. He had no qualms about the court determining whether it is reasonable.

The Chair told the Committee that the proposal for the District Court and the circuit court was attorney's fees of 15% or less. If the fee is 15% or less, the attorney has to show the reasonableness of the fee, but it is not necessary to put in all of the evidence that would otherwise be required to do that. The Committee proposes to justify this to the Court of Appeals, because it seems to be inconsistent with what the Court had actually said or may be regarded as inconsistent with the holding in *Monmouth* on the theory that most of these cases are in the District Court, and there are statutes that permit 15%. It could be argued that the legislature has blessed this by statute in most of these cases, that this is the basis for the 15% amount, and that it should be the same rule in the circuit court.

The Chair remarked that when Rules 2-306 and 3-306, Judgment on Affidavit, were recently presented to the Court of Appeals, one of the judges raised the question of whether the Committee was improperly getting into law and economics, because of decisions based on amounts as well as other issues. That judge finally did go along with what had been presented but was very leery about whether this is something that the Committee should be recommending and the Court should be approving. It is important not to go too far with making classifications in the Rules. This appears in some rules, such as Rule 3-701, Small Claim Actions. The Chair said that the Committee should not have to defend against a claim of acting like a legislature.

Mr. Brault remarked that the Rule should be finalized before any further cases are decided. Every time the Rule had been revised, the Court of Appeals had decided another case on point, including both *Friolo* decisions (*Friolo v. Frankel*, 373 Md. 501 (2003) and *Friolo v. Frankel*, 403 Md. 443 (2008)), *Monmouth*, *Suntrust*, and one or two more. The Chair noted that both appellate courts have asked for this Rule.

Mr. Enten noted that Rule 2-704 has the language "attorneys' fees of 15% or less of the principal amount of the debt due and owing" and "the requested fee does not exceed $4,500." The Chair explained that the $4,500 amount in Rule 2-704 is being sent to the Court in alternative form. The Reporter agreed, pointing out that the Court could decide to add this, stay with the 15%, or include neither of these amounts in the Rule.

Mr. Brault referred to the hypothetical situation of a wealthy developer refinancing an apartment development in the amount of $45,000,000. If the note had the 15% clause for attorneys' fees, would there be a judgment of $5,000,000 or $7,000,000 for attorneys' fees? Mr. Enten responded that the reality is that the likelihood of collecting this amount is remote. If the borrower cannot make the payments on the loan, there would be no money to pay the loan or the attorneys' fees. The Chair acknowledged that in some instances, this was true. However, some of these cases arise out of construction projects where security bonds are posted.

Mr. Enten said that all of these are subject to a negotiation. The judgment gets confessed. Motions to vacate confessed judgments are freely granted. Then the attorney would be in front of the judge arguing the case. Mr. Enten expressed his concern that a confessed judgment note, where the amount of the note was in excess of a certain threshold, and the note provided for attorneys' fees not in excess of 15%, would not be subject to all of the procedures in the Rule. There has to be some recognition that large commercial loans are treated differently than a consumer mortgage loan, as in the case referred to by Mr. Brault.

Mr. Carbine remarked that since he had not been a member of the Committee in April when the Rule had been discussed, it appeared to him that the language "and the requested fee does not exceed $4,500" was a legitimate item of discussion. He did not want to weigh in on the substantive issues, but in the circuit court, it makes the exception meaningless. The Chair responded that it does not for District Court appeals. This is what the Committee had decided. Mr. Carbine said that if there is to be an exception to the Rule that is for a claim for attorneys' fees based on a contractual undertaking to pay, and the fee is 15% or less of the principal amount of the debt, then the items in section (c) have to be proved, but not all of the other criteria listed earlier in the Rules. If the $4,500 limit is added in to the circuit court, it is a meaningless exception, because unlike District Court appeals, the cases in circuit court will have much

more than $4,500 in fees at stake.

The Chair said that the reason that the Committee voted to send the Rule to the Court of Appeals in the alternative form was to give the Court the opportunity to decide what they meant in *Monmouth*. Mr. Enten has taken the position that if there is a contract with the 15% amount, that is all that is necessary to show. The majority of the Committee was of the view that this is not the way that they read *Monmouth*; even if the contract provided for 15%, it would still be necessary to show reasonableness of the fees. What evidence must be produced to do this?

Mr. Carbine commented that he did not have a problem with the way Rule 2-704 is structured. His problem was with the $4,500 limit. The Chair responded that the intent was to give a benefit, not a punishment. The theory was that if there were no $4,500 limit, and if *Monmouth* was read the way most of the Committee had read it, all of the evidence listed in subsection (e)(3) of Rule 2-703 would have to be produced in every case. The $4,500 limit carved out an exception from having to produce all of this documentation for cases with smaller claims. The Committee did not look at this as punishment for the parties in the larger claim cases but more as a benefit for the parties in the smaller cases. This is an issue to be discussed. Mr. Carbine remarked that he did not have any problem with proving reasonableness of the fees. Operating within the guidelines, he

did not see the reason to have the dollar limit in the Rule, particularly when the maximum dollar limit is so small. The Chair reiterated that in April, the Committee had decided to send this to the Court of Appeals in alternative form, so the Court could decide what they wanted to do. Mr. Enten had asked for an opportunity to readdress this issue, because it was of importance to the banks. This is why the issue was back before the Committee.

Mr. Enten commented that when Rule 2-704 is sent to the Court this way, it sends a strong message. He agreed with Mr. Carbine that if the Rule was amended to state that the $4,500 applied to District Court appeals, the amount becomes relevant. In a contractual case where the contracted amount is 15% or less of the principal amount of the debt due, the message that is sent to the Court is that someone only gets this if the fee does not exceed $4,500. If the fee does not exceed $4,500, it is only necessary to prove the three criteria in section (c) of Rule 2-704; if the fee is $4800, it is necessary to prove the 12 criteria in subsection (e)(3) of Rule 2-703. The Chair pointed out that this is correct. Mr. Enten expressed the opinion that the $4,500 is not an amount relevant to a circuit court case.

The Chair noted that the $4,500 limit first appears in Rule 2-704 applying only to contract cases. He asked if anyone had a comment on Rule 2-701. None was forthcoming. By consensus, the Committee approved Rule 2-701 as presented.

The Chair asked about comments on Rule 2-702. The changes

were made to try to capture what the Committee had decided in April. Judge Weatherly referred to the new language in the Committee note after section (a) that reads: "...unless such liability is provided for either by statute or by a contract between the parties." She asked if liability as provided by rule should be added to the list, because there are discovery rules as well as other rules that provide for attorneys' fees. The Chair remarked that Rules such as Rule 1-341 are being excepted. The Reporter explained that those Rules have their own separate amendments that were previously approved by the Committee. These Rules appear in the meeting materials. Judge Pierson said that Judge Weatherly was trying to capture the state of the law in the Committee note. The Chair inquired if the Committee was willing to add the words "or rule" in the Committee note. The Reporter noted that this would not be added to the body of the Rule. By consensus, the Committee approved the addition to the Committee note of the language suggested by Judge Weatherly.

The Chair pointed out an issue raised by Jeffrey Fisher, Esq. pertaining to the cross reference after section (b) of Rule 2-702. The Reporter said that she had sent out Mr. Fisher's e-mail on this subject to the Committee. The Chair pointed out that the question raised by Mr. Fisher was where in Title 14 the reference to attorneys' fees in foreclosure cases ought to go. Mr. Brault asked if this question had be answered in order for the Rule to be sent to the Court of Appeals or whether the issue about Title 14 can be treated separately. The Chair answered

that it could be considered separately.

Mr. Fisher said that he was going to run the risk of going too far with this. The Chair remarked that he had already gotten what he had asked for -- to move the reference to attorneys' fees in foreclosure cases from Rule 2-702 to Title 14. Mr. Fisher commented that contrary to the views of some of his colleagues, he felt that it was important that Title 14 have a reference to this issue to make it clear that what is in the Rule does not apply to foreclosure cases. The query that he had sent in the e-mail was where this reference should go in Title 14. The Title 14, Chapter 300 Rules apply to all judicial sales; the Title 14, Chapter 200 Rules apply to foreclosure sales. He had suggested that the reference to attorneys' fees go in Rule 14-215, Post-sale Procedures, because it was not logical to put it in the Title 14, Chapter 300 Rules where it would either be a provision that applies to all judicial sales or a provision applying only to foreclosure sales that was misplaced in the section that applies to all judicial sales.

Mr. Fisher said that he had two difficult issues to bring to the Committee. The Rule as the Committee had drafted it applies to the routine case; it does not apply in any respect to the non-routine case. It is important to first make sure that the Rule that is applied to the routine case is clear. He had thought that the Rule was clear, but apparently many of his colleagues did not think that it was clear that the request for an attorney's fee that is within a routine residential foreclosure

case, where the amount of the fee is within an agency guideline, should be able to be requested on one piece of paper as a routine process. There had been some debate among Mr. Fisher's colleagues as to whether the Rule really makes this clear. The Rule should clarify that in a routine case, as long as the fee requested in a case is allowed by the contract within the agency guideline and is a reimbursement of the actual fee that has been incurred, the fee should be allowed, or subject to the auditor's discretion. In the non-routine case, the Rule provides that the attorney presents his or her fee request to the auditor. In actual practice among the counties, Montgomery County is the only jurisdiction where the auditor entertains non-routine fee requests. Most of those are brought to the court's attention.

The Chair remarked that he had thought that Ms. Ogletree, a member of the Committee, who was not present at the meeting, had said that as an auditor, she deals with non-routine fee requests in Caroline County. Mr. Fisher responded that she may handle them, but the point is that in a non-routine case, even though the Rule is located in the Title 14 Rules, the Rule may refer back to a main rule for cases of non-routine fee amounts being sought in foreclosure cases, but it should provide something with respect to the time that those motions are filed.

The Chair asked Mr. Fisher how to define what is routine and non-routine. Mr. Fisher replied that one knows it when one sees it. In the parlance of what foreclosure attorneys do day by day, if no one has filed a motion to stay the foreclosure sale, or no

one has filed exceptions to the sale, and it has just been a matter of following the process through, that would be a routine case. The Chair noted that the language that the Committee had agreed to move to Title 14 at Mr. Fisher's request appears after section (c) of Rule 2-702. It had been subsection (c)(2), Attorneys' Fee Claim in Foreclosure Action. It does not make distinctions between routine and non-routine cases. It provides that if there is a governmental or quasi-governmental limit, the auditor is supposed to give significant weight to that.

Mr. Fisher stated that the foreclosure bar does not want to have to routinely recite and go through many steps. The Chair responded that this would provide that it is not necessary to do so unless the auditor is asking for more documentation. Mr. Fisher said that a number of his colleagues do not agree with that. They think that this is basically something that is additional and helpful, but they are concerned that they will have to file five- or six-page petitions in every case.

The Reporter inquired if it would be helpful to change the deleted language (that is to be moved) in subsection (B), so that the word "may" becomes the word "shall." Subsection (B) would begin as follows: "In determining the reasonableness of the requested fee, the court shall give significant weight...". Mr. Fisher responded that this would not help. He apologized for not being prepared with specific language to suggest. He offered to craft some language, which would be something to the effect of if there were no extra motions filed, and if it fits within the

parameters of what he had termed "routine." The Chair pointed out that currently the limits of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) are fairly low. The foreclosure bar is not happy with this. These agencies are now private. The Court of Appeals would not want to abdicate its responsibility for looking at the reasonableness of attorneys' fees to some quasi-governmental federal agency. Five years from now if Wall Street rebounds, these agencies could triple their fees. The court would probably not be willing to tell the auditor that he or she cannot look at what is in the Code of Professional Conduct.

Mr. Fisher said that what the Chair had stated was what the concern of the other attorneys was. The Chair commented that whether the word "may" becomes the word "shall" in the language that is to be moved to Title 14, his understanding was that in Fannie Mae, Freddie Mac and Federal Housing Administration mortgages, the auditors are routinely using whatever the limit of the agencies is. Mr. Fisher observed that in some jurisdictions, to get a fee, the attorney has to file a motion to request it.

The Chair asked the Committee how to address the subject of attorneys' fees in Title 14. Judge Pierson inquired if this Rule was before the Committee today. The Chair answered that it had been in the Rule, and the Committee had decided in April to move it to Title 14. No one had objected to the language that was formerly subsection (c)(2) of Rule 2-704. It was just a question of where to put it. Now, the issue was that Mr. Fisher did not

like the language of this provision, or his colleagues did not. Mr. Brault said that he was not sure he understood fully what language Mr. Fisher was proposing. Mr. Fisher again apologized for not having submitted some revised language. It would basically be language that would try to delineate between the routine and the non-routine foreclosure in terms of what the paperwork requirement would be for the fee, and it would also make clear that if the foreclosure is non-routine, instead of presenting it to the auditor, a motion for fees would be filed pursuant to this Rule. However, it would refer to the time when the motion would be filed. It would be filed after ratification of the sale and prior to the audit. The Chair pointed out that the Committee wanted to send a complete package to the Court. This issue is part of it, because it pertains to contractual fee-shifting of attorneys' fees. The Committee will have to decide what they would like to do.

Mr. Fisher remarked that he did not understand from the Reporter's note where the language of subsection (c)(2) had been stricken, and where the question had been asked about whether this provision should be moved to Title 14. The Chair said that he had reviewed the minutes of the April meeting, and he thought that the Committee had decided to move this language, but it was unclear where it would be moved. Mr. Fisher responded that if the issue was where to move this language, it should be a subsection of Rule 14-215 (a). The Chair pointed out that Rule 14-215 incorporates Rules 14-305, Procedure Following Sale, and

14-306, Real Property – Recording. Mr. Fisher noted that this is where it provides that the audit is mandatory in a foreclosure. The Chair inquired if the judicial sales go to the auditor. Mr. Fisher replied that they may or may not. They are discretionary in terms of a judicial sale. Rule 14-215 makes it mandatory in a foreclosure case, and since this Rule applies to foreclosure cases, this is where the language of former subsection (c)(2) of Rule 2-704 belongs. If the Committee passes this entire package and relocates the language of subsection (c)(2), that is where it should be. If the Committee does not pass the entire package, and there are more issues to address, then he would like to be able to suggest some different language that is more workable and satisfactory to his colleagues and present it later.

Mr. Karceski questioned whether there was to be a definition of a "routine foreclosure." This term could be defined, and then the Rule could provide that all other cases would be handled differently. What is the definition? Mr. Fisher responded that it would be a foreclosure where there were no motions that take it out of the routine statutory process, such as a motion to stay the sale, or exceptions to the sale. Judge Weatherly asked if this would mean that the sale would be unopposed. Mr. Fisher answered affirmatively. He added that he would like to have some time to craft what that was.

The Chair told Mr. Fisher if he were to ask for more in a given case, because there was some opposition, and it was a mortgage controlled by the FHA, they would still only pay the

attorney what their limit is. Mr. Fisher disagreed with the Chair. The investor closely manages these cases, so if there is mediation routinely, there are additional fees for that. The Chair pointed out that this is provided for in what the agencies are willing to pay the attorney if there is a more complex case. Mr. Fisher said that he did not believe it would be. All that the auditor would want to look at is that the Fannie Mae fee is $1,300. The Chair asked if the fee would still be $1,300 if it was a Fannie Mae case, and there was opposition, mediation, etc. He was not referring to the auditor.

Mr. Fisher said that they would get more fees than that approved action by action for the services the attorneys are performing, but for those actions, he did not have a problem with the attorneys having to make some production regarding this. This will not routinely be within the "allowed fee," because the attorney does not know that he or she is necessarily going to be permitted to make a presentation that it is within the allowed fee other than to say that the agency allowed it. Schedules are published that show the "fee," which is the $1,300 scheduled fee. Then, sometimes, Fannie Mae is willing to pay something such as $500 for a particular process in the State, but they do not rise to the level of being in the published servicing guide. Also, the attorneys will probably not be requesting fees in many cases, because for the next few years, all of these cases are going to be deficiency cases where there will be deficiency amounts.

Mr. Fisher expressed the opinion that this Rule is workable

without getting into the other issues, but the direct answer to the Chair's question is that the attorney may end up having $2,800 in fees in a case, and they may all have been approved by Fannie Mae. What he envisioned in considering the provision in former subsection (c)(2) is that it will only apply to fees of $1,300. The Chair noted that the language of subsection (c)(2) does not provide that. The language is that the court may give significant weight to whether the fee does not exceed a maximum fee for the services established by law or by a government or quasi-government agency. They may approve $1,800 in a given case.

Mr. Fisher responded that he had not looked at the Rule that way, but he understood the Chair's point. The Chair observed that it would not be necessary to figure out what is routine and what is not, because it is already being done. Mr. Brault remarked that his reaction was that the Rules are drafted so that they are understandable, simple, and easy to apply. If the Rule tries to define what is a routine or a complex case, it will be unduly complicating what can be simple. He had asked Judge Pierson what his view was of the fact that fee-shifting in contract is being treated differently than fee-shifting in statute. The main reason for this is that it really works. It is very understandable. It should be that the judges, attorneys, and litigants know which rule applies and what that rule provides. They do not have to get into a debate about what category they are in.

Mr. Fisher said that his question was how the Committee envisions a fee petition in a non-contested routine foreclosure case when it is being presented to the auditor. Is it a one-page document that claims the fee given by the government agency, or is it a longer petition claiming that the fee is fair and reasonable compared to the costs for this service generally charged, the result obtained, and the other factors? Mr. Brault answered that his view was that it is fairly easy to write that petition and simply point out that it is reasonable, ordinary, what the attorney generally charges, and what others doing the same work generally charge. If it is challenged, more documentation may be required.

Judge Pierson remarked that his understanding was that if the Committee approved the package today, the deleted language of subsection (c)(2) of Rule 2-704 was going to be carved out and put somewhere in the Title 14 Rules. The Chair added that it will go with the package of Rules to the Court of Appeals. Judge Pierson noted that this is the only provision governing fee claims in foreclosure cases in which Rule 2-702 is considered. This Rule states in section (b) that these Rules do not apply to an action to foreclose a lien under Title 14. In those proceedings, the court can determine the reasonableness of any requested fee and <u>may</u> [emphasis added] apply some or all of the evidentiary requirements set forth in these Rules, as appropriate under the circumstances. There is no mandatory requirement in this set of Rules applicable to foreclosure fee petitions that

the court must apply the evidentiary requirements in the other Rules. It is up to the court in a particular case to determine what has to be applied. This allows the flexibility that had been discussed. Mr. Fisher agreed.

The Chair asked if there were any other comments on this issue. There were none. He asked if there were any other comments on Rule 2-702. None were forthcoming. The Chair inquired if there were comments on Rule 2-703. He noted that Mr. Sullivan, a member of the Committee, who was not able to be at today's meeting, had sent in a comment pertaining to subsection (c)(2) of Rule 2-703. His point was that the defense attorney may not have asked for the motion for special documentation and quarterly statements within 30 days after filing an answer to the pleading. That attorney then withdraws from the case, and the new attorney cannot do anything. The client cannot get the documentation.

The Chair noted that Mr. Sullivan had asked for language to allow the court to permit a later filing for good cause. One way to do this, if the Committee chose to do so, would be to add to subsection (c)(2) of Rule 2-703 the following sentence: "The court may permit a later filing upon a showing of good cause." The Chair suggested that language be added at the end of this sentence that would provide "and a lack of prejudice to the party demanding the attorneys' fee." This would avoid a case that has gone on for a year, and the attorney suddenly has to go back and redo all of his or her bookkeeping. Does the Committee want to

add anything to permit a later filing? Mr. Maloney moved to accept the language suggested by the Chair.

Mr. Brault noted that Mr. Sullivan had made two suggestions. The other one was that the burden is always on the plaintiff and that no burden be placed on the defendant. The plaintiff would have to determine whether the case is going to be complicated and automatically start following the Rule. The second one is the wiser move, because as Mr. Sullivan had pointed out, sometimes the attorney does not know how complicated the case is. If the *Friolo* case is considered, it is a small claim for an $11,000 debt, and it has $250,000 in fees. Mr. Sullivan is correct that this may not always be known. The Chair remarked that *Friolo* was not complicated, until the judge complicated it.

Mr. Michael inquired if the term should not be "the moving party." Are there times when the defendant would receive the attorneys' fee? Mr. Brault replied that this would not happen in the statutory fee-shifting cases. The Chair remarked that he was not sure about that. There could be a defendant with a counterclaim. Mr. Carbine added that there is a consumer protection statute that applies to both. Mr. Michael said that the word "movant" might be preferable. Instead of the issue being the plaintiff's burden, it would be the movant's burden.

The Vice Chair pointed out that the Rule refers to the term "moving party," so it should be changed to something else. The Chair commented that Rule 2-703 refers to the "moving party," but

if the additional language is added, it would provide that the court may permit a later filing on a showing of good cause and a lack of prejudice to the party demanding the attorneys' fees. The Vice Chair inquired who is filing this motion. The Chair answered that the one against whom attorneys' fees are sought is the one moving for all of the special effort. The one demanding the fees is going to have to produce this.

The Chair asked if there was a second to the motion to put the suggested language in subsection (c)(2) of Rule 2-703. The motion was seconded, and it passed unanimously.

The Reporter asked about Mr. Sullivan's second suggestion. The Chair replied that the second suggestion was what Mr. Sullivan had really wanted -- that the person who demands the fees needs to do this from the beginning. Mr. Brault added that the person should know whether the case is complicated or not. The language that was added by the Committee is preferable. The Chair said that Mr. Sullivan had another comment that relates to subsection (e)(3)(D)(vi) of Rule 2-703, which is "the fee customarily charged for similar legal services in the geographic area where the action is pending." The Attorneys Subcommittee had discussed this. The question is if this language means the county. Initially, the Committee had decided not to refer to the "county," but rather the geographic area. Mr. Sullivan was concerned about bringing in D.C. rates. He wanted to make sure that the jurisdiction is in the State of Maryland. If this is the case, the word "county" could be used.

Mr. Brault remarked that the Committee had specifically wanted to include D.C. with Montgomery County. Before anyone gets upset because some attorneys charge $1000 an hour, the Committee had also discussed the fact that it may be two D.C. firms handling the case. A D.C. firm may be on both sides of the case, and this is not uncommon. Mr. Brault disagreed with Mr. Sullivan. The Chair asked if there was a motion to adopt Mr. Sullivan's suggestion, and none was forthcoming.

The Chair told the Committee that Mr. Sullivan had a third comment pertaining to Rule 2-703 (f). He had asked that the 15 days to respond to a memorandum be increased to 30 days, indicating that at least in complex cases, someone may need more time. Mr. Michael noted that anyone can move to extend the time. Mr. Brault pointed out that section (f) has the language: "unless extended by the court." He thought that this language took care of the problem raised by Mr. Sullivan. If the case is that difficult, a party can ask for more time. The Vice Chair added that the parties can agree on an extension. She suggested that the language "unless extended by the court" should be taken out of Rule 2-703 (f). Instead there should be a cross reference to the motion to extend in Rule 1-204, Motion to Shorten or Extend Time Requirements. The rules do not routinely add the language "unless the court extends it" when a time period is stated. There is a general rule that allows the court to extend time frames. She expressed the preference for adding a cross reference to Rule 1-204 to section (f) and taking out the

language “unless extended by the court.”

Ms. Gardner told the Committee that she was from the Public Justice Center. The language “unless extended by the court” is not paralleled in subsection (d)(2), which addresses the time for filing the motion itself. That is strictly 15 days. She expressed the concern that because of that difference, arguments could arise that Rule 1-204 would not apply to the motion. She suggested parallel language that would apply after the motion is filed. The Chair asked if Ms. Gardner’s suggestion was to drop that language. The Vice Chair commented that Ms. Gardner had noted that subsections (d)(2)(A) and (B) did not have the language “unless extended by the court.” Mr. Maloney suggested that the same language could be added to subsection (d)(2)(A) and (B). Ms. Gardner expressed the view that it would be preferable to have it in both subsection (d)(2) and section (f). The Vice Chair asked if the intention was to exclude the application of Rule 1-204. Mr. Maloney noted that Ms. Gardner’s suggestion was that both subsection (d)(2) and section (f) be parallel.

The Vice Chair explained that Rule 1-204 contains its own standard for when the court can extend time frames, and it also refers to the need to file the motion before the expiration of the time frame, unless there is a very good reason why the motion was not filed prior to the expiration. If the Rule is going to use the language “unless extended on good cause and with no prejudice,” is that all that is intended to apply? Is the application of Rule 1-204 being excluded? If the intention is to

include the application of Rule 1-204, both provisions ought to be drafted that way.

Mr. Brault asked if the language would be: "unless extended by the court pursuant to Rule 1-204." The Vice Chair answered that she would only add a cross reference to Rule 1-204, if the intention is to have the terms of that Rule apply. She expressed the view that they would apply. The Chair pointed out that if a cross reference is added, but it is not added to every other rule that provides that an action has to be taken by a certain period of time, it suggests that if there is no cross reference, Rule 1-204 does not apply. The Vice Chair commented that generally, the Rules do not state everywhere that an answer is to be filed in 30 days, unless the time is extended pursuant to Rule 1-204. The Chair noted that another Rule uses the language "unless excused by the court." The Vice Chair agreed that the reference to Rule 1-204 should not be added throughout the Rules. Mr. Maloney expressed the view that the two provisions in Rule 2-703 should be parallel. The Reporter asked how the two provisions should read. Mr. Maloney replied that they should state that an extension is available for good cause shown. The Vice Chair suggested that each contain a cross reference to Rule 1-204.

Mr. Maloney commented that Rule 2-703 (d)(2) needs to be explicit that the time can be extended for good cause shown. The Vice Chair disagreed, explaining that the proposition throughout the Rule is that all time frames can be extended unless under

Rule 1-204, the time frame cannot be extended. Mr. Maloney responded that in practice, someone will say that it is jurisdictional, and the motion was not timely filed. A footnote will not solve the problem. Rule 2-703 (f) states clearly that the time can be extended. This should also be clarified in subsection (d)(2). It makes no sense to have the language in one place in the Rule, but not in the other place. What is needed is clear, bright-line language. One sentence can solve the problem. He moved to add language to subsection (d)(2) that would be parallel to the language in section (f) providing that the time frame can be extended by the court. The motion was seconded.

The Chair said that the motion was to add the language "unless extended by the court for good cause" to the provision relating to the motion itself. Ms. Gardner added that this would go into the beginning of subsection (d)(2)(A), which pertains to the timing of the motion. The Vice Chair asked if the language would be "unless extended by the court pursuant to Rule 1-204." The Chair pointed out that subsection (e)(2)(A) has the language "unless otherwise ordered by the court." Ms. Gardner observed that this pertains to the memorandum, not the motion. The Chair said that similar language is in subsection (e)(2)(A), but it is not worded the same.

Mr. Michael asked if the proposal is to make the language in subsection (e)(2)(A) parallel to the language in section (f) and subsection (d)(2). The Chair responded that what had been discussed was an answer to the motion, and the issue was that if

this language is in that provision, it should be put in the provision pertaining to the motion as well as the in the one pertaining to the memorandum, which raises the same issue.

Mr. Carbine asked if in Rule 2-702 or somewhere else up front, there could be a general statement that all time periods in the Rules are governed by this standard. Then no one would have to worry about missing something. The Chair expressed doubt that this would be helpful. The Reporter suggested that there be a Committee note that provides that the time frames listed in this Rule are not jurisdictional in nature and may be modified in accordance with Rule 1-204. The Chair expressed the view that this may go too far, because one aspect of this is that with contractual cases, the request for an extension has to be prior to judgment. The Reporter remarked that this provision could be excepted. Mr. Brault commented that the timing here is post-judgment as part of the cost rule.

Ms. Gardner suggested that the language "unless extended by the court" be included in subsection (d)(2)(A), subsection (e)(2)(A), and section (f) of Rule 2-703. Mr. Johnson commented that his reading of section (f) was that the language "unless extended by the court" modifies "any response," not the time for filing. This needs to be redrafted so that it addresses the problem being discussed. What is being discussed is extending the time for filing, not extending the response. The Chair explained that section (f) is the response. Mr. Johnson said that it may be a style issue. It appears that what is being

extended is the response, not the time for filing the response. The Reporter agreed with Mr. Johnson.

The Vice Chair said that she did not think that the time for the filing of the motion was able to be extended. Someone would have to file within the time frames listed, or his or her case is over. What would the issues be if the time frame were able to be extended. Can someone ask for an extension of the 30-day period a year later? She remarked that she thought that the point of this was to bring finality to the case. Judge Pierson commented that he was not necessarily opposed to the idea of an extension, but the idea was (and this is certainly true in the federal courts) that the motion is just *pro forma*, and it is the memorandum that is supposed to have all of the meat in it. The Reporter agreed, noting that the extension is probably not needed in subsection (d)(2); in fact, it probably should not have an extension for filing the motion. The Vice Chair agreed.

The Chair referred to the response in section (f) of Rule 2-703. The Vice Chair pointed out that the time periods for the memorandum and for the response should be able to be extended, and the language should be the same for both. Ms. Gardner expressed the opinion that the parallel language would be more useful, but because the motion itself is a very brief and *pro forma* document, there may not need to be an extension provided. The fact that the motion itself is to be filed within 15 days without the opportunity for an extension is not a big problem.

The Chair asked if anyone wanted a change in subsection (d)(2) of Rule 2-703. No one asked for a change. The Reporter directed the Committee to look at subsection (e)(2)(A) of Rule 2-703. The Vice Chair suggested that in place of the language "unless otherwise ordered by the court," the language should be "unless extended by the court." Judge Pierson expressed the view that "unless otherwise ordered by the court" is sufficient. The Vice Chair remarked that she was concerned about which wording was chosen, but the language should be the same for each provision. She expressed the opinion that this language is not clear as to the applicability *vel non* of Rule 1-204. It is not a good idea to use the language "unless extended by the court," because it sounds as if the court can do whatever it wants willy-nilly. Should Rule 2-702 state that Rule 1-204 does not apply? If someone has to comply with all the other requirements of Rule 2-702, there should not be a vague lack of reference to Rule 1-204.

Mr. Karceski asked what the problem would be with doing what Mr. Sullivan had suggested, which was making the time period 30 days and striking the language "unless extended by the court." This would provide finality to the procedure. The Chair responded that he did not have a problem changing the 15-day period to 30 days, but it did not solve the issue of whether Rule 1-204 applies. Mr. Karceski remarked that this may be an invitation to a request for an extension.

Mr. Maloney said that the people filing these motions and the people defending them frequently have to obtain experts. They may need more time, and there is no reason not to give them more time. The Chair responded that the Vice Chair's initial point had been that if Rule 1-204 applies to Rule 2-702, then it is not necessary to have any language providing for an extension. Then the question came up as to whether the Rule should have some language to this effect but be placed as a cross reference to Rule 1-204 or be placed in the text of the Rules.

Mr. Maloney said that he had recently been involved in a case where the defendant, Montgomery County, needed two months to respond to something. Mr. Maloney and his client had no problem with that, and they did not want to have to go through a lengthy, elaborate analysis of what the reasons were for it. It was basically a good-cause-shown standard. Montgomery County had very good reason not to oppose Mr. Maloney's petition for attorneys' fees. The Rule should give the court some flexibility. It should have one black-letter sentence, so that everyone can understand what good cause for an extension is.

Mr. Karceski remarked that Mr. Maloney's point was that in many of these cases, 15 days will not be enough time. Why choose 15 days? It makes no sense. Mr. Maloney expressed the view that 30 days is sufficient, but the more important issue is that people need to have flexibility. When these cases are post-judgment, more activity may be taking place. Many times, the experts' bills have not even been presented.

Mr. Karceski reiterated that 15 days is not much time. The Chair stated that this is for the response. Mr. Sullivan's point only related to the response. He had inquired about changing the 15-day time period to 30 days in section (f). The Chair asked if anyone had an objection to this change. Judge Pierson answered affirmatively. He expressed the opinion that 15 days is enough time for someone to figure out if he or she needs an extension. Either the person files, or the person asks for an extension. What is more magical about 30 days than 15 days or 45, 60, or 90 days? The Chair referred to time standards. Judge Pierson added that someone can ask for an extension.

Mr. Karceski inquired what would happen if the person did not get the extension. Judge Pierson had said that every judge would order the extension, and Mr. Karceski was not sure that this would be the case. He reiterated that 15 days is a short period of time. Judge Pierson responded that in the case referred to by Mr. Maloney, 30 days was too short. Mr. Karceski remarked that if someone wants an extension, and the time period is 30 days, the person can file the extension early on, and there is some time to work with. If the time period is 15 days, the person might find out on the 12th day that he or she did not get an extension.

Ms. Gardner noted that section (f) of Rule 2-703 refers both to the response to the motion and the response to the memorandum. The moving party gets 15 days for a very basic motion, and 30 days for a much more involved memorandum. She expressed the

opinion that something parallel to this would make perfectly good sense for the response. This may substantially reduce the number of cases in which extensions for the response to the memorandum might be required. There will always be cases in which an extension is required, because the case is too complex for a 30-day response. This is why she favored whatever rules allow the parties maximum flexibility to stipulate and work these issues out.

The Vice Chair told Ms. Gardner that she had said exactly what the Vice Chair had been about to say, which was that section (f) ought to be changed to read that a party has 15 days to file a response, because that can be on one piece of paper just like the motion was. The next document being filed is really an opposition to a memorandum. It is a full-fledged memorandum. She expressed the view that the 15 days there should be changed to 30 days. She moved to change the language in section (f) that reads "...supplemental memorandum shall be filed no later than 15 days after service of the memorandum..." to "...no later than 30 days...". The motion was seconded, and it passed unanimously. The Chair stated that there would be 15 days to file a motion and the response to it and 30 days to file a memorandum and the response to it. Master Mahasa said that no cross reference to Rule 1-204 was necessary.

The Vice Chair remarked that she was not concerned with the result, but only with the structure of the Rule. The Rule either needs to provide that the extension is done pursuant to the Title

1 Rule, or it needs to state that the Title 1 Rule does not apply and state what is necessary is to show good cause. Mr. Maloney responded that this is not the entire Rule 1-204 analysis to shorten time. The Rule should simply use the language "for good cause shown." This situation calls for a great deal of flexibility by the court and the parties. He had seen at least 50 of these cases. He added that the Rule should not box people in. The Vice Chair asked Mr. Maloney if his view was that Rule 1-204 should not apply, and he replied affirmatively. The Chair inquired if Rule 1-204 was different than excusing a late filing. If someone had 30 days to take an action, and the person needed 60 days, he or she asks in advance to extend the time. The other possibility is that 30 days has passed, and the person has not taken the required action. A motion is filed to dismiss the case, and now the person wants to file something to be excused from not taking the initial action. The Vice Chair added that the person may have been in the hospital. The Chair noted that the discussion is the same unless it really is jurisdictional and not excusable.

The Chair inquired how the Committee wanted to address this. Mr. Maloney reiterated his suggestion that the language "for good cause shown" be added. The Chair asked if this would go both into subsection (d)(2) (the motion) and subsection (e)(2) (the memorandum). The Vice Chair replied that it should not go into subsection (d)(2). Mr. Maloney said it should go into subsection (e)(2) and in the opposition to the memorandum. The Chair

observed that if the motion is not filed in time, then the person has no further recourse. Mr. Maloney agreed.

The Chair asked the Committee about putting in the text the language "for good cause shown" to apply to the memorandum and to the response to the memorandum. The Vice Chair added that it would apply to the response to the motion. This could be extended. The Chair commented that this was an issue to be determined, whether the time for filing the motion can be extended and whether the time to respond to the motion should be extended. The Vice Chair expressed the opinion that the motion itself is jurisdictional. The time frame cuts off the jurisdiction of the court to hear any further claim for attorneys' fees. The Chair pointed out that the jurisdiction cannot be cut off, but the exercise of jurisdiction can be cut off.

Mr. Brault said that Mr. Maloney's motion was for both filing the motion and filing the response to the motion. The Chair added that it was also for filing the memorandum and the response to it. Mr. Brault remarked that it was not for filing the memorandum, but for filing the motion for attorneys' fees. Mr. Maloney commented that he did not feel strongly about including the suggested language in subsection (d)(2). The memorandum is what is really important. The Chair noted that all of the work goes into the memorandum. He asked what the motion was. Mr. Maloney answered that it is for the memorandum and the opposition to the memorandum. The Chair called for a vote on the

motion, and it passed with three opposed.

Mr. Carbine stated that if this Rule is meant to be different from Rule 1-204, then Rule 1-204 must be changed. It has to be dealt with like a motion for a new trial. Otherwise, there is a major ambiguity. The Chair responded that there would certainly be an issue as to whether this would prevail over Rule 1-204, since it is specific to this Rule. Mr. Carbine remarked that Rule 1-204 would have to apply to every rule with an exception. The Chair said that under that theory, this would not be put in anywhere. Master Mahasa observed that this Rule would include Rule 1-204. The Chair pointed out that the argument would be vague. Rule 2-703 provides that the court can excuse a late filing and grant an extension. Someone will say that the person who filed late did not ask for the extension on time, and under Rule 1-204, the court cannot do anything, even though this Rule states that the court can. Mr. Carbine remarked that Mr. Maloney's point was that this should be different than Rule 1-204. It has different standards. The Committee had already voted on changing Rule 2-703. Mr. Carbine explained that his view was that Rule 2-703 would have to be added to the list of rules that are not covered by Rule 1-204.

Mr. Maloney said that Rule 2-703 enhances Rule 1-204. Rule 1-204 (a) allows the time to be extended for cause shown. It does not use the language "good cause." The problem with Rule 1-204 is the language in section (a) that reads: "The court may not shorten or extend the time for filing," and then the Rule

provides an entire list of procedures whose time periods may not be shortened or extended. It also has the language "or taking any other action where expressly prohibited by rule or statute." Someone is going to read this and say that Rule 1-204 does not apply to Rule 7-203. Mr. Maloney expressed the view that the two Rules are not inconsistent. It is not necessary for Rule 2-703 to even refer to Rule 1-204. Rule 1-204 has the language "cause shown." In a parallel way, Rule 7-203 would have the language "for good cause shown." The Chair said that the motion had already been voted on.

The Chair drew the Committee's attention to subsection (d)(1) of Rule 2-703. The language that the Committee had approved was the language that was bolded and underlined: "[u]pon resolution of the underlying cause of action." The question was whether the court could permit this to be done before that if the court so chooses. The drafter's note points out that there may be a situation in which all of this could be finalized at one time if the parties agree as to who is entitled to the fee. The issue is entitlement. The question was whether the Committee wanted to do this. Currently, it is not in the Rule.

Judge Pierson said that this situation could be simplified by eliminating the first clause entirely. The Rule could read: "A party who has made a demand for attorneys' fees ...shall file a motion." Then subsection (d)(2) would provide that the motion for attorneys' fees incurred in connection with preparing or litigating the action in the circuit court has to be filed no

later than 15 days after entry of judgment or entry of an order disposing of a motion. There is nothing that expressly prohibits the court from allowing the motion to be filed at any time. The Chair explained that the underlined language was put in to make clear that this cannot be done until the underlying action is essentially resolved. This is statutory. It is necessary to wait until someone wins before the issue of attorneys' fees can be resolved. If this language is taken out, then this point is not made. The only question is whether in a given case, the court could permit this to be done earlier. If there is no motion to add this, then it will not be added.

The Vice Chair inquired what language would be added to Rule 2-703. The Chair answered that it was the capitalized language in subsection (d)(1). The Reporter noted that at the April meeting, the Committee had added the language at the beginning of subsection (d)(1) that reads: "Upon resolution of the underlying cause of action." The Vice Chair asked what the motion was. Mr. Brault answered that it was whether to add the language "or such earlier time permitted by the court." This would allow the court some flexibility. Mr. Leahy questioned whether the drafter's note would be included. The Chair replied that the drafter's note would end up being added to a Reporter's note. Since there was no motion to add the capitalized language, it would not be added.

The Chair drew the Committee's attention to section (i) of Rule 2-703. He said that his recollection was that the Committee

had approved the language in the beginning of section (i), which was "[t]he court shall enter a judgment...". Upon looking at the rest of the text, the question was whether the word "judgment" should be the word "order." The order may be a judgment. The language of the second sentence reads: "the order shall be entered as a separate judgment." Normally, a judgment is not entered denying a motion. Judge Pierson suggested that the word should be "order."

The Vice Chair remarked that what is being referred to is a mini-proceeding on attorneys' fees alone. No other issue is to be decided. How could the piece of paper be anything other than a judgment? The Chair responded that the language of section (i) is:"[u]nless included in the judgment entered ... the order shall be entered as a separate judgment." Judge Weatherly commented that the judge would order it and then enter a judgment. Mr. Brault said that someone had told the Subcommittee that sometimes even in statutory fee-shifting, the fees are put into the judgment, and it goes on appeal. By consensus, the Committee approved Judge Pierson's suggestion to use the words "an order."

By consensus, the Committee approved Rule 2-703 as amended.

The Chair drew the Committee's attention to Rule 2-704. He told the Committee that Mr. Enten had raised an issue concerning subsection (b)(2)(B) of Rule 2-704. In April, the Committee had decided to send this provision to the Court as alternatives. The issue was the contractual fee in a case tried by a jury, where the fees are being claimed as part of the

underlying action, and everyone has agreed that the jury determines the entitlement to the fee. The question arises as to determining the amount, assuming the jury finds entitlement. Is this an issue for the jury or for the judge? In the first *Friolo* case, which involved statutory fee-shifting, not contractual, the Court of Appeals said that the amount of the fee is always for the judge to determine. When this issue was brought up in April, someone had asked whether the jury should be deciding the amount of the fee, also, because if it is a jury case, under the Maryland Constitution there is not a right of a jury trial constitutionally. The issue would be presented in two alternative forms. The first alternative, Alternative A, is that the jury decides all, but the judge would have the ultimate control to look at the reasonableness only of the fee. The second alternative, Alternative B, does not allow the jury to determine the reasonableness of the amount at all. Alternative B raises the issue of the right to a jury trial pursuant to Article 5 of the Declaration of Rights of the Maryland Constitution. The Committee had approved sending both alternatives to the Court. Mr. Enten had asked for a reconsideration of this.

Mr. Enten told the Committee that the issue regarding the $4,500 limit is more important, because it is a meaningless amount in circuit court. Then Rule 2-703 has the 12-pronged list of criteria that a jury is going to have to address in every case. This involves high hourly rates of attorneys. The Chair

asked if Mr. Enten preferred Alternative B. Mr. Enten responded affirmatively.

Judge Pierson remarked that he had not agreed to sending up two alternatives. He noted that prevailing party clauses in contracts are different from other contract-based fee claims. He had expressed the view earlier that prevailing party contract-based fee claims should be submitted to the finder of fact, and he still believed that this was the case. He did not understand how this procedure would work, because the jury will ask who the prevailing party is, and then if a motion for a new trial is filed, there would be another prevailing party after the trial. The Chair countered that the jury is going to determine who the prevailing party is in deciding their verdict on the underlying claim. He asked Judge Pierson if his view was that the jury should not decide this either. Judge Pierson explained that he had been overruled at the previous meeting. His view was that there is law that supports deciding prevailing-party contract fee claims after the decision on the merits. This makes more sense.

Mr. Carbine said that he needed some clarification about this issue, because he had not been present at the meeting in April. Had the Committee discussed and considered the fact that in loser-pays contract claims, and where the entitlement to the fee and the amount of the fee is to be proven and decided in the substantive trial on the merits, both sides have to put on their case for attorneys' fees, both sides have to estimate what the cost to complete the trial is going to be, and both sides have to

have all of their experts' bills in? What is done if the defendant gets the case dismissed on a summary judgment, because there has to be a trial on the merits for the attorneys' fees? The Chair responded that Mr. Carbine was referring to prevailing-party contracts where either side can get attorneys' fees. Mr. Carbine commented that he had problems with the Rule as it applies to loser-pays contractual claims.

Mr. Brault remarked that he had a question about the language in Alternative A that provides that the issues of entitlement and the amount shall be presented to the jury. If the jury finds that one party prevails, and the party presents attorneys' fees for $800,000, the jury may feel that this is a ridiculously high amount. What would the jury do? Does the jury fix the fee? The Chair noted that this was the whole point of the Rule. Initially, what was before the Committee was essentially Alternative B. It follows the *Friolo* case providing that the amount of the attorneys' fees is for the judge to determine. The argument had been made that *Friolo* was a statutory fee-shifting case, not a contractual fee-shifting case. The Committee decided last time to send both alternatives up to the Court of Appeals to see what they want to do.

The Vice Chair inquired if she was correct that two different issues were being discussed. One was when the proceeding is going to occur to determine fees, which, in her experience, is always after the judgment as to who won. The

Chair responded that this is not true in the contract cases. The Vice Chair responded that it is true in contract cases. Mr. Carbine added that he had never experienced it the other way, because he always files a motion to bifurcate, and it is always granted. How would an attorney know if it is required in the substantive part of his or her case to put on not only how much time the person spent but what the person spent it on while arguing over the merits? The attorney does not know how much it will cost to finish up the case; the attorney does not have the experts' bills nor all of the necessary information. Mr. Carbine said that he has never seen this issue part of the trial on the merits.

The Vice Chair added that she had not, either, and she had never heard anyone refer to the matter of attorneys' fees being part of the trial on the merits. One of the two questions to which she had referred was when the attorneys' fees should be determined, and her view was that they should be determined after the decision as to who the prevailing party is. The Chair responded that the Vice Chair may have been correct about this, but it cannot be determined after judgment has been entered. The Vice Chair explained that her point was the timing of the determination. The second question she had was whether there is a right to trial by jury in that proceeding if the fee is decided after the determination as to who the prevailing party is.

Judge Pierson noted that there are two types of contract-based attorneys' fees. One is where the attorneys' fees have

been incurred as a result of the other party's breach of contract, such as indemnification cases. The law is clear that those have to be presented to the finder of fact. The other type of case is the prevailing party contract. The Chair said that he was not certain that the division of these cases was so clear. Indemnification is one kind of case, but what about normal contracts where there is a breach, and the other party gets what the first party owes for the default, damages plus attorneys' fees? This is not necessarily a prevailing-party situation. One side gets this; the prevailing party situation is: whoever wins gets from the other side. This may be the defendant who gets a verdict and tells the plaintiff that the defendant is entitled to his or her attorneys' fees. The Vice Chair said that the Chair's language was that if someone defaults on his or her obligation on the contract, then in addition to whatever is owed to the other party under the contract, the one who defaults has to pay the other person's attorneys' fees. This depends on winning on the issue of whether the person defaulted or not. If the person did not default, under that language, the defendant does not have any right to attorneys' fees.

The Chair commented that the Committee had already discussed this for a lengthy period of time. The Vice Chair said that she was not sure that the language in Rule 2-704 reflected what the Committee had decided. Mr. Maloney pointed out that the Committee had decided to let the Court of Appeals choose. He agreed that the court historically has awarded attorneys' fees to

the prevailing party. The court should be willing to award fees to the prevailing party. He did not understand where in the Constitution it is carved out that there is no right to a jury trial in prevailing-party cases. The Court of Appeals is essentially being asked to decide on the right to a jury trial.

Mr. Brault stated that he had a totally different view of the concept of "prevailing party," which was that the solution is that when a party prevails, a new cause of action is created. That will be taken care of post-judgment on the merits. He compared it to the right of contribution or indemnification that may flow between defendants. If two defendants are at a trial, and both are held liable, but one is a millionaire and one is not, a cause of action between them is created by the finding under the Uniform Contribution Among Joint Tort-Feasors Act, Code, Courts Article, §3-1401 et seq. This can be handled by a separate cause of action or by a counterclaim. If someone thinks that he or she is going to be the prevailing party, that person has the option as a defendant who prevails to file a claim against the plaintiff for the amount of the person's attorneys' fees. The other option is that the person can counterclaim for the fees.

The Chair noted that this issue has come full circle. Initially, language had been in Rule 2-704 referring to what happens if a party prevails. Someone suggested that this was not appropriate and that it should be taken out. The issue of prevailing party may get worse, because of what the Access to

Justice Commission had been recommending. Apart from that, the contract can state that on default, if there is a breach, the other party gets attorneys' fees in some amount. Only one side is entitled to that, but that party has to win. That was the theory -- the party has to prevail. The other possibility is that the contract can state that the prevailing party in any litigation arising out of the contract is entitled to attorneys' fees in which event the defendant may be entitled to get attorneys' fees. This is the difference between a prevailing party contract and the fee-shifting only when a plaintiff wins.

The Chair said that Mr. Maloney had raised an interesting question. The right to a jury trial is pursuant to Article 5 of the Maryland Declaration of Rights, which applies the common law that existed in 1634. The rule of non-fee-shifting is the American Rule. The common law that Maryland got from England was that the loser pays. Mr. Maloney inquired if the loser in England had the right to a jury trial. The Chair pointed out that in Maryland, Article 5 was extended to add not only the common law of England but the specific right to a jury trial.

Mr. Maloney remarked that what was awkward was a situation where the contract has a "loser pays" clause. If that is tried before the trier of fact without bifurcating it, are both sides going to come in with their attorneys and experts and put on the case for the attorneys' fees? The Chair responded that where he had thought that this was heading was that in a contractual fee-shifting situation, the determination of the fee has to be folded

into the ultimate judgment. It is not done like a statutory fee-shifting case. But the issues can be bifurcated, so that the issue of who wins can be tried first, and then depending on that, before judgment is entered, the matter of attorneys' fees can be decided. Then the question is whether the jury decides that latter part, also.

Mr. Carbine noted that one of those concerns can be solved by simply inserting in the Rule the right to file a motion to bifurcate. He said that he did not feel so strongly about the second issue other than what to do about prevailing on a motion for summary judgment. The Chair commented that he did not know whether someone could ask for a partial summary judgment on liability for the amount or ask for total summary judgment. If the person asks for a total summary judgment, the person would have to show what is required to get it. If the person wants attorneys' fees, he or she will have to show it in the summary judgment.

Mr. Brault remarked that he did not see how the issue of attorneys' fees can be tried in front of the jury, because the entitlement to attorneys' fees is not over. If someone is the prevailing party or the winner, and there is an indemnity clause in the contract, that entitles someone to be paid if a breach of the contract is found, and this carries through to the the post-judgment and to the appeal phase. The Chair asked if Mr. Brault's point was that the issue of entitlement is not sent to the jury. Mr. Brault replied negatively, noting that the jury

can find entitlement, but the amount of the fees is growing all the time. The amount changes with the motion for a new trial and with the appeal. The Chair commented that this is what Alternative B would do.

Mr. Brault expressed the opinion that Alternative B is the better approach. If the case is one where the loser pays, and the defendant prevails, the defendant has a new cause of action. That cause of action can be taken up either by way of counterclaim or in the substantive cause of action. The Chair pointed out that Alternative A was only included because of the concern by the Committee in April that the amount in a jury case was also presentable to the jury. The Committee had argued about this, so the decision was to send both versions up to the Court of Appeals.

The Vice Chair asked if the Committee had seen the language of Alternatives A and B. The Chair responded that the Committee had decided to use the alternatives, but the language had to be drafted later. The Vice Chair remarked that this is a very complicated area of the law, and this is why it had been discussed so much. It is difficult to get this language right. Section (a), the scope of Rule 2-704, states that the Rule applies to any case where a contract provides the right to attorneys' fees. The Vice Chair expressed the opinion that this includes the situation of indemnity, which must be presented as part of the damages during the trial itself, or the damages are lost. This is opposed to the situation where, if a party wins,

then that party gets the attorneys' fees. The latter is a completely different scenario, and that is always tried after the first case is tried. Mr. Maloney inquired where this is stated.

The Vice Chair expressed the opinion that the language of Alternatives A and B mixes up those two concepts. The first question is when the issue of fees gets tried, and the second question is when it gets tried whether in the case itself (with respect to indemnity, there is an absolute right to a jury trial) or after the initial case. Then the issue is whether there is a right to a jury trial. This is a more difficult issue, and the Vice Chair added that she did not know the answer. She had always presented the issue of attorneys' fees to a judge.

The Chair drew the Committee's attention to subsection (b)(2)(C), which makes clear that an award of attorneys' fees must be part of the judgment entered in the action but shall be separately stated. This is what the Committee had approved. The Vice Chair noted that this has always been true. The Chair said that the award of attorneys' fees has to be folded into the judgment. Mr. Maloney noted that the Rule does not state explicitly what the Vice Chair had just said. He agreed that if it were an indemnification, the issue would be before the initial trier of fact, and otherwise, it would be later. But the Rule does not explicitly state this. The Vice Chair commented that this should be clear in the Rule. The scope provision purports to cover both, and they are two completely different scenarios.

The Chair noted that Rule 2-704 could provide that this is

strictly trial procedure and that this can be done as part of the case-in-chief with the entire claim, or it could be bifurcated. First, the underlying claim is addressed and then attorneys' fees depending on what the decision is on the first one. This could be stated in the Rule. The Vice Chair remarked that she did not think that what the Chair had said was true in the situation of the prevailing party. In the main case, someone has no right to put in his or her alleged damages relating to attorneys' fees, because they are not yet damages. There is no right to say that one has a right to attorneys' fees, because he or she has not prevailed yet. This never happens in the trial of the main case. The Chair's suggested wording makes it sound as if someone has the opportunity even in the prevailing party situation to raise this in the main case. The Chair responded that it certainly happens in the District Court. All of the evidence is put in at one time.

Mr. Karceski inquired whether the judge can be asked to determine the substantive cause, and then the party can ask for a jury only on the issue of attorneys' fees if a jury can make the determination. The Vice Chair answered that she did not know. Mr. Karceski remarked that he thought that someone could ask for a court trial, and then if a jury has the right to make the determination, the person can make a request to bifurcate the trial. Everyone seems to feel that this makes sense, because there may be times when someone engages an expert in a trial and then does not use the expert, but if the person prevails, would

that be a cost that is part of the person's case preparation? If, at the trial, the person is not using an expert that he or she has engaged and paid for, does the person not have to tell the jury during the trial that he or she has paid for the expert? It complicates matters doing this all at once.

The Vice Chair commented that she had never heard of determining the liability and the fees all at once in the prevailing party situation. Mr. Karceski added that it seems impossible to do it. The Vice Chair observed that doing it all at once may be prejudicial, also. Mr. Karceski reiterated that he did not see how it could be folded into one trial. The Chair said that it has to be folded into one trial, because there has to be one judgment in these cases.

Mr. Carbine expressed the opinion that the Committee was stumbling over definitions. In his experience, he moves to bifurcate, the decision is made as to the liability and damages, and it is a memorandum opinion, or it is a jury verdict. Then there are motions for a new trial as well as motions on the attorneys' fees, and if the case is decided in January, judgment may not be entered until May, after the court addresses everything.

The Chair responded that this is not a matter of semantics. There are cases where the attorney did not put in evidence to get a determination of the attorneys' fees, an appeal was taken, and the appellate court held that there was no right to the attorneys' fees, because they were not part of the judgment, or

because the judgment was not complete under Rule 2-602, Judgments Not Disposing of Entire Action. The court then sent the case back to the lower court. It is jurisdictional. Judge Pierson observed that the issue of whether it has to be presented to the fact-finder in the underlying trial on the underlying claim is not the same issue as to whether it has to be in the judgment. Mr. Maloney said that everyone agreed with this statement.

Judge Pierson noted that Rule 2-704 could provide in certain circumstances for the resolution of the attorneys' fee claim after the underlying trial on the merits without disturbing the judgment. The Chair acknowledged that the Rule could provide this, but he pointed out that the question is how can this be done. The question raised at the meeting was whether Alternative A or B is appropriate. Does this get presented to the jury or not? Mr. Maloney remarked that this is a separate issue. The Chair agreed, noting that one issue is when is this phase tried, and the other is to whom does one try it. Mr. Maloney suggested that as to the issue of when, there be a one-sentence rule that provides that the award of attorneys' fees shall be tried after trial on the merits, except for indemnification cases. The Vice Chair observed that it would be except when the issue of attorneys' fees is part of the claim. The Chair noted that this is what the Rule had provided at the outset in the original draft.

Mr. Carbine remarked that collection cases are separate from a "loser pays" rule. Rather than have an absolute rule, a

mechanism where a party can file a motion to bifurcate could be added to the Rule. The Vice Chair expressed the opinion that this is dangerous, because not all cases can be bifurcated. The indemnification situation cannot be bifurcated. Mr. Carbine responded that hopefully, the judge would understand this. The Vice Chair commented that she would not file a motion to bifurcate in the prevailing-party situation, because she did not think that it was necessary. The issue of fees would not have arisen yet. Mr. Brault inquired how the fees would be added on appeal if everything has been folded in at the judgment phase. The Chair replied that if someone is asking for attorneys' fees for the appeal, the Rule provides for it. The case goes back to the circuit court. There is a judgment that captures all of the attorneys' fees up to the point of the judgment. Then an appeal is taken. Mr. Brault noted that this would not solve the jury problem –- is someone entitled to a jury trial? The Chair stated that someone would try liability to jury #1, that jury is dismissed, and then another jury is empaneled to decide attorneys' fees. Mr. Carbine pointed out that this would be the result of the Rule. If the Rule provides that the case has to be tried by a jury, either the impaneled jury would remain to hear it, which is not a good idea, or a new jury would be empaneled.

The Chair stated that if the case is going to be tried before a jury in a contract case, a procedure such as the one used in a criminal case would have to be used where the case is tried on the issue of whether there was a default or a breach and

what the damages are, and the jury comes in with a verdict. Then, if the jury has decided that the plaintiff has won, and the plaintiff is entitled to attorneys' fees, the plaintiff gives evidence as to the fees, and the jury will come back with another verdict on that. Then, the judgment is entered. Then, there would be a motion for a new trial, because everything has been resolved. Ultimately, there is one appeal. Mr. Carbine added that it may be reversed. The Chair responded that if it is reversed, it is back in the lower court. This happens in any reversal.

Mr. Carbine noted that this does not solve the problem of the ability to get the data together in that short period of time. The Chair said that the attorney would have the data. A good attorney knows that he or she will be asking for attorneys' fees and has to keep the case together. Mr. Karceski questioned whether it is that way in a case with punitive damages. It does not begin necessarily after the jury comes back with its verdict. It can start the next day. The Chair agreed, but he noted that in a case with punitive damages, the reason it is done that way is because certain evidence is not admissible until there is a finding of liability. Mr. Karceski asked whether subpoenas can be issued for that particular hearing. The Committee indicated that this can be done.

The Vice Chair commented that she had reread section (b) of Rule 2-704. Subsection (b)(1) was intended to address the situation where the attorneys' fees are part of the underlying

claim, but somehow, with the language that had been taken out, that provision does not say anything. It basically states that one always has to assert and prove the claim for attorneys' fees in all cases prior to the entry of the jury's verdict or court's findings in the action. This is not correct. When the Rule was first drafted, it was to be applied to two different scenarios, one where the claim for attorneys' fees is part of the underlying claim and one where it is not. Then section (b) was going to address when it was part of the underlying claim, and it was going to provide that if it is part of the underlying claim, it has to be alleged and proved before the jury or the judge can make a determination. This makes sense. What follows in subsection (b)(2) should not be part of this.

The Vice Chair said that she had another point to make. The Rule should not attempt to state whether the attorneys' fees are going to be decided by a jury. The right to a trial by jury depends on whether there is a constitutional right. It should not be addressed by rule. The Chair reiterated that this issue arose, because in a statutory fee-shifting case (*Friolo*), which had been tried before a jury, the Court of Appeals held that it is not for the jury to determine the reasonableness of the fee. The Committee spent some time discussing whether this should apply to contract fee-shifting cases as well. This needs to be resolved. The Vice Chair expressed the view that the language of the Rule is not correct on this point.

The Chair noted that Alternatives A and B only speak to who is ultimately going to decide the amount of any attorneys' fees. This does not address when, where, or how. The Vice Chair expressed the view that these provisions should not be addressing who decides the amount, because a rule should not decide whether someone has the right to a jury trial. The Chair said that the Committee had decided to send both of these alternatives to the Court of Appeals, so that they could make the decision. The Vice Chair remarked that the Committee had not seen the language of the two alternatives before. The Chair acknowledged this, but he pointed out that it captured exactly what the Committee had decided to do.

Mr. Karceski asked the Vice Chair if her suggestion was to strike both alternatives and leave only subsection (b)(2)(C) in Rule 2-704. The Vice Chair replied negatively, explaining that she was suggesting that the Rule have two separate sections. One section should provide that if the attorneys' fees are part of the underlying claim, they should be requested up front and proved during the trial. The other section should provide that if the attorneys' fees are not part of the underlying claim (this is basically the prevailing party case, although there may some other cases that would apply), the claim for damages should be presented after the jury reaches a verdict. Mr. Karceski asked the Vice Chair if her point was that neither alternative should be in the Rule. The Vice Chair answered that Alternatives A and B should not appear in the way that they are presented in the

Rule.

The Chair noted that all of these Rules pertaining to attorneys' fees were drafted for guidance for the bar and the bench as to how to handle these fees. The Rule is not really necessary, because there had never been a rule on this topic before. However, the complaint was that in the attorney fee-shifting cases, which are becoming more frequent, attorneys and judges are getting it wrong. Parties had appealed and had been told either that the judgment was not final, or that they had lost the attorneys' fees, because the fees were not part of the judgment. One of the issues that came up was who is going to address the amount. If the Rule does not address how to determine attorneys' fees, then it offers no guidance, and the Court will have to make a decision as to whether the case is properly before them or not. Will the entire case have to be retried because the determination of attorneys' fees should have been handled by a jury? The proposed Rule gives the Court an opportunity to address this issue.

The Chair said that the issue as to when the fees are determined had been discussed. The Vice Chair had pointed out that subsection (b)(1) of Rule 2-704 may be the place to address this. The language is "...a claim must be asserted and proved prior to entry of the jury's verdict or court's finding in the action." Then the Rule could provide that the matter can be bifurcated as to the issue of the attorneys' fees, and the underlying claim can be tried first, although the attorneys' fees

are often part of the underlying claim. This is so not just in indemnity cases; it is that way in a normal collection case.

The Vice Chair expressed the opinion that this is similar to the prevailing party situation. If the contract provides that a person who breaches the contract owes the other party $100,000 in attorneys' fees, the preliminary question is: did the party breach the contract? This is very much like the issue of whether a party prevailed or not, because the right to attorneys' fees does not come into being until there is or is not a breach. The Chair pointed out that what the Vice Chair had said was exactly what was in the earlier draft of the Rule about prevailing party and the fact that a party has to prevail. The Committee had decided to take this out. The Vice Chair responded that the Committee may be seeing this differently. The Chair commented that he was not sure that if this language was put back into the Rule, the same objection would not arise when the Committee sees the language. The Vice Chair said that this may be, but this is not easy to draft.

Mr. Brault remarked that the Vice Chair's point seemed to be that Alternative A of subsection (b)(2) of Rule 2-704 appears to provide a right of trial by jury which is beyond the authority of the Rules. The Rules cannot award the right to a trial by jury or take away the right. It is for the Court of Appeals to decide whether someone is entitled constitutionally to a trial by jury. The Vice Chair added that this would be by case law. Mr. Brault noted that if Alternative A is considered, instead of providing

that the jury is to determine entitlement, the Rule could state that any fees awarded by a jury are subject to review for reasonableness and leave out the issue of entitlement, so that the Rule does not dictate when a right of trial by jury exists that might not otherwise apply. The Vice Chair responded that this was her point in part.

Mr. Brault said that in Alternative A, it would be better not to state whether someone has a right to a trial by jury or not; the Rule could simply provide that any attorneys' fees awarded by a jury under this Rule are subject to review by the Court. The Chair commented that this is what the Rule already provides. Mr. Brault disagreed, pointing out that Alternative A provides that the jury shall determine entitlement.

The Chair noted that Alternative A states that the finder of fact determines entitlement. The Vice Chair remarked that this cannot be the jury. The Chair disagreed, noting that if there is an issue on entitlement, and it is disputed, the jury has to decide it. He added that this is exactly what happens in the wage payment cases which are statutory claims (Code, Labor and Employment Article, §3-501 et seq.). A party is not entitled to an attorneys' fee in a wage payment case unless there is a finding that the dispute was not a bona fide dispute.

Mr. Brault remarked that he was leaning toward Alternative A as a way to avoid the issue of jury rights. The Vice Chair expressed the view that this would still provide major guidance to the bar on the issue of attorneys' fees. Many attorneys do

not think about the fact that sometimes their fees are part of the underlying claim and that evidence in support of the fees must be presented. The attorneys forget about the fees. There is a provision in the Rule that distinguishes clearly that sometimes the fees have to be noted. It is not necessary to define when that is. Figuring it out is important as well as noting the fact that it may have to be done first. If the fees are not part of the underlying claim, the Rule should say that the fees are determined after the verdict or decision.

The Chair commented that this begs the question of whether it is part of the underlying claim. The Vice Chair responded that it is very difficult to do this. The Chair noted that the appellate courts have not drawn the distinction that the Vice Chair had drawn. If there is a contract claim that provides for attorneys' fees, whether it is for the plaintiff or for whoever wins, that is part of the claim. The Vice Chair disagreed with this. It is part of the claim as a whole, but it is not part of the underlying claim that must proven in the case-in-chief or in the main case. The Chair said that he agreed with this. Any case can be bifurcated. The Vice Chair said that it may not even be able to be bifurcated, because someone does not have a right to the fees until a certain point.

The Reporter asked how Rule 2-704 should be changed. The Chair said that what is important is when the evidence on attorneys' fees is presented. Subsection (b)(1) would provide that the issue of attorneys' fees has to be asserted and proved

prior to the entry of the verdict or findings in the action. The attorneys' fee issue can be bifurcated, so that the trier of fact would decide first the entitlement to the fees. Mr. Brault expressed the view that this would be up to the court. The Rule should not be that finite as to how to conduct the trial. As far as the right to a jury trial, he could imagine some corporate entity represented by five attorneys getting a judgment. If that corporation has to present their attorneys' fees to the jury, the jury may decrease the fees greatly or not find for that side, because the fees are so high. This is persuasive that the right to a jury is important in this setting, and it would be better that the Rule not affect that.

Mr. Carbine suggested that the Committee should vote on the principles, rather than trying to draft the language. The issue can be addressed by allowing a bifurcation camp, and the "two whens" camp has been defined. For the bifurcation camp, it is a matter of writing the Rule so that it has the right to bifurcate. If it is defined as part of one's case, it is what has to be done on the merits and what can be done later. If that is what the Committee chooses, the Rule can be drafted accordingly rather than the Committee debate forever on this.

The Chair said that Alternatives A and B pertain to whom the issue of the entitlement to the fees is presented. If a provision were to be added that on motion of a party, the court may provide that the issue of entitlement to a fee be presented first, that would include someone winning on the underlying

claim. Then the Rule would state that the amount would be presented after the issue of entitlement is resolved. Mr. Carbine expressed his agreement with this. The Chair added that this would all be before the judgment.

The Vice Chair inquired if the court can bifurcate less than all of the claim or defense. She had never thought that the court could decide with respect to attorneys' fees that are part of the damages, such as in an indemnification, that a party can just present that later. If it is a jury trial, the court absolutely cannot do this. The Chair asked why the court could not. The Vice Chair answered that the indemnification damages are part of the underlying claim. The Chair commented that it is not necessary to use the word "bifurcate." The court has inherent control over the presentation of evidence; there is plenty of law on this issue. The language of the Rule could be: "on motion of a party, the court may provide or require the presentation of evidence as to entitlement to the fees, and then based on the ruling, evidence as to the amount." This could be before the jury or before the court.

Mr. Brault expressed the opinion that no rule on this is needed. It is almost routine to bifurcate liability and damages in tort cases. It happens frequently. The defense always wants to bifurcate liability and damages in serious injury cases to keep the jury from being influenced. When a judge bifurcates, it may well be for that reason alone: the evidence of damages is so prejudicial to liability that the court bifurcates it. That is

why this is done in cases with punitive damages, because the evidence of the defendant's net worth is very prejudicial on the issue of liability. No rule needs to be written for this. This can be done under current practice.

The Chair agreed, but he noted the problem is that there should be a self-contained rule that presents "soup to nuts" on attorney fee-shifting. If the Rule does not provide that this is permissible, people will not know it can be done. The Vice Chair remarked that the real "soup to nuts" formula would be that the Rule would have two sections. One should address when attorneys' fees are part of the underlying claim. It would provide that the fee issue has to be presented as part of the case; on motion, a judge could defer this matter until afterwards.

The Vice Chair said that the next section addresses where attorneys' fees are not part of the underlying claim. She expressed the view that it would help the practitioner if the Rule would provide that where the issue of the fees is not part of the underlying claim, the issue of what the fees are would be tried after the verdict or court decision. This is the most helpful to everyone. It alerts everyone to the idea that sometimes the fees have to be brought up as part of the case, or the issue is lost. Otherwise, the issue would be brought up after the decision in the case. The Chair said that the issue of fees is always part of the underlying case in contractual fee-shifting. The Vice Chair remarked that she may not have been using the correct language. The Chair responded that she was

looking at indemnity cases as the only category where the issue of fees is part of the claim.

Mr. Carbine moved that the Committee approve in concept the Chair's approach in taking essentially the existing language and building in the ability to file a motion to bifurcate. The motion was seconded. It passed with three opposed. The Chair remarked that he was not sure that the word "bifurcate" should be used. It is the control of the presentation of evidence. This issue will show up again.

Judge Pierson commented that he had a separate item pertaining to Rule 2-704. He had realized, by looking at the District Court Rule and by the experience in Baltimore City Circuit Court, that it would be helpful to have something in Rule 2-704 similar to subsection (c)(3) of proposed Rule 3-741 (Attorneys' Fees), which reads: "If the party seeking attorneys' fees has requested a judgment by confession ...the requested fee shall be included in the affidavit required by Rule 3-611 (a)." Baltimore City is getting judgments by confession. Under the new Rule, the judge must review those; they are not entered by the clerk any more, and they are coming in without adequate presentations as to attorneys' fees. Proposed Rule 2-704 addresses contract-based fee claims but does not refer to confessed judgments. He expressed the opinion that this should be in the circuit court Rule as well as in the District Court Rule.

After the lunch break, the Chair told the Committee that

there were two other issues to discuss relating to Rule 2-704. Judge Pierson reiterated that nothing in Rule 2-704 captures what is in Rule 3-741 pertaining to judgments by confession, and it should be, because it would provide clear guidance that when there is a confessed judgment claim in the circuit court, the attorney should present the information demonstrating his or her entitlement to fees in the affidavit required by Rule 2-611, Confessed Judgment. Something like this should be in Rule 2-704.

The Chair asked Judge Pierson if he was suggesting that in an affidavit supporting the confessed judgment, not a motion for summary judgment, the attorney would have to put in documentation about the reasonableness of the fee. Judge Pierson answered that the Rule that they are applying is that the attorney has to demonstrate reasonableness of the fees in order to get an award of fees. Most of the Baltimore City judges tell the attorneys that they cannot ask for fees of 15% of the amount claimed without providing other information to enable the court to determine what is reasonable. There should be some demonstration of reasonableness accompanying the request for fees as part of the initial confessed judgment.

Mr. Enten said that he may be on a losing course to argue that contractual cases are different. Subsection (e)(2), which has the language pertaining to the amount owing not being more than $4,500, makes some sense. The level of detail judges require to determine reasonableness may be what is customarily provided for. Judges will make decisions that will be different

in one court than in another. Rule 2-704 never mentions judgment by confession. Mr. Enten expressed the view that even if judgment by confession is not mentioned, it will still be addressed under the Rules no differently whether it is a judgment by confession or not, because the circuit court has the same type of test in section (c) of Rule 2-704. Section (c) provides that if the claim for attorneys' fees is 15% or less of the principal amount of the debt due and owing, then the additional condition of not exceeding $4,500 makes no sense. The same three tests in section (c) apply whether it is a judgment by confession or not.

Judge Pierson remarked that his earlier comment was not addressing required evidence, standards, or the $4,500 exception. His point had been that there should be an express provision using the language of Rule 3-741 (d)(3). The language should be that whatever must be included should be included in the initial filing under Rule 2-611. The Chair asked if anyone had an objection to this. Mr. Enten commented that regardless, the right to the fees would have to be established, and there should be some reference to reasonableness. How would the language of subsection (d)(3) of Rule 3-741 relate to the language of subsection (e)(2) of the same Rule?

The Chair noted that the language suggested by Judge Pierson addressing judgment by confession could be added as a section (d) of Rule 2-704, and proof could be required of only what is in subsections (A),(B), and (C) of Rule 3-741 (e). He asked Judge Pierson if this would be enough, because a party can always have

a judgment by confession vacated. Judge Pierson responded that the current procedure is that the judges have to review confessed judgments before the judgment is entered. Even if the court is told to enter a confessed judgment, it can still be vacated if a motion is filed. The Chair pointed out that what Judge Pierson had requested is a provision in Rule 2-704 that addresses confessed judgments. The Chair said that he was suggesting that all that is needed is what is in subsections (A), (B), and (C) of section (e) of Rule 3-741 and not anything else. Would this be sufficient for purposes of confessed judgments? Judge Pierson replied that this would cover it. It includes facts sufficient to demonstrate that the requested fee is reasonable.

Mr. Enten noted that the language that is in subsection (d)(3) of Rule 3-741 covers subsections (A) and (B), but not subsection (C) of section (e). There seems to be a difference between what is provided for a judgment by confession and what is generally required. The Rule makes a distinction between a judgment by confession and a judgment on an affidavit. The Chair inquired if Mr. Enten was objecting to the language in section (e) that reads: “that the fee sought does not exceed the fee that the claiming party has agreed to pay that party’s lawyer.” Mr. Enten responded that he was not sure that someone would know what that fee is going to be.

The Chair pointed out that the fee that is shifted to the defendant cannot be more than what the other party has agreed to pay his or her own attorney. Mr. Enten commented that what the

party has agreed to pay is the costs of collection. Does that include pre-judgment and post-judgment activity? How would the post-judgment activity be covered? The Chair inquired how this would be covered in any case. Mr. Enten answered that if the attorney is going to get 15% of the principal amount of the debt, because that is what is agreed to by contract, one of the reasons that this was approved in the past was because it is understood that much of the time is going to be spent not getting the judgment but trying to collect it. Mr. Maloney remarked that the award is not prospective as to what fees someone might incur. Mr. Enten noted that collection cases are different because the reason someone gets a default judgment and the reason someone sues is because the other party will not pay. Much of the work is done post-judgment.

The Chair said that the Committee had discussed this point a number of times. In a contractual case, but not in a statutory case where more fees can be obtained, the party cannot get more than what the person has agreed to pay his or her own attorney. Mr. Enten acknowledged this. The Chair told the Committee that there were two other issues to discuss. One had been pointed out by the Reporter in Rule 2-703. Subsection (d)(2)(B) pertains to what happens when fees are incurred on appeal, not in the trial. It provides that the fees can be obtained, but the party has to go back to the circuit court to try this issue. The Court of Special Appeals will not sit as a trial court. This provision is not in Rule 2-704. It is an unintentional gap. If an appeal is

taken from the circuit court judgment, and someone is entitled to additional fees by contract, there has to be a way to litigate this.

The Chair asked Mr. Brault if he remembered why this had been left out of Rule 2-704. Mr. Brault replied that the Subcommittee might not have gone into that much detail when drafting the Rule. They had also considered the question of fees on fees and fees on appeal that were recoverable. The language of subsection (d)(2)(B) could be added to Rule 2-704. The question was if this would create a cause of action when trying the cases under Rule 2-704 to a jury.

The Chair responded that the same problem exists in the statutory cases as well, because those cases could be tried to a jury and often are. If the case is appealed, and someone is entitled to attorneys' fees under the contract, is the person entitled to them for the appellate case? Mr. Brault answered that he thought that the person would be entitled to them. The practice is probably to file a motion in the circuit court. The Chair noted that this is what Rule 2-703 provides. Mr. Brault reiterated that he had no problem with adding the provision to Rule 2-704. By consensus, the Committee approved the addition of language to Rule 2-704 similar to the language of Rule 2-703 (d)(2)(B).

The Chair noted that the last issue regarding Rule 2-704 was a comment by Judge Love, which applied to the District Court Rule but would apply to Rule 2-704, too. This is the exception for

cases with attorneys' fees of 15% or less of the principal amount of the debt. A handout of a proposed Rule change had been distributed. Judge Love said that in subsection (e)(2) of Rule 3-741 and the companion Rule in the circuit court, Rule 2-704, the language is: "If the claim for attorneys' fees is based on a contractual undertaking to pay on default or breach of contract an attorneys' fee of 15% or less of the principal amount of the debt due and owing, the court may ...".

Judge Love's concern was that this language could be read one of two ways. The first interpretation would be the one that he thought was meant which would be "if a claim for attorneys' fees is based upon a contract to pay on default or breach, and the demand for attorneys' fees does not exceed 15%...the court may...". The other way to read it is "if a claim for attorneys' fees is based on a contract that specifically provides for payment of attorneys' fees that do not exceed 15% ...". The latter reading had concerned him, because the way the second interpretation reads could mean that it only pertains to contracts that specifically provide for attorneys' fees of 15% or less, when most of the contracts the District Court judges see are silent as to the percentage. The language that had been proposed in the handout would link to the demand for attorneys' fees not exceeding 15% regardless of what the contract said.

The Chair asked Judge Love if he approved of the language in the handout. Judge Love answered that he would substitute the word "demand" for the word "claim." Otherwise, the language of

the Rule is appropriate. The Chair inquired if anyone else had a comment on the proposed change to Rule 2-704 (c), because if it is added to the Rule 3-741, the clarification should go into Rule 2-704 as well. By consensus, the Committee approved the change to Rule 2-704 (c) and the addition of parallel language to Rule 3-741.

Mr. Carbine asked what the decision was as to the language "and the requested fee does not exceed $4,500" that had been suggested for section (c) of Rule 2-704. The Chair replied that the Committee had decided to send the Rule to the Court of Appeals in alternative form. No one had made a motion to change this. This is what the Committee had voted in April. He inquired if anyone had a motion to change this. Mr. Enten questioned whether for the circuit court, if the amount requested is in excess of $4,500 in a contractual case, to get those fees all of the provisions in subsection (e)(4) of Rule 2-703, which would apply in complex cases, would have to be listed and analyzed. He said that he was trying to understand what the impact would be. The Chair answered that the provisions of subsection (e)(4) would not have to be followed, but the provisions of subsection (e)(3) would have to be listed and analyzed.

Mr. Enten noted that it would be all of the provisions of subsection (e)(3), including the nature of the case, the legal basis, the applicable standard, all relevant facts, a detailed description of the work performed, the rate charged, and the

attorney's customary fee. All of these items would have to be specified before the judge in the circuit court instead of the three items in subsection (e)(2) of Rule 2-704. Mr. Enten added that it made no sense why the three items in Rule 2-704 (e)(2) are not sufficient. Why would all of the other factors have to be analyzed? If the case is not complex, and the judgment may be by default, why should the 15-step analysis have to be gone through? He would make this argument in front of the Court of Appeals. It was all because of complex fee-shifting cases. Those standards make sense in a complex fee-shifting case where there is a statutory right to damages, but not in a simple case as to whether money is owed on a promissory note, particularly where no defense has been filed. Judge Weatherly commented that she had a big problem with those cases. Someone may ask for $45,000 in attorneys' fees in a case which has nine pieces of paper. She would not give an attorney anything close to that amount for that type of case.

The Chair stated that he had not heard a motion to change any of the Rules. By consensus, the Committee approved Rule 2-704 as amended.

Mr. Brault presented Rule 3-741, Attorneys' Fees, for the Committee's consideration.

The Chair pointed out that the Committee had approved the language suggested by Judge Love for addition to Rule 3-741 with the change from the word "claim" to the word "demand." Mr. Leahy asked Judge Love if he meant that if the contract refers to

"reasonable attorneys' fees," the plaintiff is asking for less than 15%, and if he or she meets the three requirements in subsection (e)(2) of Rule 2-704, it would be allowed. Judge Love answered affirmatively. Regardless of what the contract states, if the fees are more than 15% of the principal amount of the debt due and owing, the person requesting the fees would have to comply with all of the provisions of Rule 2-703 (e)(3). By consensus, the Committee approved Rule 3-741 as amended.

The Chair noted that there were some conforming amendments to Rule 2-504, Scheduling Order, which included the addition of a cross reference and a Committee note, and to Rule 2-341, which included the same two items. The Reporter said that this would be the time to let her know if any of the Rules needed to be changed. The Rules had been previously approved by the Committee and were ready to go forward. The Chair said that he and the Reporter would do the necessary redrafting based on what was decided at the meeting today. It would be presented to the Committee at the January meeting but only on what had been proposed for change today.

Agenda Item 2. Reconsideration of proposed amendments to Rule 2-305 (Claims for Relief)

Mr. Brault presented Rule 2-305, Claims for Relief, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

AMEND Rule 2-305 to change the circumstances under which a party is required to include the amount of damages sought in a demand for a money judgment and to add a Committee note, as follows:

Rule 2-305. CLAIMS FOR RELIEF

A pleading that sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain a clear statement of the facts necessary to constitute a cause of action and a demand for judgment for relief sought. Unless otherwise required by law, (a) a demand for a money judgment that is less than or equal to $75,000 shall include the amount of damages sought, and (b) a demand for a money judgment that exceeds $75,000 shall not specify the amount sought, but shall include a general statement that the amount sought exceeds $75,000. Relief in the alternative or of several different types may be demanded.

Committee note: If the amount sought exceeds $75,000, a general statement to that effect is necessary in order to determine if the case may be removed to a federal court based on diversity of citizenship. *See* 28 U.S.C.S. §1332. A specific dollar amount must be given when the damages sought are less than or equal to $75,000 because the dollar amount is relevant to determining whether the amount is sufficient for circuit court jurisdiction or a jury trial.

Source: This Rule is derived in part from former Rules 301 c, 340 a, and 370 a 3 and the 1966 version of Fed. R. Civ. P. 8 (a) and is in part new.

[Query: Is a reference or Committee note regarding the application of Rule 2-341 necessary? As explained in the Committee

note following Rule 2-341 (b), a court may grant leave to amend the amount sought in a demand for a money judgment after a jury verdict is returned. A plaintiff could request $74,000 in order to avoid removal to a federal court, even if the case is obviously worth much more, and move to amend after the jury returns its verdict.]

Rule 2-305 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 2-305 changes the current Rule's requirement that a party, unless otherwise required by law, must include the amount sought in a demand for a money judgment. The Rule is amended to provide that, unless otherwise required by law, a demand for a money judgment that is less than or equal to $75,000 must include a specific dollar amount; however, a demand for a money judgment that is greater than $75,000 may not specify the amount sought, but must include a general statement that the amount sought is greater than $75,000.

The amendment is proposed in light of discussions with attorneys who recommend eliminating the requirement to plead specific amounts in favor of a framework similar to that used in medical malpractice cases. *See* Code, Courts Article, §3-2A-02 (b). It is thought that *ad damnum* clauses are damaging to defendants who become frightened upon receiving complaints with huge amounts specified in the clauses; to plaintiffs who may become disillusioned as to the value of their cases; and to the legal profession because they lead to a negative public perception by distorting the attorney's actual valuation of the case.

The Subcommittee has been advised that defendants and insurance companies do not exclusively rely upon the amount of damages sought in *ad damnum* clauses to determine the value of the case. Insurance companies set aside reserves based upon their own investigation and experience. Defendants and insurance companies obtain information about

> the actual value of the case during the discovery process.
>
> The Committee note explains that $75,000 is used as the benchmark because it is the amount necessary to remove a case to federal court based upon diversity of citizenship. A specific dollar amount must be pled if it is less than or equal to $75,000 because the dollar amount may be relevant for purposes of circuit court jurisdiction and the right to a jury trial.

Mr. Brault told the Committee that the suggestion had been made by a member of the bar to take the dollar amounts out of the demand for judgment in a money judgment case and to parallel Rule 2-305 to what was effected by statute (Code, Courts Article, §3-2A-02) in medical malpractice cases. The argument by the plaintiff's bar was that they do not want to make a demand for money damages, because they may not ask for enough. So that they are not caught in a trap of not demanding enough money, they make ridiculous demands in most cases. They therefore propose, and the Attorneys Subcommittee had accepted, the idea to only claim reasonable damages as in medical malpractice cases.

Mr. Brault said that he had been involved with the Governor's Commission that worked on the medical malpractice statute. One of the main factors that drove that concept in medical malpractice cases was newspaper accounts of lawsuits. The proposed damages listed have hurt the families of the person being sued. The article may read that someone is being sued for $25,000,000, which often has no relationship between the amount and reality. This has become a ridiculously common occurrence

now, and it brings to mind recent claims of sexual misconduct. When the newspapers report that someone, who may be a coach of a football team, had been sued for $20,000,000 for sexual abuse of young boys, it is the same idea that ridiculous demands make good headlines. Interestingly, after the change in the malpractice statute, the newspaper accounts of physicians being sued almost completely stopped, because the articles cannot state that the physicians have been sued for millions of dollars.

Mr. Brault commented that the Subcommittee had thought that making a similar change to Rule 2-305 was a good idea. The problem was addressing the issue of removal to federal court. Another issue that the Subcommittee had to discuss was jurisdictional pleading dollar amounts that are necessary for the circuit court and the District Court. The proposed change to the Rule is to refer to the $75,000 amount that would allow the removal to federal court. This would alert the bar, because there are only 30 days after service to remove a case to federal court; after that time, the removal would be waived. It has to be in the pleading, and the Subcommittee included it.

Mr. Brault noted that the Subcommittee did not put in a reference to District Court. If a jury demand is made, it must be in the circuit court. If it is filed in the District Court, the Subcommittee felt that obviously the amount is below the jurisdictional amount, or it would never have been filed. Judge Love noted that there is no automatic right to a jury trial in a civil case that is less than $10,000. The $30,000 jurisdictional

limit has to be addressed. If someone files a suit in the District Court for $31,000, it is a problem. If someone files an auto tort case for $9,999, which frequently happens, the defense is not entitled to a jury trial in the circuit court. The Chair asked if the Rule addresses this issue. Mr. Carbine noted that the Rule captures all the cases under $75,000.

The Chair noted that if a case is for less than $75,000, the person filing the suit has to state how much is being demanded. Mr. Brault pointed out that the Rule provides that it is for the circuit court only, so it does not really apply to the District Court. The Subcommittee did not write a rule for the District Court. Theoretically, the procedure there will remain the way it is now. If that is to be changed, a jurisdictional amount would have to be created. Once a case is in the circuit court, and a trial by jury is demanded, theoretically the person is entitled to it.

The Chair referred to the language in subsection (a), which reads "a demand for a money judgment that is less than or equal to $75,000," and he asked if this could read "a demand for a money judgment that does not exceed $75,000." The Reporter responded that Ms. Lynch, one of the Assistant Reporters, had researched this. Ms. Lynch said that under the federal statute, the language is that the amount has to exceed the sum or value of $75,000, exclusive of interests and costs. Case law had indicated that if the amount exactly equaled $75,000, there was no jurisdiction for diversity of citizenship. The Chair noted

that this is in subsection (b). Subsection (a) requires that the person state what the amount is. Is the language "less than or equal to" the same as "does not exceed?" Either it does exceed, or it does not exceed. Mr. Leahy added that if the amount is $75,000, it does not exceed it. By consensus, the Committee approved the change suggested by the Chair.

Mr. Maloney expressed the opinion that the Rule is excellent. He asked what the minimum jurisdiction is. Judge Love answered $5,000. Mr. Maloney inquired what would happen if someone is sued for $3,000 in the District Court, but this is not known. Should there be some requirement that the person is suing for the minimum of statutory jurisdiction? The Chair pointed out that the person has to state the amount. Mr. Maloney said that the person may only be suing for $3,000, but if the amount is not stated, the court would not know that the case has to be dismissed. Mr. Leahy reiterated that the amount has to be stated if the amount is less than $75,000.

By consensus, the Committee approved Rule 2-305 as amended.

The Chair wished everyone a happy Thanksgiving, Christmas, and New Year. There being no further business before the Committee, the Chair adjourned the meeting.