COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 of the Judiciary Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland on September 4, 2009.

Members present:

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

F. Vernon Boozer, Esq.
Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Hon. Ellen L. Hollander
Hon. Michele D. Hotten
John B. Howard, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Hon. Thomas J. Love
Zakia Mahasa, Esq.
Timothy F. Maloney, Esq.
Robert R. Michael, Esq.
Hon. John L. Norton, III
Scott G. Patterson, Esq.
Hon. W. Michel Pierson
Debbie L. Potter, Esq.
Kathy P. Smith, Clerk
Del. Joseph F. Vallario, Jr.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Alexandra Gilliland, Rules Committee Intern
W. Thomas Lawrie, Esq., Assistant Attorney General
Scott Shellenberger, Esq., State's Attorney Office for Baltimore County
Paul H. Ethridge, Esq., Maryland State Bar Association
Russell R. Butler, Esq.
Connie Kratovil-Lavelle, Esq., Administrative Office of the Courts

The Chair convened the meeting. The Reporter introduced the Rules Committee intern for the semester, Alexandra Gilliland, a second year student at the University of Baltimore School of Law. If anyone needs any research that can be done by her, contact the

Reporter. The Reporter also announced that Mr. Klein is appearing in the musical production of "Songwriters in the Round" on September 5, 2009 in Springfield, Virginia. The Chair said that the Court of Appeals will be considering the 162nd Report, which includes amendments to the death Rule and the new DNA rules, on September 9, 2009 at 2:00 p.m. Anyone who would like to attend is welcome to do so.

Agenda Item 1. Consideration of proposed amendments to Rules 2-611 and 3-611 (Confessed Judgment)

Mr. Bowen presented Rules 2-611 and 3-611, Confessed Judgment, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 600 - JUDGMENT

AMEND Rule 2-611 to specify the form of affidavit accompanying a complaint seeking a confessed judgment, to require the court to direct the clerk to enter a confessed judgment under certain circumstances, and to require the court to dismiss the complaint under certain circumstances, as follows:

Rule 2-611. CONFESSED JUDGMENT

~~(a) Entry of Judgment~~

~~Judgment by confession shall be entered by the clerk upon the filing of a complaint, the original or a photocopy of the written instrument authorizing the confession of judgment for a liquidated amount, and an affidavit specifying the amount due and~~

~~stating the address of the defendant or that the whereabouts of the defendant are unknown to the plaintiff.~~

(a) Complaint; Written Instrument and Affidavit Required

A complaint seeking a confessed judgment shall be accompanied by the original or a photocopy of the written instrument authorizing the confession of judgment for a liquidated amount and an affidavit in the following form:

Affidavit for Judgment by Confession

1. I, _____, am competent to testify.
(Name of Affiant)

2. I am: ☐ the plaintiff in this action.

or

☐ _____.
(If the Affiant is not the plaintiff, state the Affiant's relationship to the action.)

3. The original or a photocopy of the written instrument authorizing the confession of judgment against the defendant is attached to the complaint.

4. The amount due and owing under the instrument is:

Principal	$_____
Interest	$_____
Attorneys' Fees	$_____
Total	$_____

5. The address of the defendant is _____.
If the address is unknown, the following efforts to locate the defendant have been made: _____

_____

_____
(State specific details of the efforts made, including by

whom and when the efforts were made.)

6. The instrument does not evidence or arise from a consumer loan subject to the Maryland Consumer Loan Law-Credit Provisions, Title 12, Subtitle 3 of the Commercial Law Article of the Annotated Code of Maryland.

7. The instrument does not evidence or arise from a consumer transaction subject to Subtitle 3 of the Maryland Consumer Protection Act, Title 13 of the Commercial Law Article of the Annotated Code of Maryland.

8. The instrument was not executed by a buyer under the Retail Installment Sales Act, Title 12, Subtitle 6 of the Annotated Code of Maryland.

I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing Affidavit are true.

_____
(Signature of Affiant)

_____
(Date)

(b) Action by Court

If the court determines that (1) the complaint complies with the requirements of section (a) of this Rule and (2) the pleadings and papers demonstrate a factual and legal basis for entitlement to a confessed judgment, the court shall direct the clerk to enter the judgment. Otherwise, it shall dismiss the complaint.

~~(b)~~ (c) Notice

Promptly upon entry of a judgment by

confession, the clerk, instead of a summons, shall issue a notice informing the defendant of entry of judgment and of the latest time for filing a motion to open, modify, or vacate the judgment. If the address of the defendant is stated in the affidavit, the notice and copies of the original pleadings shall be served on the defendant in accordance with Rule 2-121. If the court is satisfied from ~~an~~ the affidavit filed by the plaintiff that despite reasonable efforts the defendant cannot be served or the whereabouts of the defendant cannot be determined, the court shall provide for notice to the defendant in accordance with Rule 2-122.

~~(c)~~ (d) Motion by Defendant

The defendant may move to open, modify, or vacate the judgment within the time prescribed for answering by sections (a) and (b) of Rule 2-321. The motion shall state the legal and factual basis for the defense to the claim.

~~(d)~~ (e) Disposition of Motion

If the court finds that there is a substantial and sufficient basis for an actual controversy as to the merits of the action, the court shall order the judgment by confession opened, modified, or vacated and permit the defendant to file a responsive pleading.

~~(e)~~ (f) Delay of Enforcement

Unless the court orders otherwise, property shall not be sold in execution of a judgment by confession and wages or other debt shall not be remitted by a garnishee to the judgment creditor until the expiration of the time for filing a motion under section ~~(c)~~ (d) of this Rule and the disposition of any motion so filed.

Source: This Rule is derived as follows:
Section (a) is in part derived from former Rule 645 a and in part new.
Section (b) is new.
Section ~~(b)~~ (c) is new. The last sentence

is consistent with former Rule 645 e.

Section ~~(c)~~ (d) is derived from former Rule 645 c.

Section ~~(d)~~ (e) is derived from former Rule 645 d.

Section (e) (f) is new but is consistent with former Rule 645 i.

Rule 2-611 was accompanied by the following Reporter's Note.

The Chief Judge of the District Court has brought to the attention of the Rules Committee the problem of the confessed judgment Rules being used for the entry of judgments based on illegal contracts and fraudulent misrepresentations.

To address this problem, the Judgments Subcommittee recommends amendments to Rules 2-611 and 3-611.

Proposed to be added to the Rules as part of new section (a) is a mandatory form of affidavit that includes a statement of the principal, interest, and attorneys' fees claimed to be due and owing under the instrument; specific details of efforts to locate a defendant whose whereabouts are claimed to be unknown; and three specific representations (Statement Nos. 6, 7, and 8) concerning the underlying transaction. Section (a) carries forward the current requirement that the original or a photocopy of the written instrument authorizing the confession of judgment for a liquidated amount be filed with the complaint.

Pursuant to new section (b), the complaint is reviewed by the court. If the court determines that the requirements of section (a) are met and that the papers and pleadings demonstrate a factual and legal basis for entitlement to a confessed judgment, the court directs entry of the confessed judgment. If these requirements are not met, the court dismisses the complaint. This procedure modifies the procedure set out in current section (a), wherein there is no court involvement prior to entry of a confessed judgment.

Current section (f) of Rule 3-611 is deleted as unnecessary, in light of Statement No. 8 of the required affidavit.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 600 - JUDGMENT

AMEND Rule 3-611 to specify the form of affidavit accompanying a complaint seeking a confessed judgment, to require the Court to direct the clerk to enter a confessed judgment under certain circumstances, to require the Court to dismiss the complaint under certain circumstances, and to delete section (f), as follows:

Rule 3-611. CONFESSED JUDGMENT

~~(a) Entry of Judgment~~

~~Judgment by confession shall be entered by the clerk upon the filing of a complaint, the original or a photocopy of the written instrument authorizing the confession of judgment for a liquidated amount, and an affidavit specifying the amount due and stating the address of the defendant or that the whereabouts of the defendant are unknown to the plaintiff.~~

(a) Complaint; Written Instrument and Affidavit Required

A complaint seeking a confessed judgment shall be accompanied by the original or a photocopy of the written instrument authorizing the confession of judgment for a liquidated amount and an affidavit in the

following form:

Affidavit for Judgment by Confession

1. I, _____, am competent to testify.
(Name of Affiant)

2. I am: ☐ the plaintiff in this action.

or

☐ _____.
(If the Affiant is not the plaintiff, state the Affiant's relationship to the action.)

3. The original or a photocopy of the written instrument authorizing the confession of judgment against the defendant is attached to the complaint.

4. The amount due and owing under the instrument is:

Principal	$_____
Interest	$_____
Attorneys' Fees	$_____
Total	$_____

5. The address of the defendant is _____. If the address is unknown, the following efforts to locate the defendant have been made:_____

_____

_____
(State specific details of the efforts made, including by whom and when the efforts were made.)

6. The instrument does not evidence or arise from a consumer loan subject to the Maryland Consumer Loan Law-Credit Provisions, Title 12, Subtitle 3 of the Commercial Law Article of the Annotated Code of Maryland.

7. The instrument does not evidence or arise from a consumer transaction subject to Subtitle 3 of the Maryland Consumer

Protection Act, Title 13 of the Commercial Law Article of the Annotated Code of Maryland.

8. The instrument was not executed by a buyer under the Retail Installment Sales Act, Title 12, Subtitle 6 of the Annotated Code of Maryland.

I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing Affidavit are true.

_____
(Signature of Affiant)

_____
(Date)

(b) Action by Court

If the court determines that (1) the complaint complies with the requirements of section (a) of this Rule and (2) the pleadings and papers demonstrate a factual and legal basis for entitlement to a confessed judgment, the court shall direct the clerk to enter the judgment. Otherwise, it shall dismiss the complaint.

~~(b)~~ (c) Notice

Promptly upon entry of a judgment by confession, the clerk, instead of a summons, shall issue a notice informing the defendant of entry of judgment and of the latest time for filing a motion to open, modify, or vacate the judgment. If the address of the defendant is stated in the affidavit, the notice and copies of the original pleadings shall be served on the defendant in accordance with Rule 3-121. If the court is satisfied from ~~an~~ the affidavit filed by the plaintiff that despite reasonable efforts the defendant cannot be served or the whereabouts of the defendant cannot be determined, the court shall provide for notice to the

defendant in accordance with Rule 2-122.

~~(c)~~ (d) Motion by Defendant

The defendant may move to open, modify, or vacate the judgment within 30 days after service of the notice. The motion shall state the legal and factual basis for the defense to the claim.

~~(d)~~ (e) Disposition of Motion

If the court finds that there is a substantial and sufficient basis for an actual controversy as to the merits of the action, the court shall order the judgment by confession opened, modified, or vacated and permit the defendant to file a responsive pleading.

~~(e)~~ (f) Delay of Enforcement

Unless the court orders otherwise, property shall not be sold in execution of a judgment by confession and wages or other debt shall not be remitted by a garnishee to the judgment creditor until the expiration of the time for filing a motion under section ~~(c)~~ (d) of this Rule and the disposition of any motion so filed.

~~(f) Plaintiff's Certificate~~

~~Judgment by confession may be entered only when accompanied by a certificate executed by the plaintiff or plaintiff's attorney in the following form: "I hereby certify that the instrument authorizing confession of judgment was not executed by a buyer under the Retail Installment Sales Act, Commercial Law Article, Sections 12-601 through 12-636, of the Annotated Code of Maryland."~~

Source: This Rule is derived as follows:
Section (a) is in part derived from former M.D.R. 645 a and in part new.
Section (b) is new.
Section ~~(b)~~ (c) is new. The last sentence is consistent with former Rule 645 e.
Section ~~(c)~~ (d) is derived from former

M.D.R. 645 c.
Section ~~(d)~~ (e) is derived from former M.D.R. 645 d.
Section ~~(e)~~ (f) is new but is consistent with former M.D.R. 645 i.
~~Section (f) is derived from former M.D.R. 645 j.~~

Rule 3-611 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 2-611.

Mr. Bowen explained that on June 1, 2009, the Maryland Commissioner of Financial Regulation issued a cease and desist order to a group of individuals operating mainly in Montgomery and Prince George's Counties who were unlawfully filing confessed judgments in transactions where statutes forbid confessed judgments. Following the cease and desist order, the Attorney General wrote to the Honorable Ben Clyburn, Chief Judge of the District Court, suggesting that there should be a rule change to prevent such activity. On June 24, 2009, Judge Clyburn referred the matter to the Chair.

The group had filed over 1500 cases in the District Court, seeking confessed judgments on illegal consumer loans, known as "payday loans." The group was not licensed to operate this lending business. They were taking confessed judgment notes to enforce the terms of the illegal contracts. This matter was referred to the Judgments Subcommittee to suggest changes to the Rules to forbid this type of fraudulent behavior.

Mr. Bowen said that the Subcommittee proposes a new section (a) to Rule 2-611 that requires that an affidavit in the form

prescribed be filed. As to the written instrument on which the claim is based, the Rule requires a statement that it does not evidence or arise from a consumer loan subject to the Maryland Consumer Loan Law-Credit provisions, Title 12, Subtitle 3 of the Commercial Law Article. The Rule also requires that the complainant include the efforts made to locate a defendant whose address is unknown. The Subcommittee had suggested that if the complaint is not accompanied by the affidavit, the clerk can reject the complaint.

The Chair had expressed concern about allowing the clerk to reject a pleading so the revised draft, which was handed out today, has eliminated the reference to the clerk and requires review by a judge. It provides that the court shall direct the clerk to enter a judgment, if the court determines that the complaint complies with the requirements of section (a), and the pleadings and papers demonstrate a factual and legal basis for entitlement to a confessed judgment. Otherwise, the court shall dismiss the complaint. The District of Columbia Creditors' Bar Association sent in a letter objecting to the affidavit having to be on personal knowledge and belief.

The Chair inquired whether the changes to Rule 3-611 are the same as the circuit court Rule, and Mr. Bowen answered affirmatively. The Chair introduced Thomas Lawrie, the Assistant Attorney General who had brought this matter to Judge Clyburn's attention. Mr. Lawrie explained that the primary protection afforded by the court looking at the documents as opposed to the

clerk doing so is that the judge will actually be reviewing the contracts to make sure the transaction is not a consumer transaction in which confessed judgments are note allowed.

Mr. Brault said that he had been contacted by an attorney representing creditor attorneys, who said that the requirement of personal knowledge will cause problems, because they feel that most of these cases will be brought on the basis of records. They may be sales of loans from one business to another or one bank to another. When the cases are filed, they are based on records that the parties have received in the transaction and are not based on their personal knowledge. The creditors' bar has asked that the affidavit be based on knowledge and belief and not on personal knowledge. Mr. Bowen pointed out that the Subcommittee's view was that the affidavit should be filed on personal knowledge when it was represented to the court that the matter was not a consumer transaction. The clerks approve of the change to the Rules as long as it does not interfere with their traditional method of handling confessed judgments.

Mr. Brault remarked that he had never liked confessed judgments. Many jurisdictions, including the District of Columbia, have declared them against public policy. Mr. Bowen expressed the opinion that they serve a useful purpose by providing quick access to judgment information without using up the court's time. It is up to the Committee to decide whether to eliminate the personal knowledge requirement. The Vice Chair said that she felt strongly that the Rule should remain as it

appears in the current draft. Generally speaking, to get any kind of a judgment, there must be testimony based on personal knowledge. Obtaining a judgment is an important event. The affidavit must provide the information about where the defendant is, a statement that the transaction is not a consumer loan, and how much money is owed. The affiant should be able to give this information on personal knowledge.

Mr. Brault said that he had called to the attention of the creditors' bar Rule 2-501, Motion for Summary Judgment, which requires personal knowledge to obtain summary judgment. The creditors' bar's view is that a judgment can be set aside if there is a legitimate defense. What is a legitimate defense? Mr. Brault added that he is leaning towards the view expressed by the Vice Chair, but he had promised the creditors' bar that he would bring their concerns to the Committee. Judge Pierson observed that the affidavit referred to in Rule 2-501 requires personal knowledge, but there are other affidavits in the Rules that do not require this. It is difficult for someone to always have personal knowledge of what someone's address is. It may come from a variety of sources and would not necessarily be on personal knowledge. This requirement may create some logistical issues in terms of the source of the information.

Mr. Lawrie commented that one of the problems that his office saw in their cases was fraudulent affidavits submitted to the court, which stated that the affiant had served people at their addresses. In fact, consumers did not even know about the

suit, and by the time that they had learned about it, their wages had been garnished. The way that this affidavit is set up is that if the affiant does not know the address of the defendant, he or she states the efforts made to locate the defendant. This seems to be the farthest that the affiant has to go. If this is not a consumer transaction, this should be able to be identified on the face of the documents. The way that this is set up, it is not that difficult to get personal knowledge.

The Chair asked if there were any other comments or questions. It would take a motion to amend the recommendation of the Subcommittee other than stylistic amendments. Judge Pierson moved to change the wording of the affidavit from "I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents..." to "I solemnly affirm under the penalties of perjury and to the best of my knowledge, information, and belief that the contents...". The motion was seconded.

The Vice Chair noted that she saw a distinction for affidavits based on knowledge, information, and belief where a judgment is not being obtained as a result. She expressed the opinion that in every instance, including at trial, personal knowledge is necessary to obtain a judgment. Judge Pierson asked about Rule 2-613, Default Judgment. The Vice Chair observed that a default judgment can be ordered when there is no answer. The Chair pointed out that the court file will indicate that a judgment is appropriate. Judge Pierson remarked that Rule 2-501 carves out the general form of an affidavit, although he had not

looked at every rule containing an affidavit.

The Chair said that when he read the complaint that the Office of the Attorney General filed against the group of entrepreneurs, it occurred to him that with this type of person it does not matter what the affidavit contains, because the person would be willing to file a false affidavit. There may not be a rule that would prevent this from happening. People can ask the court to set these judgments aside very easily if they know it can be done and how to do it. He was not sure what the District Court practice is pertaining to the payday loans. How many people ask to set these judgments aside? Judge Love answered that very few do so, and those that do are all *pro se*. The Chair added that it is a right that people have, and if they exercise it, the judge probably will set the judgment aside. The question is whether people know that they can ask for this or how to do it.

The Chair called for a vote on the motion. It passed on a vote of 8 to 5.

The Chair asked for any other comments on Rules 2-611 and 3-611. The Vice Chair referred to the language in Statement 2. of the Affidavit form that reads: "(If the Affiant is not the plaintiff, state the Affiant's relationship to the action.) Does this mean the relationship to the action or the relationship to the plaintiff? Mr. Bowen responded that this could involve an employee of the plaintiff, and it could be a relationship other

than with the plaintiff. In commercial transactions, it is difficult to facilitate an amendment that would pertain to everybody. It will almost always be an employee, and the bank is filing the affidavit. The Chair pointed out a style matter. The Committee has a standard way to cite references to the Code. He did not know if there was a reason to depart from this in Statements 6., 7. and 8. The usual citation is “Code, Commercial Law Article, Title 12, Subtitle 3". The Reporter commented that this is a form of affidavit that people will be filing, so it is important to give them as much information as possible, so that they can find it. They need to know that it is in the Commercial Law Article of the Maryland Code. The Chair noted that there is a reference to the “Maryland Consumer Loan Law-Credit Provisions” in the form. This can be added in front of the usual Code citation. The Reporter remarked that the Style Subcommittee can look at this.

By consensus, the Committee approved Rules 2-611 and 3-611 as amended.

Agenda Item 2. Consideration of proposed amendments to Rule 9-206 (Child Support Guidelines)

Master Mahasa presented Rule 9-206, Child Support Guidelines, for the Committee’s consideration.

ALTERNATIVE #1

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 200 - DIVORCE, ANNULMENT AND ALIMONY

AMEND Rule 9-206 to add provisions concerning “cash medical support” to the worksheets, as follows:

Rule 9-206. CHILD SUPPORT GUIDELINES

(a) Definitions

The following definitions apply in this Rule:

(1) Shared Physical Custody

"Shared physical custody" has the meaning stated in Code, Family Law Article, §12-201 (i).

(2) Worksheet

"Worksheet" means a document to compute child support under the guidelines set forth in Code, Family Law Article, Title 12, Subtitle 2.

(b) Filing of Worksheet

In an action involving the establishment or modification of child support, each party shall file a worksheet in the form set forth in section (c) or (d) of this Rule. Unless the court directs otherwise, the worksheet shall be filed not later than the date of the hearing on the issue of child support.

Cross reference: See Code, Family Law Article, §12-203 (a) and *Walsh v. Walsh*, 333 Md. 492 (1994).

(c) Primary Physical Custody

Except in cases of shared physical custody, the worksheet shall be in substantially the following form:

_____ In the

Circuit Court for _____

v.

_____ No. _____

WORKSHEET A - CHILD SUPPORT OBLIGATION: PRIMARY PHYSICAL CUSTODY

_____	_____	_____	_____
Name of Child	Date of Birth	Name of Child	Date of Birth
_____	_____	_____	_____
Name of Child	Date of Birth	Name of Child	Date of Birth
_____	_____	_____	_____
Name of Child	Date of Birth	Name of Child	Date of Birth

	Mother	Father	Combined
1. MONTHLY ACTUAL INCOME (Before taxes) (Code, Family Law Article, §12-201 (b))	$	$	/////// ///////
a. Minus preexisting child support payment actually paid	-	-	/////// ///////
b. Minus alimony actually paid	-	-	///////
c. Plus/minus alimony awarded in this case	+/-	+/-	/////// ///////
2. MONTHLY ADJUSTED ACTUAL INCOME	$	$	$
3. PERCENTAGE SHARE OF INCOME			///////

Divide each parent's income on line 2 by the combined income on line 2.)	%	%	//////// //////// ////////
4. BASIC CHILD SUPPORT OBLIGATION (Apply line 2 Combined Income to Child Support Schedule.)	////// ////// //////	////// ////// //////	$
a. Work-Related Child Care Expenses (Code, Family Law Article, §12-204 (g))	$	$	+
b. Health Insurance Expenses (Code, Family Law Article, §12-204 (h)(1))	$	$	+
c. Extraordinary Medical Expenses (Code, Family Law Article, §12-204 (h)(2)) <u>or</u> <u>Cash Medical Support (Code, Family Law Article, §12-102 (c))</u>	$	$	+
d. Additional Expenses (Code, Family Law Article, §12-204 (i))	$	$	+
5. TOTAL CHILD SUPPORT OBLIGATION (Add lines 4, 4 a, 4 b, 4 c, and 4 d).	////// ////// //////	////// ////// //////	$
6. EACH PARENT'S CHILD SUPPORT OBLIGATION (Multiply line 5 by line 3 for each parent.)	$	$	////// ////// //////
7. TOTAL DIRECT PAY BY EACH PARENT (Add the expenses shown on lines 4 a, 4 b, 4 c, and 4 d paid by each parent.)	$	$	////// ////// ////// //////
8. RECOMMENDED CHILD SUPPORT AMOUNT			//////

(Subtract line 7 from line 6 for each parent.)	$	$	//////
9. RECOMMENDED CHILD SUPPORT ORDER (Bring down amount from line 8 for the non-custodial parent only. If this is a negative number, see Comment (2), below.)	$	$	//////

Comments or special adjustments, such as (1) any adjustment for certain third party benefits paid to or for the child of an obligor who is disabled, retired, or receiving benefits as a result of a compensable claim (see Code, Family Law Article, §12-204 (j) or (2) that there is a negative dollar amount on line 9, which indicates a recommended child support order directing the custodial parent to reimburse the non-custodial parent this amount for "direct pay" expenses):

PREPARED BY: DATE:

(d) Shared Physical Custody

In cases of shared physical custody, the worksheet shall be in substantially the following form:

_____ In the
Circuit Court for _____

v.

_____ No. _____

WORKSHEET B - CHILD SUPPORT OBLIGATION: SHARED PHYSICAL CUSTODY

Name of Child	Date of Birth	Name of Child	Date of Birth
Name of Child	Date of Birth	Name of Child	Date of Birth

Name of Child	Date of Birth	Name of Child	Date of Birth

	Mother	Father	Combined
1. MONTHLY ACTUAL INCOME (Before taxes) (Code, Family Law Article, §12-201 (b))	$	$	////// //////
a. Minus preexisting child support payment actually paid	-	-	////// //////
b. Minus alimony actually paid	-	-	//////
c. Plus/minus alimony awarded in this case	+/-	+/-	////// //////
2. MONTHLY ADJUSTED ACTUAL INCOME	$	$	$
3. PERCENTAGE SHARE OF INCOME (Divide each parent's income on line 2 by the combined income on line 2.)	%	%	////// ////// ////// //////
4. BASIC CHILD SUPPORT OBLIGATION (Apply line 2 Combined Income to Child Support Schedule.)	////// ////// //////	////// ////// //////	$
5. ADJUSTED BASIC CHILD SUPPORT OBLIGATION (Multiply Line 4 by 1.5)	////// ////// //////	////// ////// //////	$
6. OVERNIGHTS with each parent (must total 365)			365
7. PERCENTAGE WITH EACH PARENT (Line 6 divided by 365)	A %	B %	////// //////
STOP HERE IF Line 7 is less than 35% for either parent. Shared physical	////// //////	////// //////	////// //////

custody does not apply. (Use Worksheet A, instead.)	////// //////	////// //////	////// //////
8. EACH PARENT'S THEORETICAL CHILD SUPPORT OBLIGATION (Multiply line 5 by line 3 for each parent.)	A$	B$	////// ////// ////// //////
9. BASIC CHILD SUPPORT OBLIGATION FOR TIME WITH OTHER PARENT (Multiply line 8A by line 7B and put answer on Line 9A.) (Multiply line 8B by line 7A and put answer on line 9B.)	A$	B$	////// ////// ////// ////// ////// //////
10. NET BASIC CHILD SUPPORT OBLIGATION (Subtract lesser amount from greater amount in line 9 and place answer here under column with greater amount in Line 9.)	$	$	////// ////// ////// ////// ////// //////
11. EXPENSES:	//////	//////	
a. Work-Related Child Care Expenses (Code, Family Law Article, §12-204 (g))	////// ////// ////// //////	////// ////// ////// //////	+
b. Health Insurance Expenses (Code, Family Law Article §12-204 (h)(1))	////// ////// //////	////// ////// //////	+
c. Extraordinary Medical Expenses (Code, Family Law Article, §12-204 (h)(2)) <u>or</u> <u>Cash Medical Support (Code, Family Law Article, §12-102 (c))</u>	////// ////// ////// ////// ////// //////	////// ////// ////// ////// ////// //////	+
d. Additional Expenses (Code, Family Law Article, §12-204 (i))	////// ////// //////	////// ////// //////	+

12. NET ADJUSTMENT FROM WORKSHEET C. Enter amount from line j, WORKSHEET C, if applicable. If not, continue to Line 13.	$	$	//////
13. NET BASIC CHILD SUPPORT OBLIGATION (From Line 10, WORKSHEET B)	$	$	//////
14. RECOMMENDED CHILD SUPPORT ORDER (If the same parent owes money under Lines 12 and 13, add these two figures to obtain the amount owed by that parent. If one parent owes money under Line 12 and the other owes money under Line 13, subtract the lesser amount from the greater amount to obtain the difference. The parent owing the greater of the two amounts on Lines 12 and 13 will owe that difference as the child support obligation. NOTE: The amount owed in a shared custody arrangement may not exceed the amount that would be owed if the obligor parent were a non-custodial parent. See WORKSHEET A).	$	$	//////

Comments or special adjustments, such as any adjustment for certain third party benefits paid to or for the child of an obligor who is disabled, retired, or receiving benefits as a result of a compensable claim (see Code, Family Law Article, §12-204 (j)):

PREPARED BY: DATE:

INSTRUCTIONS FOR WORKSHEET C: Use Worksheet C ONLY if any of the Expenses listed in lines 11 a, 11 b, 11 c, or 11 d is directly

paid out or received by the parents in a different proportion than the percentage share of income entered on line 3 of Worksheet B. Example: If the mother pays all of the day care, or parents split education/medical costs 50/50 and line 3 is other than 50/50. If there is more than one 11 d expense, the calculations on lines g and h below must be made for each expense.

WORKSHEET C - FOR ADJUSTMENTS, LINE 12, WORKSHEET B

	Mother	Father
a. Total amount of direct payments made for Line 11 a expenses multiplied by each parent's percentage of income (Line 3, WORKSHEET B) (Proportionate share)	$	$
b. The excess amount of direct payments made by the parent who pays more than the amount calculated in Line a, above. (The difference between amount paid and proportionate share)	$	$
c. Total amount of direct payments made for Line 11 b expenses multiplied by each parent's percentage of income (Line 3, WORKSHEET B)	$	$
d. The excess amount of direct payments made by the parent who pays more than the amount calculated in Line c, above.	$	$
e. Total amount of direct payments made for Line 11 c expenses multiplied by each parent's percentage of income (Line 3, WORKSHEET B)	$	$
f. The excess amount of direct payments made by the parent who pays more than the amount calculated in Line e, above.	$	$
g. Total amount of direct payments made		

for Line 11 d expenses multiplied by each parent's percentage of income (Line 3, WORKSHEET B)	$	$
h. The excess amount of direct payments made by the parent who pays more than the amount calculated in line g, above.	$	$
i. For each parent, add lines b, d, f, and h	$	$
j. Subtract lesser amount from greater amount in Line i, above. Place the answer on this line under the lesser amount in Line i Also enter this answer on Line 12 of WORKSHEET B, in the same parent's column.	$	$

Source: This Rule is new.

Rule 9-206 was accompanied by the following Reporter's Note.

> Chapter 508, Laws of 2009 (SB 70) requires the court, under certain circumstances, to order one or both parents to pay "cash medical support," as that term is defined in Code, Family Law Article, §12-102 (a)(6). Under certain other circumstances, the new statute authorizes, but does not require, the court to order the payment of cash medical support. Code, Family Law Article, §12-102 (c)(5) requires that if cash medical support is ordered, the amount of it "shall be added to the basic child support obligation and divided by the parents in proportion to their adjusted actual income."
>
> The Worksheets contained in Rule 9-206 are proposed to be amended to conform to this legislation.

ALTERNATIVE #2

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 200 - DIVORCE, ANNULMENT AND ALIMONY

AMEND Rule 9-206 to add provisions concerning “cash medical support” to the worksheets, as follows:

Rule 9-206. CHILD SUPPORT GUIDELINES

(a) Definitions

The following definitions apply in this Rule:

(1) Shared Physical Custody

"Shared physical custody" has the meaning stated in Code, Family Law Article, §12-201 (i).

(2) Worksheet

"Worksheet" means a document to compute child support under the guidelines set forth in Code, Family Law Article, Title 12, Subtitle 2.

(b) Filing of Worksheet

In an action involving the establishment or modification of child support, each party shall file a worksheet in the form set forth in section (c) or (d) of this Rule. Unless the court directs otherwise, the worksheet shall be filed not later than the date of the hearing on the issue of child support.

Cross reference: See Code, Family Law Article, §12-203 (a) and *Walsh v. Walsh*, 333 Md. 492 (1994).

(c) Primary Physical Custody

Except in cases of shared physical custody, the worksheet shall be in substantially the following form:

_____ In the

Circuit Court for _____

v.

_____ No. _____

WORKSHEET A - CHILD SUPPORT OBLIGATION: PRIMARY PHYSICAL CUSTODY

_____	_____	_____	_____
Name of Child	Date of Birth	Name of Child	Date of Birth
_____	_____	_____	_____
Name of Child	Date of Birth	Name of Child	Date of Birth
_____	_____	_____	_____
Name of Child	Date of Birth	Name of Child	Date of Birth

	Mother	Father	Combined
1. MONTHLY ACTUAL INCOME (Before taxes) (Code, Family Law Article, §12-201 (b))	$	$	/////// ///////
a. Minus preexisting child support payment actually paid	-	-	/////// ///////
b. Minus alimony actually paid	-	-	///////
c. Plus/minus alimony awarded in this case	+/-	+/-	/////// ///////
2. MONTHLY ADJUSTED ACTUAL INCOME	$	$	$

3. PERCENTAGE SHARE OF INCOME Divide each parent's income on line 2 by the combined income on line 2.)	%	%	//////// //////// //////// ////////
4. BASIC CHILD SUPPORT OBLIGATION (Apply line 2 Combined Income to Child Support Schedule.)	////// ////// //////	////// ////// //////	$
a. Work-Related Child Care Expenses (Code, Family Law Article, §12-204 (g))	$	$	+
b. Health Insurance Expenses (Code, Family Law Article, §12-204 (h)(1))	$	$	+
c. Extraordinary Medical Expenses (Code, Family Law Article, §12-204 (h)(2))	$	$	+
d. Cash Medical Support (Code, Family Law Article, §12-102 (c))	$	$	+
~~d.~~ e. Additional Expenses (Code, Family Law Article, §12-204 (i))	$	$	+
5. TOTAL CHILD SUPPORT OBLIGATION (Add lines 4, 4 a, 4 b, 4 c, ~~and~~ 4 d, and 4 e).	////// ////// //////	////// ////// //////	$
6. EACH PARENT'S CHILD SUPPORT OBLIGATION (Multiply line 5 by line 3 for each parent.)	$	$	////// ////// //////
7. TOTAL DIRECT PAY BY EACH PARENT (Add the expenses shown on lines 4 a, 4 b, 4 c, ~~and~~ 4 d, and 4 e paid by each parent.)	$	$	////// ////// ////// //////

8. RECOMMENDED CHILD SUPPORT AMOUNT (Subtract line 7 from line 6 for each parent.)	$	$	////// ////// //////
9. RECOMMENDED CHILD SUPPORT ORDER (Bring down amount from line 8 for the non-custodial parent only. If this is a negative number, see Comment (2), below.)	$	$	////// ////// ////// ////// //////

Comments or special adjustments, such as (1) any adjustment for certain third party benefits paid to or for the child of an obligor who is disabled, retired, or receiving benefits as a result of a compensable claim (see Code, Family Law Article, §12-204 (j) or (2) that there is a negative dollar amount on line 9, which indicates a recommended child support order directing the custodial parent to reimburse the non-custodial parent this amount for "direct pay" expenses):

PREPARED BY: DATE:

(d) Shared Physical Custody

In cases of shared physical custody, the worksheet shall be in substantially the following form:

_____ In the
Circuit Court for _____

v.

_____ No. _____

WORKSHEET B - CHILD SUPPORT OBLIGATION: SHARED PHYSICAL CUSTODY

_____	_____	_____	_____
Name of Child	Date of Birth	Name of Child	Date of Birth

Name of Child	Date of Birth	Name of Child	Date of Birth
Name of Child	Date of Birth	Name of Child	Date of Birth

	Mother	Father	Combined
1. MONTHLY ACTUAL INCOME (Before taxes) (Code, Family Law Article, §12-201 (b))	$	$	////// //////
a. Minus preexisting child support payment actually paid	-	-	////// //////
b. Minus alimony actually paid	-	-	//////
c. Plus/minus alimony awarded in this case	+/-	+/-	////// //////
2. MONTHLY ADJUSTED ACTUAL INCOME	$	$	$
3. PERCENTAGE SHARE OF INCOME (Divide each parent's income on line 2 by the combined income on line 2.)	%	%	////// ////// ////// //////
4. BASIC CHILD SUPPORT OBLIGATION (Apply line 2 Combined Income to Child Support Schedule.)	////// ////// //////	////// ////// //////	$
5. ADJUSTED BASIC CHILD SUPPORT OBLIGATION (Multiply Line 4 by 1.5)	////// ////// //////	////// ////// //////	$
6. OVERNIGHTS with each parent (must total 365)			365
7. PERCENTAGE WITH EACH PARENT (Line 6 divided by 365)	A %	B %	////// //////

STOP HERE IF Line 7 is less than 35% for either parent. Shared physical custody does not apply. (Use Worksheet A, instead.)	////// ////// ////// //////	////// ////// ////// //////	////// ////// ////// //////
8. EACH PARENT'S THEORETICAL CHILD SUPPORT OBLIGATION (Multiply line 5 by line 3 for each parent.)	A$	B$	////// ////// ////// //////
9. BASIC CHILD SUPPORT OBLIGATION FOR TIME WITH OTHER PARENT (Multiply line 8A by line 7B and put answer on Line 9A.) (Multiply line 8B by line 7A and put answer on line 9B.)	A$	B$	////// ////// ////// ////// ////// //////
10. NET BASIC CHILD SUPPORT OBLIGATION (Subtract lesser amount from greater amount in line 9 and place answer here under column with greater amount in Line 9.)	$	$	////// ////// ////// ////// ////// //////
11. EXPENSES:	//////	//////	
a. Work-Related Child Care Expenses (Code, Family Law Article, §12-204 (g))	////// ////// ////// //////	////// ////// ////// //////	+
b. Health Insurance Expenses (Code, Family Law Article §12-204 (h)(1))	////// ////// //////	////// ////// //////	+
c. Extraordinary Medical Expenses (Code, Family Law Article, §12-204 (h)(2))	////// ////// ////// //////	////// ////// ////// //////	+
d. Cash Medical Support (Code, Family Law Article, §12-102 (c))	////// ////// //////	////// ////// //////	+

~~d.~~ e. Additional Expenses (Code, Family Law Article, §12-204 (i))	////// ////// //////	////// ////// //////	+
12. NET ADJUSTMENT FROM WORKSHEET C. Enter amount from line ~~j~~ l, WORKSHEET C, if applicable. If not, continue to Line 13.	$	$	////// ////// ////// //////
13. NET BASIC CHILD SUPPORT OBLIGATION (From Line 10, WORKSHEET B)	$	$	////// ////// //////
14. RECOMMENDED CHILD SUPPORT ORDER (If the same parent owes money under Lines 12 and 13, add these two figures to obtain the amount owed by that parent. If one parent owes money under Line 12 and the other owes money under Line 13, subtract the lesser amount from the greater amount to obtain the difference. The parent owing the greater of the two amounts on Lines 12 and 13 will owe that difference as the child support obligation. NOTE: The amount owed in a shared custody arrangement may not exceed the amount that would be owed if the obligor parent were a non-custodial parent. See WORKSHEET A).	$	$	////// //////

Comments or special adjustments, such as any adjustment for certain third party benefits paid to or for the child of an obligor who is disabled, retired, or receiving benefits as a result of a compensable claim (see Code, Family Law Article, §12-204 (j)):

PREPARED BY: DATE:

INSTRUCTIONS FOR WORKSHEET C: Use Worksheet C ONLY if any of the Expenses listed in lines 11 a, 11 b, 11 c, ~~or~~ 11 d, or 11 e is directly paid out or received by the parents in a different proportion than the percentage share of income entered on line 3 of Worksheet B. Example: If the mother pays all of the day care, or parents split education/medical costs 50/50 and line 3 is other than 50/50. If there is more than one 11 ~~d~~ e expense, the calculations on lines ~~g~~ i and ~~h~~ j below must be made for each expense.

WORKSHEET C - FOR ADJUSTMENTS, LINE 12, WORKSHEET B

	Mother	Father
a. Total amount of direct payments made for Line 11 a expenses multiplied by each parent's percentage of income (Line 3, WORKSHEET B) (Proportionate share)	$	$
b. The excess amount of direct payments made by the parent who pays more than the amount calculated in Line a, above. (The difference between amount paid and proportionate share)	$	$
c. Total amount of direct payments made for Line 11 b expenses multiplied by each parent's percentage of income (Line 3, WORKSHEET B)	$	$
d. The excess amount of direct payments made by the parent who pays more than the amount calculated in Line c, above.	$	$
e. Total amount of direct payments made for Line 11 c expenses multiplied by each parent's percentage of income (Line 3, WORKSHEET B)	$	$
f. The excess amount of direct payments made by the parent who pays more than the amount calculated in Line e, above.	$	$

g. Total amount of direct payments made for Line 11 d expenses multiplied by each parent's percentage of income (Line 3, WORKSHEET B)	$	$
h. The excess amount of direct payments made by the parent who pays more than the amount calculated in line g, above.	$	$
i. Total amount of direct payments made for Line 11 e expenses multiplied by each parent's percentage of income (Line 3, WORKSHEET B)	$	$
j. The excess amount of direct payments made by the parent who pays more than the amount calculated in line i, above.	$	$
~~i.~~ k. For each parent, add lines b, d, f, ~~and~~ h, and j	$	$
~~j.~~ l. Subtract lesser amount from greater amount in Line ~~i~~ k, above. Place the answer on this line under the lesser amount in Line ~~i~~ k. Also enter this answer on Line 12 of WORKSHEET B, in the same parent's column.	$	$

Source: This Rule is new.

Rule 9-206 was accompanied by the following Reporter's Note.

Chapter 508, Laws of 2009 (SB 70) requires the court, under certain circumstances, to order one or both parents to pay "cash medical support," as that term is defined in Code, Family Law Article, §12-102 (a)(6). Under certain other circumstances, the new statute authorizes, but does not require, the court to order the payment of cash medical support. Code,

> Family Law Article, §12-102 (c)(5) requires that if cash medical support is ordered, the amount of it "shall be added to the basic child support obligation and divided by the parents in proportion to their adjusted actual income."
>
> The Worksheets contained in Rule 9-206 are proposed to be amended to conform to this legislation.

Master Mahasa explained that a change to the Child Support Guidelines is being proposed. The federal government created Title IV-D, Aid to Needy Families with Children, in 42 U.S.C. §651, et. seq. In an effort to make parents more responsible for providing health insurance for their children, Maryland enacted Chapter 508, Laws of 2009 (SB 70), which added a new provision requiring one or both parents to pay "cash medical support" in lieu of health insurance. The Child Support Guidelines also have a worksheet. In that worksheet, certain items are taken into consideration including health insurance, extraordinary medical expenses, and other child support obligations. The parents' salaries are taken into consideration in computing this. There is a pro rated amount of how much each parent has to pay depending upon his or her salary. Senate Bill 70 adds another category of support that is entitled "cash medical support." This was created as a direct result of Title IV-D which mandated that Maryland add this. It sounds simple to decide whether another line has to be added to the worksheet, but the earlier discussions indicated that this was anything but simple. There was no consensus as to how to incorporate the provisions of the

statute.

Master Mahasa said that because the statute is such a quagmire, she would try to avoid referring to it. The initial position of the Subcommittee was to make no change to the Rule. The courts would add in the cash medical support on a case by case basis when it is necessary. The strongest support she could find was Code, Family Law Article, §12-204 (j), which is a setoff for parents who are getting SSI (Supplemental Security Income) benefits. An example would be parents getting benefits of $4000, and their dependent is getting benefits of $1000. The $1000 amount can be used to set off any child support owed by the parent. If the child support is $800, and the child is getting $1000, the extra $200 can be used to satisfy arrears. This has been in effect since about 1997. The worksheet does not have a line for this. Proponents of the view that the Rule should not be changed despite the enactment of SB 70 pointed out that this is a similar item, and it is not added into the worksheets. The thought was that judges will know how to handle this. This is putting a great amount of faith in the idea that judges will all recognize what to do. This raised a flag for Master Mahasa who wondered how many judges do not know about Code, Family Law Article, §12-204 (j).

Master Mahasa drew the Committee's attention to subsection 4. c. of Worksheet A, Alternative #1 which has language added that reads: "... or Cash Medical Support (Code, Family Law Article, §12-102 (c)." This is listed under "Extraordinary

Medical Expenses." Code, Family Law Article, §12-102 (a)(6) gives the definition of "cash medical support," as follows: "... an amount paid: (I) toward the cost of health insurance provided by: 1. a public entity; or 2. one or both parents through employment or otherwise; or (II) for other medical costs not covered by insurance, including extraordinary medical expenses." The language "for other medical costs not covered by insurance, including extraordinary medical expenses" in Number II can be read two ways. It could mean that these costs are subsumed under extraordinary medical expenses, or it could mean just the opposite which is for other medical costs not covered by insurance, including those not covered by extraordinary medical expenses. Alternative #1 reflects the first interpretation, subsuming cash medical support under extraordinary medical expenses.

The Chair inquired whether the only difference between Alternative #1 and #2 is that in the second one, cash medical support is broken out as a separate item. Is there a substantive difference between the two alternatives? Master Mahasa responded that there was a substantive difference. The cash medical support cannot be put in under 4. c. "extraordinary medical expenses," because that only applies if the amount is more than $100. If there are other medical expenses that are $99 or less, it would not fit into the statutory definition of "extraordinary medical expenses." The Chair pointed out that the statute uses the word "or," which indicates that it is a separate item.

Master Mahasa asked about the situation where someone has both extraordinary medical expenses and cash medical support. The Reporter inquired whether this can be done. Master Mahasa noted that subsection (a)(6)(II) of the statute, which provides that "'cash medical support' means an amount paid...for other medical costs not covered by insurance, including extraordinary medical expenses" can be read that extraordinary medical expenses are those not covered by insurance or that they are covered by insurance.

Mr. Bowen said that in Alternative #1, Statement 11. c of Worksheet B lists "extraordinary medical expenses or cash medical support," but in Alternative #2, they are listed as separate items. Master Mahasa responded that this was to show the differences in interpreting the statute. She added that she prefers Alternative #2. Mr. Klein told the Committee that although his practice does not include working with child support, he questioned whether cash medical support is different from extraordinary medical expenses. Master Mahasa expressed the opinion that the two are different. She reiterated that the meaning of the term "extraordinary medical expenses" depends on what the comma means in subsection (a)(6)(II) of the statute.

Mr. Klein inquired whether there is a written opinion on this, and Master Mahasa replied that this is new. The difference is that "extraordinary medical expenses" apply once the expenses go beyond $100. Mr. Klein referred to the ambiguity of the statutory language, and he asked what would happen if "cash

medical support" were listed first, followed by "extraordinary medical expenses" modified by the language "other than what is in section (c)." This would make it clear that no overlap of the two items is intended. Master Mahasa noted that Alternative #2 separates the two items. Mr. Klein said that if there is a question as to whether "cash medical support" is subsumed by "extraordinary medical expenses," the Rule should be clarified that one is not intended to be subsumed by the other, but that they are different. If "cash medical support" is listed first followed by "extraordinary medical expenses," it would mean anything other than what was reported in the definition of "cash medical support."

Master Mahasa remarked that Alternative #2 separates the two items even more discretely. The strongest argument for the term "cash medical support" to stand alone is that if it is commingled with "extraordinary medical expenses," it would be difficult for the court to determine what health insurance is as opposed to what cash medical support is. If the two items are separated, the court can look at the form and see exactly what was health insurance and what was cash medical support. Health insurance goes to a third party, while cash medical support goes directly to the parent. The Chair asked how this procedure works. The way that he read the statute, cash medical support is an alternative to placing a child under the parent's health insurance. In subsection (c)(3) of the statute, if the obligation is to provide health care insurance, but it is not

available at a reasonable cost, then the cash medical support is provided. Master Mahasa pointed out that the court may order both.

The Chair asked how this procedure would work if it is an "either - or" situation. Trying to set child support in advance, may not be feasible for whatever reason to require the payor to provide health insurance, but there may not be any cash medical expense at that point. What number can be put in the Guidelines to set child support when it is not known that there is going to be any such expense? Master Mahasa replied that she did not know the answer. SSI is used statewide, although it does not have to be. The version of the answer to the Chair's question that she had heard is that because the court orders cash medical support, and because worksheets are usually drafted pretrial, the practitioners tell her that they will put in recommended amounts. The Chair asked if this would be estimates of what the expenses would be in the upcoming year or two years. If the child is healthy and there are no expenses, the court can add up to 5% of the payor's income to child support just in case. Is this the way it works? Master Mahasa answered affirmatively.

Mr. Brault questioned where the money goes. Is this ordering a private health savings account? Master Mahasa answered negatively, explaining that the money goes directly to the parent. Mr. Brault asked if the parents can spend the money on something else if there is no health care expense. The Chair replied that it is part of child support. The Reporter inquired

as to whether the money does go to the parent or if it is part of SSI. The Chair remarked that SSI is mandated. Master Mahasa said that this is tantamount to an increase in child support. Although not before the Rules Committee, it is interesting that it only applies to Title IV-D. The Chair commented that it is mandated in that case, but somewhere the statute permits it in any case. He pointed out that the worksheet will be used in every case. Master Mahasa noted that cash medical support is only applicable to Title IV-D. If the recipient is not receiving funds under Title IV-D, this is not applicable. Mr. Maloney pointed out that subsection (c)(1) provides that this only applies to a child support order under Title IV, Part D of the Social Security Act.

The Reporter commented that the problem with the statute is that this new law was put in Code, Family Law Article, §12-102. All of the law pertaining to the Guidelines is in Code, Family Law Article, §12-204. They were not drafted together to coordinate with each other. The bulk of this statute only applies in Social Security cases, and the mandatory part is when there is no health insurance. Master Mahasa said that cash medical support is satisfied if someone has health insurance, or if someone is getting medical assistance. If someone does not have health insurance or is not getting medical assistance, the court has to consider cash medical support for Title IV-D recipients only.

Delegate Vallario told the Committee that the bill came over

from the Senate to the House of Delegates very late. It was discussed in the last week or two of the 2009 session of the General Assembly. The House had trouble with the bill, because of what it seemed to be requiring. The delegates insisted that representatives from the Department of Social Services (DSS) testify three different times on this bill after it had cleared the Senate. The DSS maintained that they would lose millions of dollars if this bill were not passed. The delegates had some reservations about it. The DSS established proof that the federal government was requiring that this bill be passed. The House put in the language referring to "Title IV, part D." This could mean anything such as asking the DSS to collect the check for child support. Very little of this is asking only for services from the DSS that could put one in this Title IV-D category. The idea was to switch the responsibility over to the State to try to collect this money for the health insurance to come up with the support of the medical fees that are necessary to take care of a child. The hope is that people will get insurance, so that they do not come to the hospitals for care with no insurance. The provision that allows the court to order parents to provide cash medical support in an amount not to exceed 5% of the parents' income was added as an amendment. Along with this, there will be hearings in the next few months to increase the amounts in the Guidelines. The DSS had testified that money would be lost. Master Mahasa agreed that funds would have been lost. Delegate Vallario said that usually there are no

hearings on Senate bills, but on this one, there were three separate hearings.

Judge Pierson remarked that he wanted to respond to the Reporter's comment that the statutory language was added to Code, Family Law Article, §12-102 and not §12-204. Even though this is something that is only going to come up in a narrow range of cases, some reference to it should be added to the Guidelines worksheet, so people will know to include it for SSI purposes. He questioned whether the Subcommittee had considered putting it in as an alternative for the additional expenses under Code, Family Law Article, §12-204 (i) as a kind of catchall. The courts do not see these in many cases, however, there are small exceptions that come up from time to time. It would be a catchall to put in items that do not go anywhere else under the Guidelines. The Reporter responded that because of the reference in the statute itself to "extraordinary medical expenses," the Subcommittee tried to tie this to the same language in the Guidelines rather than the additional expenses. Another way to approach this is to include it as additional expenses, since the courts do not see this very much. Judge Pierson added that it would be Statement 11 d. on the worksheet, Additional Expenses (Alternative #1). Code, Family Law Article, §12-204 (i) includes special education and transportation needs. The courts see these but not very often.

Master Mahasa reiterated that the statute is very difficult to understand. Mr. Maloney suggested that a reference to the

statute could be added to the worksheet instead of another line item. Master Mahasa remarked that there has to be some way to determine what the item is. Judge Pierson recalled that in any case where he had awarded expenses, he would have made a specific finding. As an example, if the court awards tuition on the grounds that it is related to Code, Family Law Article, §12-204 (i), that is normally recorded somewhere. The court found that these expenses were necessary because of the child's special education needs.

The Chair said that Alternative #2 could be used since the two items are broken out separately. "Cash medical support" is in two different places, in Statement 4. c. and in Statement 11. d. It would be helpful to list it as a separate item, but the language "where required" and the statutory reference could be added, so that the judge would know that this is to be done only where required, and he or she knows where to look to see if it is required. Master Mahasa explained that this appears in two places, because one pertains to primary physical custody and one to shared physical custody. The Chair noted this can be broken out separately as in Alternative #2, and the language "where required" can be added. Master Mahasa agreed with this suggestion. She also suggested that language could be added in a footnote providing that this is for Title IV-D only. The Chair remarked that this will alert the judge that he or she does not have to take this into consideration unless it is necessary. Judge Pierson pointed out that "if required" is an implied

condition of all of the items on the worksheet. Master Mahasa expressed her concern that the judges will feel that they have to apply this to all cases. Judge Pierson observed that attorneys will try to get this in all cases. Master Mahasa commented that if the language "for Title IV-D only" is added, the attorneys will know that they should not waste their time. Judge Pierson commented that this adds another line to the worksheet. Every time someone goes to the computer program for SSI, there will be an additional line on the worksheet, and it is only for a small minority of cases. Master Mahasa responded that Judge Pierson seems to be agreeing with Alternative #1. Judge Pierson noted that there has to be a reference to "cash medical support," so that someone knows where to plug it in if the case does have it. Master Mahasa said that Judge Pierson is advocating putting the reference somewhere, but not as another line.

Mr. Leahy pointed out that section (c) of Code, Family Law Article, §12-102 states that it only applies to a child support order under Title IV, Part D of the Social Security Act. Master Mahasa reiterated that the first argument was to leave the Guidelines alone. For example, Code, Family Law Article, §12-204 (j), which is the setoff, is in the statute, but it is not in the worksheet. Hopefully, judges and masters know to add it in, even though it is not referenced on the worksheet. The Chair said that many of the judges and masters have worked in the family division long enough to know this, but if the judges rotate around into different divisions, the new ones may not be as

knowledgeable. Master Mahasa said that this was her concern. How many judges even know about Code, Family Law Article, §12-204 (j)?

The Chair remarked that he did not see how breaking out cash medical expenses as a separate item would be confused with extraordinary medical expenses as long as it is identified. The two items are not the same. Master Mahasa expressed the opinion that cash medical expenses should not be added in with extraordinary medical expenses. The Chair noted that this is the way Alternative #2 presents the worksheet. Master Mahasa reiterated that an argument could be made that every time a new statute is enacted, the worksheet would have to be changed. The Chair responded that judges and lawyers are going to be using the Guidelines worksheet. They will not be looking at the statutes. Master Mahasa agreed, commenting that she had been doing the calculations by hand without the worksheet. Now the numbers are plugged into the SSI, and many of the practitioners do not even know how to do the worksheet, because they do not have to. They simply plug in the numbers. The Chair stated that there is a mandated form, and this is what the practitioners are going to look at.

Mr. Karceski suggested that in Alternative #2 instead of the language "excluding" or "only applies to...," it could read "Title IV, Part D cash medical support." Ms. Kratovil-Lavelle referred to some of the comments made today that the proposed changes would be confusing. She explained that she works in the

Office of Family Administration in the Administrative Office of the Courts, which maintains and manages the forms. It would be easy to add in the reference to "cash medical support" and explain the change to practitioners. Her office is working with the person who creates the program organizing trainings that may be jurisdiction-specific. They are working on a bulletin that explains the worksheets. This would take care of the concern about the changes being confusing. The Judiciary does get Title IV, Part D contracts with the federal Office of Child Support Enforcement, receiving almost $6,000,000 a year. The federal government reimburses them for the courts' work on the Title IV-D cases. There are requirements with which the State must comply. Her department is working very closely with the Office of Child Support Enforcement, and the ways in which Maryland forms and rules could comply to make it easier for audit purposes. If the operations of the Office of Child Support Enforcement are adversely affected, it indirectly affects the operations of Ms. Kratovil-Lavelle's office. In response to the comment that the proposed change does not apply to many cases, Ms. Kratovil-Lavelle noted that it applies to thousands of Title IV-D cases, and the Maryland Office of Child Support Enforcement collects over $1,000,000,000 for a three-year period.

The Chair asked Ms. Kratovil-Lavelle if she had a recommendation between the proposed changes in Alternatives #1 and #2, and if she had any suggestions for anything that would assist judges, masters, attorneys, and her. Ms. Kratovil-Lavelle

replied that when her office sent around Alternatives #1 and #2 to the Family Law Committee and its subcommittees, the consensus was that they supported Alternative #2, because the fact that cash medical support was on a separate line made it clearer and less confusing. There were no other suggestions from the Committee, except to highlight that this applies to Title IV-D cases only. The Chair said that this would be added in both places on the worksheet, Statements 4. d. on Worksheet A and 11. d. on Worksheet B. Ms. Kratovil-Lavelle agreed with the Chair.

Mr. Klein moved to adopt Alternative #2 of Rule 9-206 making it clear that it applies to Title IV, Part D cases. The motion was seconded, and it passed unanimously.

The Chair said that Agenda Item 4 would be considered next, because there were interested persons present to discuss some of the Rules.

Agenda Item 4. Consideration of proposed amendments to: Rule 4-216 (Pretrial Release), Rule 4-342 (Sentencing - Procedure in Non-Capital Cases), Rule 4-345 (Sentencing - Revisory Power of Court), Rule 4-347 (Proceedings for Revocation of Probation), Rule 4-348 (Stay of Execution of Sentence), and Rule 4-501 (Applicability)

Mr. Karceski presented Rule 4-216, Pretrial Release, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-216 (c) by adding a new statutory reference, as follows:

Rule 4-216. PRETRIAL RELEASE

. . .

(c) Defendants Eligible for Release Only by a Judge

A defendant charged with an offense for which the maximum penalty is death or life imprisonment or with an offense listed under Code, Criminal Procedure Article, §5-202 (a), (b), (c), (d), ~~or~~ (e)<u>, or (f)</u> may not be released by a District Court Commissioner, but may be released before verdict or pending a new trial, if a new trial has been ordered, if a judge determines that all requirements imposed by law have been satisfied and that one or more conditions of release will reasonably ensure (1) the appearance of the defendant as required and (2) the safety of the alleged victim, another person, and the community.

. . .

Rule 4-216 was accompanied by the following Reporter's Note.

A District Court Commissioner may not authorize the pretrial release of a defendant charged with violating certain crimes. Chapter 42, Laws of 2009 (HB 88) added another category of crimes to this list. It prohibits a defendant who is charged with specified firearm violations from being released pretrial by a commissioner if the defendant had previously been convicted of one of the firearm violations listed. The Criminal Subcommittee recommends adding a reference to the new provision into section (c) of Rule 4-216.

Mr. Kareceski explained that the legislature recently enacted Chapter 42, Laws of 2009, (HB 88), which amended Code,

Criminal Procedure Article, §5-202 by adding another category of crime, firearm violations, for which a District Court Commissioner would be unable to set bail when that crime is charged if the defendant whose bail is being reviewed had been previously convicted of one of the enumerated firearm charges. There are nine of these violations listed in the statute. This would put a judge in charge of determining whether a bail should be set for those offenders. The use of a Rule 4-216 pretrial determination and other considerations would be made by the District Court judge at the first level to determine whether that defendant would be entitled to bail. The simple remedy proposed by the Criminal Subcommittee to accommodate the new law is to add the letter (f) to the list of Criminal Procedure provisions in section (c) of Rule 4-216.

By consensus, the Committee approved Rule 4-216 as presented.

Mr. Karceski presented Rule 4-342, Sentencing - Procedure in Non-capital Cases, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-342 by adding language to section (i) to conform to a statutory change, as follows:

Rule 4-342. SENTENCING - PROCEDURE IN NON-CAPITAL CASES

. . .

(i) Advice to the Defendant

At the time of imposing sentence, the court shall cause the defendant to be advised of any right of appeal, any right of review of the sentence under the Review of Criminal Sentences Act, any right to move for modification or reduction of the sentence, and the time allowed for the exercise of these rights. At the time of imposing a sentence of incarceration for a violent crime as defined in Code, Correctional Services Article, §7-101 and for which a defendant will be eligible for parole as provided in §7-301 (c) or (d) of the Correctional Services Article, the court shall state in open court the minimum time the defendant must serve for the violent crime before becoming eligible for parole and before becoming eligible for conditional release under mandatory supervision pursuant to Code, Correctional Services Article, §7-501. The circuit court shall cause the defendant who was sentenced in circuit court to be advised that within ten days after filing an appeal, the defendant must order in writing a transcript from the court ~~stenographer~~ *reporter*. **[This proposed change to section (i) is pending before the Court in the 162nd Report.]**

. . .

Rule 4-342 was accompanied by the following Reporter's Note.

Chapter 584, Laws of 2009 (HB 638) provides that an inmate convicted of a violent crime committed on or after October 1, 2009 is not eligible for a conditional release until after the inmate becomes eligible for parole. It also provides that when a sentence of confinement that is to be served is imposed for a violent crime for which a defendant will be eligible for parole, the court shall state in open court the minimum time the defendant must serve before becoming eligible for parole and

before becoming eligible for conditional release under mandatory supervision. The Criminal Subcommittee suggests adding language to section (i) of Rule 4-342 to conform to the new legislation.

Mr. Karceski told the Committee in light of Chapter 584, Laws of 2009, (HB 638), the Subcommittee suggests adding language to section (i) of Rule 4-342. This addresses the issue of those who are sentenced to serve a period of confinement for having committed a violent crime. Previously, a person serving a sentence for a violent crime, had to serve at least 50% if the sentence before becoming eligible for parole. Such a person could however earn good behavior or other credits toward a reduction of that sentence, and could therefore be conditionally released prior to the service of the 50% of the sentence.

The new law removes that benefit and requires that a person imprisoned for a violent crime cannot be conditionally released until the person serves at least 50% of the sentence. It equates eligibility for conditional release with eligibility for parole. The Subcommittee believes that this should be announced by the trial judge in open court along with other rights of the defendant at the time the person is being sentenced, and therefore the underlined language pertaining to conditional release was proposed to be added. The Subcommittee feels that this addresses the intent of the legislation.

The Chair inquired how this would work. The requirement in the statute, Code, Criminal Procedure Article, §7-501 (b) only

applies to crimes committed after October 1, 2009. People who committed crimes before that date are not subject to this new condition. If a defendant has been sentenced for multiple convictions, how is a judge going to know what the minimum time for conditional release is on October 2, 2009? If the judge does not announce this, what is the remedy?

Delegate Vallario said that the original intent of the law was that the judge was supposed to state: "You are hereby sentenced to ten years, the first five without the possibility of parole." This could happen even if it were a parolable offense. Persons had been able to earn credit for as much as 20 days a month. As a result of this, the defendant could be out of prison in less time than 50% of the sentence. It only affected four or five people. It basically addresses the perception that a defendant will have to serve five to ten years. The Chair noted that it applies to crimes committed after October 1, 2009. Delegate Vallario responded that it was before this time that a person had to serve five years, and it was also supposed to be announced.

Mr. Karceski remarked that the intent of the new legislation is that one is not eligible for a credit for a violent offense. The person has to serve one-half of the time. The Chair's question is how is a judge going to compute all of this. This was discussed at the Subcommittee meeting. Despite what the Rule provides, it is amazing how few times this is ever stated in a courtroom. The rights known to be standard at the beginning of

Rule 4-342 are always announced. These include the right to appeal and the right to modification, but many a defendant has been sentenced on a violent crime without the judge making this statement. Judges are not going to be able to compute this time, but the thought was that if someone has been advised that having been convicted of a violent crime the person will have to serve one-half of the sentence, then the person will not be released or subject to conditional release. Whatever that amounts to will be determined later. One may get additional release credits later, but it will not be until after the person has served 50% of the sentence. The Chair commented that when the Rule creates a mandate, the Rule provides that the court shall cause the defendant to be advised of these rights. If he or she is not advised of the right to an appeal, he or she could complain later and get a belated appeal. What happens if the judge gets this wrong? What is the remedy? Does the defendant get a new sentence? Can the defendant appeal to the Court of Special Appeals?

Judge Pierson pointed out that Code, Criminal Procedure Article, §6-217 (b) provides that the sentence is not affected. Mr. Karceski said that he was not sure why there should be a remedy. This is like a nicety on the part of the judge. If the judge forgets to tell the defendant that he or she has to serve at least 50% of the sentence, the defendant should not get out of prison. Delegate Vallario said that this provision has been in the law for a number of years. It came in when the Sentencing

Commission was created about ten years ago. The purpose of the law was not for the defendant to be advised, because the defendant already knew that he or she would have to serve at least one-half of the sentence. The purpose of the law was for the benefit of the victim, so that the victim would know that the defendant would not be out of prison for five years. The problem is that the judges do not announce this.

Mr. Karceski remarked that the idea of the statute makes better sense if it would be incorporated into a plea situation. What purpose would it serve to tell the defendant who has already been sentenced that he or she has to serve 50% of the sentence without getting any credit? It may make the victims happier. He was not certain that all of the attorneys know about this and advise their clients accordingly. It is not serving any real purpose as an advice of right to the defendant after he or she has been sentenced, and it only partially serves the purpose at a guilty plea, because it only applies to guilty pleas. If the defendant opts for a trial, the only time he or she can get this advice is when the defendant is being sentenced. Maybe a change should be made to Rule 4-243, Plea Agreements.

Judge Norton pointed out that organizationally, the problem is that this is listed under advice to the defendant as opposed to under notice to the victim. The Vice Chair agreed, and she suggested that the new language could be in a new section which addresses notice to victims. The Chair remarked that the victim has an interest in this, but Mr. Karceski added that the

defendant has a greater interest. The Vice Chair noted that the comment had been made that this rarely happens. Judge Norton explained that his point was that the advice should be given, but the new language should go into a different section in the Rule.

Mr. Patterson said that he agreed conceptually that at this point in the proceedings, there is no purpose to this advice, except, as Delegate Vallario had stated, that it is for the victim. The State should be advising the victim as to what is going on with the case, just as a defense attorney should be advising the defendant as to what is going on with the case. Whether it is put in the provision pertaining to advice to the defendant, appellate courts have determined that if the judge does not advise the defendant of certain rights, whether it is in the Rule or not, it is reversible error. An example is the situation where someone is subject to an enhanced punishment by operation of being a subsequent offender, yet the judge who does not even know this, because he or she is not allowed to know it, has to advise the defendant about this, and if the judge does not do so, it is reversible error. This is prior to the plea. Mr. Patterson expressed the opinion that whether the new language is put into the advice of rights, the courts will hold that the judge has to do this anyway.

The Chair noted that the Court of Appeals has had cases on what happens when the legislature makes things more difficult for prisoners by extending some mandate. There is the question of whether this applies retroactively. The statute in front of the

Committee is clear that it only applies to crimes committed after October 1, 2009. However, in determining conditional release, if someone is in prison under several different sentences, the Department of Correction has to determine when the person gets out of prison. How will this new Rule provision fit into this formula? The statute is proper, but in terms of a judge making a clear statement as to how much time someone has to serve before one can get released early because of credits, how would this work?

Mr. Shellenberger observed that in all his years of practice in courtrooms, he had never heard a judge make the statement required by the statute. He did not envision a judge ever being able to say to the defendant that the judge gave a sentence of 20 years, with five of those without parole, and the defendant would not be able to get out of prison on diminution credits until 2014. No one could be that clairvoyant, because the diminution credits may change yearly or monthly depending on how full the prisons are. He expressed the view that what Delegate Vallario said about the statute being intended for the victim is correct. It is to make clear to everyone in the courtroom, including the defendant and victim, and it sends a message to the Department of Correction, that the intent of the sentence is that the defendant does not get out before he or she would normally be eligible for parole. Mr. Karceski is correct that just because the judge says something, there is not necessarily a remedy, particularly because the statute provides that the statement does not affect

the sentence. It was an attempt to have truth in sentencing, letting all of the parties know that the intent of the sentence was that the defendant must serve at least one-half of the sentence. Even if this does not happen frequently, it is important to encourage prosecutors to remind the judge that this needs to be stated. It is not a complete exercise in futility. He expressed the view that what the Subcommittee drafted is appropriate.

By consensus, the Committee approved Rule 4-342 as presented.

Mr. Karceski presented Rule 4-345, Sentencing - Revisory Power of Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-345 to add subsection (e)(3) to conform to a certain statute, as follows:

Rule 4-345. SENTENCING - REVISORY POWER OF COURT

. . .

(e) Modification Upon Motion

(1) Generally

Upon a motion filed within 90 days after imposition of a sentence (A) in the District Court, if an appeal has not been perfected or has been dismissed, and (B) in a

circuit court, whether or not an appeal has been filed, the court has revisory power over the sentence except that it may not revise the sentence after the expiration of five years from the date the sentence originally was imposed on the defendant and it may not increase the sentence.

Cross reference: Rule 7-112 (b).

(2) Notice to Victims

The State's Attorney shall give notice to each victim and victim's representative who has filed a Crime Victim Notification Request form pursuant to Code, Criminal Procedure Article, §11-104 or who has submitted a written request to the State's Attorney to be notified of subsequent proceedings as provided under Code, Criminal Procedure Article, §11-503 that states (A) that a motion to modify or reduce a sentence has been filed; (B) that the motion has been denied without a hearing or the date, time, and location of the hearing; and (C) if a hearing is to be held, that each victim or victim's representative may attend and testify.

(3) Inquiry by Court

Prior to considering a motion under this Rule, the court shall inquire if a victim or victim's representative is present. If present, the court shall allow the victim or victim's representative to be heard as allowed by law. If the victim or victim's representative is not present, the court shall inquire of the State's Attorney on the record regarding any justification for the victim or victim's representative not being present. If the court is not satisfied by the statement that proceeding without the appearance of the victim or victim's representative is justified, or, if no statement is made, the court may postpone the hearing.

Committee note: The court may commit a defendant who is found to have a drug or alcohol dependency to a treatment program in

> the Department of Health and Mental Hygiene at any time if the defendant voluntarily agrees to participate in the treatment, even if the defendant did not timely file a motion for modification, or if the defendant timely filed a motion for modification that was denied. See Code, Health General Article, §8-507.
>
> . . .

Rule 4-345 was accompanied by the following Reporter's Note.

> Code, Criminal Procedure Article, §11-403 was amended by Chapter 573, Laws of 2009 (SB 620) to require the court to ascertain from the prosecuting attorney information on the record regarding the presence of the victim or victim's representative. The Criminal Subcommittee recommends adding a new subsection to section (e) to conform to the new legislation.

Mr. Karceski told the Committee that the proposed new language added to Rule 4-345 is in consideration of victims. It provides for an inquiry from the court about the absence of the victim or the effort on the part of the State's Attorney to have the victim present at one of a number of proceedings, including a modification of a sentencing of a defendant. The Subcommittee chose to add a new subsection (e)(3) entitled "Inquiry by Court." The new language requires the court to make an inquiry of the victim or the victim's representative as to whether the person is present. The victim or the representative are allowed to be heard, if the victim is present, and if he or she is not present, the court should then make inquiry of the State's Attorney on the record regarding any reason or justification for the victim or the victim's representative to not be present. If the court is

satisfied with the reason for the victim's absence, the court may proceed with the hearing. If the court is not satisfied with that statement, and if the victim is not present, the court may postpone the hearing to make a better effort for the victim to be able to attend. The new language tracks the language of Chapter 573, Laws of 2009, (SB 620).

Mr. Karceski asked Mr. Butler, who is the Executive Director of the Maryland Crime Victims' Resource Center, if he had any comment. Mr. Butler replied that he did not. The Vice Chair pointed out that the statutory provision is much more detailed as to what the justification has to be than the proposed language to be added to Rule 4-345. The State's Attorney has to say that the victim was contacted by the prosecutor and waived the right to attend the hearing, or efforts were made to contact the victim or the victim's representative, and to the best knowledge and belief of the prosecutor, the victim or victim's representative cannot be located. Either all of this should be added to the Rule, or the Rule should state that regarding the justification for the victim or the victim's representative not being present, see Code, Criminal Procedure Article, §11-403. Mr. Karceski agreed with the Vice Chair's latter suggestion. The Chair asked whether the reference to the statute should be in the text of the Rule or in a cross reference. The Vice Chair answered that if all of the text of the statute is not going to be in the Rule, then the reference to the statute should be in the body of the Rule as opposed to being in a cross reference. The Chair inquired as to

whether this was a motion. The Vice Chair responded that if the Subcommittee agrees with the suggestion, no motion is necessary. The Subcommittee agreed with this.

Mr. Bowen pointed out that the Committee note was not in the right place in the Rule. It should go after subsection (e)(1). By consensus, the Committee approved Mr. Bowen's suggested change.

By consensus, the Committee approved Rule 4-345 as amended.

Mr. Karceski presented Rule 4-347, Proceedings for Revocation of Probation, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-347 by adding a cross reference after section (a) and by adding language to section (c) referring to a judge of the circuit court, as follows:

Rule 4-347. PROCEEDINGS FOR REVOCATION OF PROBATION

(a) How Initiated

Proceedings for revocation of probation shall be initiated by an order directing the issuance of a summons or warrant. The order may be issued by the court on its own initiative or on a verified petition of the State's Attorney or the Division of Parole and Probation. The petition, or order if issued on the court's initiative, shall state each condition of probation that the defendant is charged with having violated and the nature of the

violation.

Cross reference: Code, Criminal Procedure Article, §6-223. For proceedings for revocation of probation in circuit court, see *Beach v. State*, 75 Md. App. 431 (1988).

(b) Notice

A copy of the petition, if any, and the order shall be served on the defendant with the summons or warrant.

Cross reference: For victim notification procedures, see Code, Criminal Procedure Article, §§11-104, 11-503, and 11-507. **[This proposed change is pending before the Court in the 162nd Report.]**

(c) Release Pending Revocation Hearing

Unless the judge who issues the warrant sets conditions of release or expressly denies bail, a defendant arrested upon a warrant shall be taken before a judicial officer of the District Court or before a judge of the circuit court without unnecessary delay or, if the warrant so specifies, before a judge of the District Court or circuit court for the purpose of determining the defendant's eligibility for release.

(d) Waiver of Counsel

The provisions of Rule 4-215 apply to proceedings for revocation of probation.

(e) Hearing

(1) Generally

The court shall hold a hearing to determine whether a violation has occurred and, if so, whether the probation should be revoked. The hearing shall be scheduled so as to afford the defendant a reasonable opportunity to prepare a defense to the charges. Whenever practicable, the hearing shall be held before the sentencing judge or,

if the sentence was imposed by a Review Panel pursuant to Rule 4-344, before one of the judges who was on the panel. With the consent of the parties and the sentencing judge, the hearing may be held before any other judge. The provisions of Rule 4-242 do not apply to an admission of violation of conditions of probation.

Cross reference: See *State v. Peterson*, 315 Md. 73 (1989), construing the third sentence of this subsection. For procedures to be followed by the court when a defendant may be incompetent to stand trial in a violation of probation proceeding, see Code, Criminal Procedure Article, §3-104.

(2) Conduct of Hearing

The court may conduct the revocation hearing in an informal manner and, in the interest of justice, may decline to require strict application of the rules in Title 5, except those relating to the competency of witnesses. The defendant shall be given the opportunity to admit or deny the alleged violations, to testify, to present witnesses, and to cross-examine the witnesses testifying against the defendant. If the defendant is found to be in violation of any condition of probation, the court shall (A) specify the condition violated and (B) afford the defendant the opportunity, personally and through counsel, to make a statement and to present information in mitigation of punishment.

Cross reference: See *Hersch and Cleary v. State*, 317 Md. 200 (1989), setting forth certain requirements with respect to admissions of probation violations, and *State v. Fuller*, 308 Md. 547 (1987), regarding the application of the right to confrontation in probation revocation proceedings. For factors related to drug and alcohol abuse treatment to be considered by the court in determining an appropriate sentence, see Code, Criminal Procedure Article, §6-231.

Source: This Rule is new.

Rule 4-347 was accompanied by the following Reporter's Note.

> The legislature modified the procedure to revoke probation by providing in Chapter 513, Laws of 2009 (SB 145) that the circuit court as well as the District Court may end the period of probation and that the time period for filing a revocation of probation is District Court would be extended. To conform to the new statute, the Criminal Subcommittee suggests adding a cross reference to it and a cross reference to *Beach v. State*, 75 Md. App. 431 (1988), which addresses revocation of probation in the circuit court, as well as a reference to "a judge of the circuit court" in section (c).

Mr. Karceski explained that the proposed change to Rule 4-347 was based on Chapter 513, Laws of 2009, (SB 145), which amended Code, Criminal Procedure Article, §6-223. The statute as it now reads allows the District Court to end probation at any time and does not refer to the circuit court being able to do the same. The legislation permits the circuit court and the District Court to end the period of probation, and in the District Court it provides that the probation violation can be filed at any time during the defendant's period of probation or 30 days after the probation period has been concluded or terminated. The Subcommittee decided that a cross reference to Code, Criminal Procedure Article, §6-223 should be added to the Rule. The cross reference also cites *Beach v. State*, 75 Md. App. 431 (1988), which addresses revocation of probation at the circuit court level. Section (c) of Rule 4-347 is entitled "Release Pending Revocation Hearing." The legislation added that

the person arrested shall be taken before a judicial officer of the circuit court. Prior to the legislative change, the statute only referred to someone being taken before the District Court and not the circuit courts. The Subcommittee added language to section (c).

With regard to the remaining portion of the legislation, it was the consensus of the Subcommittee to add only a cross reference to the Criminal Procedure Article. The issues that it covers are the termination of probation by either court and, after a violation of probation is charged, the extension to allow the District Court to issue a warrant or notice during the period of probation or within 30 days after a violation of probation that requires the probationer to appear before the judge issuing the warrant or notice. There had been problems with the District Court not having the authority to issue warrants or notices within that period of time or the time window outside of the probationary period.

By consensus, the Committee approved Rule 4-347 as presented.

Mr. Karceski presented Rule 4-348, Stay of Execution of Sentence, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-348 (b) to add a sentence

to conform to a certain statute, as follows:

Rule 4-348. STAY OF EXECUTION OF SENTENCE

. . .

(b) Sentence of Imprisonment

The filing of an appeal or a petition for writ of certiorari in any appellate court, including the Supreme Court of the United States, stays a sentence of imprisonment during any period that the defendant is released pursuant to Rule 4-349, unless a court orders otherwise pursuant to section (d) of that Rule. On the filing of a notice of appeal in a case that is tried *de novo*, the circuit court may, on motion or by consent of the parties, stay a sentence of imprisonment imposed by the District Court and release the defendant pending trial in the circuit court.

. . .

Rule 4-348 was accompanied by the following Reporter's Note.

The 2009 General Assembly passed Chapter 680, Laws of 2009 (HB 569), which provides that when a criminal appeal that is tried *de novo* is filed, the circuit court may stay a sentence of imprisonment imposed by the District Court and release the defendant pending trial in the circuit court. The Criminal Subcommittee suggests conforming section (b) of Rule 4-348 to the new statute.

Mr. Karceski told the Committee that the legislature passed Chapter 680, Laws of 2009, (HB 569), which pertains to criminal procedure on de novo appeals from the circuit court and a stay of sentence. The new language in the statute reads as follows: "On the filing of a notice of appeal, the circuit court may stay

a sentence of imprisonment imposed by the District Court and release the defendant pending trial in the circuit court." There had been some confusion among circuit court judges, some of whom believed that they did not have the authority to stay the imposition of the sentence at the District Court. Delegate Vallario agreed with Mr. Karceski. Mr. Karceski said that as a result of the confusion, the legislation was enacted giving the circuit court that authority. The language of the statute has been incorporated into Rule 4-348. This allows the circuit court, if it chooses, to release the defendant pending trial in the circuit court after a District Court has refused to allow the sentence to be stayed.

The Chair asked whether it is implicit that the circuit court judge can attach conditions to the release, or if the release has to be on the defendant's own recognizance without conditions. Mr. Karceski replied that it should be that the circuit court judge can attach conditions. Delegate Vallario remarked that a circuit court judge can put any conditions on the release that he or she chooses. The Chair said that this goes back to a pretrial status. Delegate Vallario added that it is a de novo hearing from the beginning, and the judge should be able to attach any conditions that the judge wishes to. The Chair commented that the District Court commissioner or judge may have set bail. The defendant has been sentenced, so the matter is no longer pretrial, but for the record, it is important to note that the circuit court judge can attach conditions to the release of

the defendant. Mr. Karceski stated that he had no doubt that this true, but the language of the bill does not refer to conditions. He was not sure that Rule 4-348 could provide more than the bill provides. Judge Norton said that he thought that the circuit court was monitoring and had control of pretrial conditions pending trial in the circuit court. The circuit court has the authority to do this absent the statute.

The Vice Chair remarked that it is appropriate for the court to have the authority to do this without the statute, but apparently some judges thought that they did not have this authority. The way that she read the statute is that the defendant should be released on his or her own recognizance. If the legislature intended to allow the court to impose terms and conditions, the Rule should say this. Delegate Vallario said that the legislature wanted to give the judge the authority. One of the problems is that the District Court form has a box that indicates that the sentence shall not be stayed. He was not sure where this came from, and there is no authority for this box on the form. Judge Norton said that when he is confronted with that box, he writes in a phrase such as, "unless an appeal bond has been posted."

Mr. Maloney remarked that a problem with this is that some District Court judges require massive appeal bonds, and this creates a big habeas corpus practice. He suggested that the bill may end this practice. Judge Norton inquired as to whether the circuit court judges feel that they do not have the authority for

the amount of the bond, and this leads to habeas corpus proceedings. Mr. Maloney replied that some judges do feel this way. He expressed the view that it would be appropriate to add language to the Rule that would read "on such terms and conditions...". The judges are doing this, anyway.

Mr. Shellenberger remarked that while the language "on terms and conditions" could be added to the Rule, he did not think that it was necessary to do so. He had never met a circuit court judge who did not think that he or she did not have the power to order any conditions. The genesis of the Rule has to do with the box to which Delegate Vallario had referred and with the fact that there were some sentences in Baltimore County where a District Court judge was giving the defendant five days and checking that box. It would not be possible to go before a judge in five days, so the sentence had already been served by the time the defense attorney was able to find a reasonable individual to talk to. This is why Delegate Vallario's committee was approached to give this power to a circuit court judge. There is no reason for the judges to believe that suddenly they cannot put terms and conditions on the release. The prosecutors are given notice and have the right to be at the hearing, and they can ask for terms and conditions. Mr. Karceski commented that when the Subcommittee had discussed this Rule, they agreed to add "on motion or by consent of the parties," because there were a few cases in which both the State and the defense agreed that there should be a release.

The Vice Chair questioned whether the Subcommittee intended to take away the court's power to do this without a motion or consent on its own initiative. Mr. Karceski responded that he did not think that the court would do this on its own initiative. The Vice Chair remarked that if the language of Rule 4-348 is compared to the language of Rule 4-216, Pretrial Release, the release referred to in Rule 4-348 would mean release with no conditions at all. The argument could be made that this is an absolute release based on the structure of these two Rules. The Chair noted that the language in Rule 4-348 is exactly the language of the statute. It is a question of legislative intent. Did the legislature really mean unconditional release? If so, the Court of Appeals by rule could not put conditions on it. This is an issue of statutory construction.

Delegate Vallario observed that the bond that was placed in the District Court would not go to the circuit court. It is a de novo trial. Generally speaking, in this situation, the bond follows that case. The Chair added that this is so, because the sentence is in effect. Mr. Karceski disagreed. Mr. Maloney commented that it is an appeal bond. Mr. Patterson added that technically, once the defendant appears for trial, the bond is released. It had been in place to insure the defendant's appearance. What happens thereafter is that the bond is not held accountable for insuring the defendant's appearance.

The Chair pointed out that in the District Court, if the judge were to stay the sentence pending the appeal, the District

Court judge could put conditions of release on that, because it is in an appeal bond. Now the authority to stay is being given to the circuit court judge. Would it be any less authority than the District Court judge would have to put conditions on the release? Mr. Shellenberger responded that he did not think so. This issue arose because of a number of people being given five-day sentences for such minor offenses as disorderly conduct. This is not some issue that is out of control. It was designed to remedy one single problem in a local jurisdiction. Notwithstanding the language, no circuit court judge would believe that he or she does not have the power to control a defendant whom the judge has to decided to release. It is obvious that the circuit court judge has this power. Mr. Patterson noted that the language is silent. It does not prohibit the judge from issuing conditions, it just does not address this. If it is not prohibited, the judge will exercise what he or she feels is the appropriate power to include conditions.

The Chair said that this is a fair analysis of what the legislature intended. The problem is that it is not clear, because the legislature did not address it. They only used the word “release.” Mr. Karceski remarked that everyone would have to agree that the legislature intended that the circuit court would be able to apply whatever conditions of release that the court felt were necessary. It does not make any sense otherwise. The Chair commented that this could be left blank in the Rule as

the statute is, or the language pertaining to adding conditions could be put into the Rule. Mr. Maloney moved that the language "on such terms and conditions as the court deems appropriate" or similar language be added to the new language already proposed for the Rule after the word "defendant." The motion was seconded, and it passed unanimously.

By consensus, the Committee approved Rule 4-348 as amended.

Mr. Karceski presented Rule 4-501, Applicability, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 500 - EXPUNGEMENT OF RECORDS

AMEND Rule 4-501 to change a statutory reference and to add a statutory reference to the cross reference at the end of the Rule, as follows:

Rule 4-501. APPLICABILITY

The procedure provided by this Chapter is exclusive and mandatory for use in all judicial proceedings for expungement of records whether pursuant to Code, Criminal Procedure Article, §§~~10-101~~ 10-102 through 10-109 or otherwise.

Cross reference: Expungement of criminal charges transferred to the juvenile court, Rule 11-601, Code, Criminal Procedure Article, §10-106.

Source: This Rule is derived from former Rule EX2.

Rule 4-501 was accompanied by the following Reporter's Note.

Chapter 712, Laws of 2009 (HB 1227) changed the procedure for expungement of criminal charges transferred to juvenile court. The Criminal Subcommittee recommends modifying the statutory reference in the body of the Rule and adding a reference to the new statute to the cross reference at the end of the Rule.

Chapter 712, Laws of 2009 (HB 1227) pertains to cases that begin as criminal charges in the circuit court, or cases that begin in District Court and wend their way into circuit court. Most of these cases are charged as felonies, but there could be misdemeanor charges. The net result would be that the defendant/juvenile would ultimately be transferred to the juvenile court for prosecution, and there would be no criminal prosecution of the case. Prior to the new law, even though the juvenile offender went back to juvenile court, he or she had to go through certain hurdles before the criminal court record could be expunged. The new legislation provides that the juvenile no longer has to comply with the former requirements. It requires the court to grant an expungement petition if there had been a failure to file a delinquency petition; or that there had been a delinquency hearing and the facts were not sustained. It also permits the court to grant a petition for expungement when the person becomes 21 years of age if a charge transferred to the juvenile court resulted in the adjudication of the person as a delinquent child. Until one of those conditions were satisfied, the record would remain a criminal court docket on that juvenile with that juvenile’s name attached thereto. The new law provides

that a person may file, and the court shall grant, a petition that would transfer a case and expunge the criminal record if the case were transferred back under Code, Criminal Procedure Article, §4-202. What the Subcommittee proposes in Rule 4-501 is to modify the statutory reference in the body of the Rule and add a reference to the new statute, which is Code, Criminal Procedure Article, §10-106. This is the specific section of the Code that applies to the mandatory expungement of an adult criminal charge transferred back to the juvenile court.

The Vice Chair asked if the cross reference means to say "For expungement of criminal charges transferred to the juvenile court, see Rule 11-601 and Code, Criminal Procedure Article, §10-106." Currently, the cross reference lists three items that seem to run together. Mr. Karceski answered that this is what it means. The Chair said that this can be restyled. Delegate Vallario pointed out that the House of Delegates stuck the language in the bill from page 1 through page 11 and simply added the few lines on pages 11 and 12.

By consensus, the Committee approved Rule 4-501 subject to the language of the cross reference being restyled.

Additional Agenda Item.

The Chair told the Committee that several Rules had been added to the agenda and had been handed out earlier in the meeting.

The Chair presented Rule 16-824, Restrictions, for the

Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-824 by changing the word "may" to the word "shall" in the Committee note after section (b), as follows:

Rule 16-824. RESTRICTIONS

(a) Judge's Own Ceremony

A judge may not perform his or her own marriage ceremony.

(b) Compensation

A judge may receive no compensation, remuneration, or gift for performing a marriage ceremony.

Committee note: See Code, Family Law Article, §2-410, as to the fees a clerk or deputy clerk ~~may~~ shall collect for performing a marriage ceremony.

(c) Advertising or Other Solicitations

A judge may not give or offer to give any reward to any person as an inducement to have the judge perform a marriage ceremony. A judge may not advertise or otherwise solicit individuals contemplating marriage to choose the judge to perform the ceremony.

Source: This Rule is new.

Rule 16-824 was accompanied by the following Reporter's Note.

The General Court Administration

> Subcommittee believes that the Committee note after section (b) incorrectly implies that clerks have the option of collecting fees for performing marriages. Since clerks must collect these fees by law, the Subcommittee recommends changing the word "may" to the word "shall."

The Chair explained that the proposed amendment to Rule 16-824 does not solve the problem. This surfaced with a casual comment from Ms. Kathy Smith at the Subcommittee meeting that raised the question of judges performing marriage ceremonies. It appears that the clerk at the time of issuing the marriage license is to collect a separate fee of $25, or $30 in Cecil County, if a judge is going to perform the marriage ceremony. How would a clerk know necessarily that a judge is going to perform the ceremony? The clerk could ask the people taking out the license, and then they must pay the fee. Apparently, the clerks are not collecting these fees.

Ms. Smith noted that many of the clerks do not know that a judge is performing the ceremony, or the couple being married may not inform the clerk until the last minute, so that the license has already been issued. The statute requires that the fee is to be collected when the license is issued. The clerks are not getting the money afterwards. The Chair commented that judges are not permitted to collect any money. Ms. Smith noted that if the clerk asks every person who comes in to get a marriage license if a judge is going to perform the ceremony, the judges will get too many requests to do so.

Mr. Maloney suggested that the Clerks' Association could ask the General Assembly to repeal this law, because it is impossible to enforce. The Chair said that unless the clerk asks the parties applying for the license, the law permits six months between the issuance of the license and the marriage ceremony, and some people may not even know at the time they apply for the license who will eventually perform the ceremony. The clerk is not getting a fee that is mandated. The best the Subcommittee could recommend is to change the wording of the Committee note after section (b) of Rule 16-824 from "may" to "shall." However, it does not appear that the fee is being collected. He asked Ms. Smith if she had checked with the other clerks about this.

Ms. Smith replied that most clerks will collect the fee if the people applying for the license tell them that a judge is going to perform the marriage ceremony; however, she reiterated that if the clerk asks each person about whether a judge will be performing the ceremony, this may backfire and cause a flurry of requests for judges to marry couples. The Chair observed that it may be slightly less of a problem if the clerk performs the marriage, because the State also is entitled to a fee if the clerk performs the ceremony. Ms. Smith noted that the parties have to schedule the ceremony with the clerk, but the ceremonies performed by a judge are not scheduled with the clerk.

Mr. Maloney remarked that the other issue is the policy behind the reimbursement to the State court judges for their time. This year the legislature changed the law to allow members

of the U.S. Tax Court to perform marriages. There is no reason to reimburse federal judicial officers. The Chair clarified that the judges are not getting reimbursed. The point is that as long as this law exists, the language of the Committee note after section (b) has to be changed. Master Mahasa asked if there is any question on the clerk's form that informs the public that there will be a $25 fee if a judge performs the marriage ceremony. Ms. Smith answered in the negative. Master Mahasa commented that if there were something written on the application, then a few months later, the parties would be on notice that by using a judge to perform the ceremony, they will have to pay the fee.

By consensus the Committee approved Rule 16-824 as presented.

The Chair presented Rule 16-1006, Required Denial of Inspection - Certain Categories of Case Records, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 1000 - ACCESS TO COURT RECORDS

AMEND Rule 16-1006 (b) to add to subsection (b)(1) a reference to a certified nurse practitioner, to substitute the words "becomes effective" for the words "is issued" in subsection (b)(2), to add a cross reference following section (b), and to add a new section (c) referring to certain records pertaining to petitions for relief from abuse, as follows:

Rule 16-1006. REQUIRED DENIAL OF INSPECTION - CERTAIN CATEGORIES OF CASE RECORDS

Except as otherwise provided by law, court order, or the Rules in this Chapter, the custodian shall deny inspection of:

. . .

(b) The following case records pertaining to a marriage license:

(1) A ~~physician's~~ certificate of a physician or certified nurse practitioner filed pursuant to Code, Family Law Article, §2-301, attesting to the pregnancy of a child under 18 years of age who has applied for a marriage license.

(2) Until a license ~~is issued~~ becomes effective, the fact that an application for a license has been made, except to the parent or guardian of a party to be married.

Cross reference: See Code, Family Law Article, §2-402 (f).

(c) Case records pertaining to petitions for relief from abuse filed pursuant to Code, Family Law Article, §4-504, which shall be sealed until the earlier of 48 hours after the petition is filed or the court acts on the petition.

~~(c)~~ (d) . . .

~~(d)~~ (e) . . .

~~(e)~~ (f) . . .

~~(f)~~ (g) . . .

~~(g)~~ (h) . . .

~~(h)~~ (i) . . .

~~(i)~~ (j) . . .

~~(j)~~ (k) . . .

~~(k)~~ (l) . . .

Rule 16-1006 was accompanied by the following Reporter's Note.

> Chapter 233, Laws of 2009 (HB 1140) allows certified nurse practitioners as well as physicians to determine whether a 15, 16, or 17-year-old minor who wishes to be married is pregnant or has given birth to a child. A proposed amendment to Rule 16-1006 (b)(1) adds a reference to a "certified nurse practitioner" as being authorized to attest to a current pregnancy of the minor or a pregnancy that resulted in the minor giving birth to a child.
>
> Subsection (b)(2) of Rule 16-1006 currently provides that the information about the application for a marriage license cannot be disclosed until a license is issued, except to a parent or guardian of a party to be married. The Rules Committee observed that Code, Family Law Article, §2-402 (f) provides that the information may not be disclosed until a marriage license becomes effective. A license may be issued immediately upon the filing of the application, but it does not become effective until two days later. Thus, the Rule and the statute are in conflict, since the Rule may allow disclosure of the fact that there has been an application for a marriage license as soon as the application is filed. The Committee recommends amending subsection (b)(2) to conform to the language of the statute.
>
> The Committee also recommends that case records pertaining to petitions for relief from abuse filed pursuant to Code, Family Law Article, §4-504 be added to the list of sealed case records in Rule 16-1006. The concern is that once the petition is filed, the alleged abuser may cause some harm before a judge can issue a protective order. The addition to the Rule would delay the disclosure to the alleged abuser.

The Chair explained that Rule 16-1006 is based on a statute, Chapter 233, Laws of 2009 (HB 1140). Previously, if a couple under the age of 16 wanted to get married, it was necessary to get a certificate from a physician that the woman was pregnant. The legislature amended this law to allow a certificate as to pregnancy from a certified nurse practitioner. The certificates are shielded and not open to the public as court records. The Rule adds a reference to a "certified nurse practitioner," giving them the same privacy protections as physicians. Judge Norton inquired as to whether this includes physicians' assistants. The Chair responded that this issue has caused conflict in the legislature.

The Vice Chair asked about the change in subsection (b)(2), which deletes the words "is issued" and adds the words "becomes effective." The Chair replied that this is a statutory change that has been in effect for some time. The Reporter added that the Committee had approved this change previously. Only the bolded language is new. The Chair noted that the license is not effective for two days, and it is shielded until it becomes effective.

By consensus the Committee approved Rule 16-1006 as presented.

Agenda Item 3. Reconsideration of proposed: New Appendix: Guidelines for Determining Attorneys' Fees and Related Expenses, New Rule 2-603.1 (Attorneys' Fees and Related Expenses), Amendment to Rule 2-504 (Scheduling Order), New Rule 3-603.1 (Attorneys' Fees and Related Expenses), and Amendments to: Rule 2-433 (Sanctions), Rule 1-341 (Bad

The Chair presented New Appendix: Guidelines for Determining Attorneys' Fees and Related Expenses, New Rule 2-603.1 (Attorneys' Fees and Related Expenses), Amendment to Rule 2-504 (Scheduling Order), New Rule 3-603.1 (Attorneys' Fees and Related Expenses), and Amendments to: Rule 2-433 (Sanctions), Rule 1-341 (Bad Faith - Unjustified Proceeding), and Rule 2-603 (Costs) for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX: GUIDELINES FOR DETERMINING ATTORNEYS' FEES AND RELATED NONTAXABLE EXPENSES

ADD a new Appendix, as follows:

APPENDIX: GUIDELINES FOR DETERMINING ATTORNEYS' FEES AND RELATED EXPENSES

(a) Applicability

If ordered by the court in a scheduling order entered under Rule 2-504, these Guidelines apply to actions in which recovery of attorneys' fees and related expenses is sought in accordance with Rule 2-603.1 *or 3-603.1 and, where applicable, Rules 2-433 and 1-341*. **[Query: Delete or amend the italicized language?]**

(b) Guidelines Regarding Billing Format, Time Recordation, and Submission of Quarterly Statements

(1) Time

Time shall be recorded by specific task and attorney, paralegal, or other

professional performing the task.

(2) Memorandum in Support of a Motion for Fees

A memorandum in support of a motion for fees, accompanied by time records, shall be submitted in the following format organized by litigation phase:

Committee note: In general, preparation time and travel time should be reported under the category to which they relate. For example, time spent preparing for and traveling to and from a court hearing should be recorded under the category “court hearings.” Factual investigation should also be listed under the specific category to which it relates. For example, time spent with a witness to obtain an affidavit for a summary judgment motion or opposition should be included under the category “motions practice.” Similarly, a telephone conversation or a meeting with a client held for the purpose of preparing interrogatory answers should be included under the category “interrogatories, document production, and other written discovery.” Of course, each of these tasks must be separately recorded in the back-up documentation in accordance with subsection (b)(1).

(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 (includes time spent preparing for deposition);

(E) preparing and responding to

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; and

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

(3) Quarterly Statements

Counsel for a party intending to seek fees shall submit to the opposing party quarterly statements showing the amount of time spent on the case and the total value of that time. These statements need not be in the "litigation phase" format provided in subsection (b)(2) or otherwise reflect how time has been spent. The first statement is due at the end of the first quarter in which the action is filed. Failure to submit these statements may result in a denial or reduction of fees.

(4) Settlement Conference

Upon request by the judge or other individual appointed or agreed upon by the parties presiding over a settlement conference, counsel for all parties (other than public attorneys who do not ordinarily keep time records) shall provide to the judge or other presiding individual statements of time and the value of that time in the "litigation phase" format provided in subsection (b)(2). If the settlement conference is pretrial, the statements shall be presented to the judge or other presiding individual in camera.

(5) Billing Records

If during the course of a fee award

dispute, a judge orders that the billing records of counsel for the party opposing fees must be turned over to the party requesting fees, those billing records shall be submitted in the “litigation phase” format.

Committee note: The requirement of subsections (b)(4) and (b)(5) are subject to attorney-client privilege and work product protection.

(c) Guidelines Regarding Compensable and Non-compensable Time

(1) Lead Attorney

Where plaintiffs with both common and conflicting interests are represented by different attorneys, there shall be a lead attorney for each task (e.g., preparing for and speaking at depositions on issues of common interest and preparing pleadings, motions, and memoranda), and other attorneys shall be compensated only to the extent that they provide input into the activity directly related to their own client’s interests.

(2) Deposition Attendance

Ordinarily, only one attorney for each separately represented party shall be compensated for attending depositions.

Committee note: Departure from this subsection would be appropriate upon a showing of a valid reason for sending two attorneys to the deposition, e.g. that the less senior attorney’s presence is necessary because that attorney organized numerous documents important to the deposition, but the deposition is of a critical witness whom the more senior attorney should properly depose. Departure from this subsection also may be appropriate upon a showing that more than one retained attorney representing the defendant attended the deposition and charged the time for the attorney’s attendance.

(3) Hearings Other Than Trial

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

Committee note: The same considerations discussed previously concerning attendance by more than one attorney at a deposition also apply to attendance by more than one attorney at a hearing. There is no guideline as to whether more than one attorney for each party is to be compensated for attending trial. This must depend upon the complexity of the case and the role that each attorney is playing. For example, if a junior attorney is present at trial primarily for the purpose of organizing documents but takes a minor witness for educational purposes, consideration should be given to billing that attorney's time at a paralegal's rate.

(4) Conferences

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

(5) Travel

(A) To Do Substantive Work

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

subject of the fee request, then the time should be billed for the substantive work, not travel time.

(B) Travel Time

Up to three hours of travel time (each way and each day) to and from a court appearance, deposition, witness interview, or similar proceeding that cannot be devoted to substantive work may be charged at the attorney's hourly rate.

(C) Long Distance Travel

Time spent in long-distance travel above the three-hour limit each way that cannot be devoted to substantive work may be charged at one-half of the attorney's hourly rate.

(d) Reimbursable Expenses

(1) Out-of-Pocket Expenses

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

(2) Mileage

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

(3) Copy Work

Copy work is compensable at a reasonable commercial rate.

The Appendix: Guidelines for Determining Attorneys' Fees and Related Expenses was accompanied by the following Reporter's Note.

The Rules Committee recommends adopting, with some modifications, the federal Rules and Guidelines for Determining Attorneys' Fees in Certain Cases to provide a set of guidelines for judges to determine appropriate attorneys' fees **if the court, in a scheduling order entered under Rule 2-504, orders that the Guidelines apply**. Specific hourly rates have been omitted, because the policy in Maryland is not to include specific dollar amounts in similar rules provisions.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 600 - JUDGMENT

ADD new Rule 2-603.1, as follows:

Rule 2-603.1. ATTORNEYS' FEES AND RELATED EXPENSES

(a) Scope

This Rule applies to actions in which a party may be entitled, by law or contract, to reasonable attorneys' fees and related expenses, except that the Rule does not apply to:

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

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

(3) unless otherwise ordered by the court in a particular action, a claim for attorneys' fees and related expenses (A) pursuant to Code, Family Law Article, §§5-309, 5-3A-09, 5-3B-08, 7-107, 8-214, 11-110, and 12-103, and (B) in an action in which the attorneys' fees claimed do not exceed $5,000.

Committee note: This Rule does not apply to costs that are taxable under Rule 2-603. "Related expenses" are those related to the provision of legal services. See, e.g., Guideline (d) of the Guidelines for Determining Attorneys' Fees and Related Expenses that are appended to these Rules. "Related expenses" are not expenses that must be proved as part of the underlying action itself, such as the expenses of sale in a foreclosure action.

(b) Motion; Time for Filing

A claim for attorneys' fees and related expenses under this Rule shall be made by written motion. Unless otherwise provided by statute or court order, the motion for attorneys' fees and related nontaxable expenses incurred through the date of judgment shall be filed within 15 days after the entry of judgment, unless a motion under Rule 2-532, 2-533, or 2-534 is filed, in which case, the motion for attorneys' fees and expenses may be filed or supplemented within 15 days after entry of an order disposing of the post-judgment proceeding. A motion for fees and expenses incurred in connection with an appeal, application for leave to appeal, or petition for certiorari shall be filed within 15 days after the mandate or order disposing of the appeal, application, or petition is filed. Unless the court, for good cause shown, excuses a failure to comply with the time requirement of this subsection, the court shall deny a motion that is not timely filed.

(c) Memorandum

(1) Time for Filing

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

(2) Contents

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

(A) the nature of the case;

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

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

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

(E) the claims not permitting fee-shifting;

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

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

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

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

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

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

(K) a listing of any expenditures for which reimbursement is sought;

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

(M) any additional factors that the attorney wishes to bring to the court's attention.

(3) Guidelines

If so ordered in a scheduling order entered under Rule 2-504, the memorandum shall be prepared in accordance with the Guidelines for Determining Attorneys' Fees and Related Expenses that are appended to these Rules.

(d) Bifurcation of Issues

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

(e) Response to Motion

Any response to a motion for attorneys' fees shall be filed no later than 15 days after service of the memorandum required by section (c) of this Rule, unless extended by court order.

(f) Stay Pending Appeal

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

(g) Informal Resolution

Before the court decides a claim for attorneys' fees, the court may (1) require

the parties to make a good faith effort to resolve any dispute, (2) refer the issue to an alternative dispute resolution process pursuant to Rule 17-103, and (3) hold a conference with the parties to discuss the matter. The conference may be held by telephone.

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

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

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

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

Section (b) is derived from Fed. R. Civ. P. 54 (d)(2)(B) and L. R. 109 2. a. For consistency with Maryland procedure, the time for filing the motion for attorneys' fees is changed from 14 to 15 days after the entry of a judgment, with a delayed filing or a supplement to the motion allowed within 15 days after entry of an order disposing of certain post-judgment proceedings. The procedure for requesting attorneys' fees in connection with an appeal, application for leave to appeal, or petition for certiorari also is modified for consistency with appellate procedure in Maryland. The "waiver" language of L. R. 109 2. a. is replaced by a provision allowing the court to deny a motion that was not timely filed unless the late filing is excused for good cause shown.

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

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

Subsection (c)(3) is derived from the last sentence of L. R. 109 2. b**, with the addition of a provision making the Guidelines applicable only if ordered in a scheduling order entered under Rule 2-504.**

Section (d) is derived from Fed. R. Civ. P. 54 (d)(2)(C), which permits bifurcation of the issues of entitlement to attorneys' fees and the amount of fees and expenses to be awarded.

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

Section (f) is added to comply with Maryland procedure.

Section (g) is added to facilitate resolution of the claims for attorneys' fees in an efficient manner.

AMEND Rule 2-504 to add to the permitted contents of a scheduling order a new subsection (b)(2)(I) pertaining to the Guidelines for Determining Attorneys' Fees and Related Expenses, 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.

(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) an order providing for the applicability of the Guidelines for Determining Attorneys' Fees and Related Expenses that are appended to these Rules; and

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

(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).

Rule 2-504 was accompanied by the following Reporter's Note.

In accordance with the introductory clauses of proposed new Rule 2-603.1 (c)(3) and section (a) of Appendix: Guidelines for Determining Attorneys' Fees and Related Expenses, Rule 2-504 is amended to add to the permitted contents of the scheduling order new subsection (b)(2)(I) pertaining to the Guidelines.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 600 - JUDGMENT

ADD new Rule 3-603.1, as follows:

Rule 3-603.1. ATTORNEYS' FEES AND RELATED EXPENSES

(a) Scope

This Rule applies to actions in which a party may be entitled, by law or contract, to reasonable attorneys' fees and related expenses, except that the Rule does not apply to:

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

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

(3) an action in which the attorneys' fees claimed do not exceed $5,000.

Committee note: This Rule does not apply to costs that are taxable under Rule 3-603. "Related expenses" are those related to the provision of legal services. See, e.g., Guideline (d) of the Guidelines for Determining Attorneys' Fees and Related Expenses that are appended to these Rules. "Related expenses" are not expenses that must be proved as part of the underlying action itself.

(b) Motion

A claim for attorneys' fees and related expenses under this Rule shall be made by written motion. The motion and any response thereto shall be made in accordance with the provisions of Rule 2-603.1, except that the time for filing the motion is as provided in section (c) of this Rule.

(c) Time for Filing

Unless otherwise provided by statute or court order, a motion for attorneys' fees and related expenses incurred through the date of judgment shall be filed within 15 days after the entry of judgment, unless a motion under Rule 3-533 or 3-534 is filed, in which case, the motion may be filed or supplemented within 15 days after entry of an order disposing of the post-judgment proceeding.

Source: This Rule is new.

Rule 3-603.1 was accompanied by the following Reporter's Note.

New Rule 3-603.1 is proposed to provide a procedure for claiming attorneys' fees and related expenses in certain types of actions in the District Court. The Rule is based on the procedures set forth in proposed new Rule 2-603.1.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-433 to add to sections (a) and (d) the words “costs and” before the word “expenses,” to add to section (d) a reference to Rule 2-434, to add a new section (e) pertaining to a memorandum in support of a motion requesting an award of costs and expenses and an award of attorneys’ fees, and to make stylistic changes, as follows:

Rule 2-433. SANCTIONS

(a) For Certain Failures of Discovery

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

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

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

(3) An order striking out pleadings or parts thereof, or staying further proceeding until the discovery is provided, or dismissing the action or any part thereof, or entering a judgment by default that includes a determination as to liability and all relief sought by the moving party against the failing party if the court is satisfied that it has personal jurisdiction over that party. If, in order to enable the court to enter default judgment, it is necessary to take an

account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any matter, the court may rely on affidavits, conduct hearings or order references as appropriate, and, if requested, shall preserve to the plaintiff the right of trial by jury.

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

(b) For Loss of Electronically Stored Information

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

(c) For Failure to Comply with Order Compelling Discovery

If a person fails to obey an order compelling discovery, the court, upon motion of a party and reasonable notice to other parties and all persons affected, may enter such orders in regard to the failure as are just, including one or more of the orders set forth in section (a) of this Rule. If justice cannot otherwise be achieved, the court may enter an order in compliance with Rule 15-206 treating the failure to obey the order as a contempt.

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

If a motion filed under ~~Rule 2-432 or under Rule 2-403~~ Rule 2-403, 2-432, or 2-434

is granted, the court, after opportunity for hearing, shall require the party or deponent whose conduct necessitated the motion or the party or the attorney advising the conduct or both of them to pay to the moving party the reasonable costs and expenses incurred in obtaining the order, including attorneys' fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of costs and expenses unjust.

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

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

(e) Memorandum Regarding Costs and Expenses, Including Attorneys' Fees

[Query: Does the language of section (e) work satisfactorily when the award of attorneys' fees is to be made to the person who opposed the original motion? See, e.g., the second paragraph of Rule 2-433 (d).]

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

(1) Costs and Expenses Other Than Attorneys' Fees

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

(2) Attorneys' Fees

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

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

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

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

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

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

(F) any additional factors that the moving party wishes to bring to the court's attention, including any applicable factor listed in the Guidelines for Determining Attorneys' Fees and Related Expenses that are appended to these Rules.

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

Section (e) is new.

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

In Rule 2-433, the Rules Committee recommends (1) the addition of the words "costs and" before the word "expenses" in sections (a) and (d); (2) the addition of a reference to "Rule 2-434" in section (d); and (3) a new section (e), which establishes a bifurcated procedure for determining whether costs, expenses, and attorneys' fees should be awarded as sanctions. The Committee believes that the issue of entitlement to the award should be decided first, so that the moving party does not have to prepare a full accounting or other documentation at the time the motion is filed. The memorandum containing an accounting and other materials pertaining to computation of an award need not be filed until 15 days after the court determines whether the party is entitled to the award.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

AMEND Rule 1-341 to make a stylistic change and to add a sentence pertaining to a memorandum in support of a motion, as follows:

Rule 1-341. BAD FAITH - UNJUSTIFIED PROCEEDING

In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification the

court may require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable ~~attorney's~~ attorneys' fees, incurred by the adverse party in opposing it. A memorandum in support of a motion filed for an award of costs and expenses shall comply with Rule 2-433 (e), and, unless otherwise ordered by the court, the memorandum shall be prepared in accordance with any applicable Guideline in the Guidelines for Determining Attorneys' Fees and Related Expenses that are appended to these Rules.

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

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

See the Reporter's note to Rule 2-433. The Committee recommends that a memorandum in support of a motion filed under Rule 1-341 be prepared in accordance with any applicable Guideline in the Guidelines for Determining Attorneys' Fees and Related Expenses.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 600 - JUDGMENT

AMEND Rule 2-603 (b) to require that a request for the assessment of certain costs be filed within a specified time, as follows:

Rule 2-603. COSTS

. . .

(b) Assessment by the Clerk

> The clerk shall assess as costs all fees of the clerk and sheriff, statutory fees actually paid to witnesses who testify, and, in proceedings under Title 7, Chapter 200 of these Rules, the costs specified by Rule 7-206 (a). On written request of a party filed within 15 days after the later of the entry of judgment or the entry of an order denying a motion filed under Rules 2-532, 2-533, or 2-534, the clerk shall assess other costs prescribed by rule or law. The clerk shall notify each party of the assessment in writing. On motion of any party filed within five days after the party receives notice of the clerk's assessment, the court shall review the action of the clerk.

. . .

Rule 2-603 was accompanied by the following Reporter's Note.

> Rule 2-603 (b) allows a party to file a written request that the clerk assess costs, other than fees of the clerk and sheriff, statutory fees paid to witnesses who testify, and costs specified under Rule 7-206 (a) in judicial reviews of decisions of administrative agencies. The Committee recommends that a request for the assessment of such other costs be made within 15 days after the entry of judgment or of an order denying a post-judgment motion.

The Chair explained that the Committee had previously approved the Appendix. The Style Subcommittee then raised some questions that were not about the structure of the Rule, but about the requirement that these Guidelines apply in almost any case in which the attorney's fee is over $5000. The Style Subcommittee had some concerns as to whether this was like "the tail wagging the dog." In Fed. R. Civ. Pro. 54, Judgment; Costs, which is the source of the Guidelines, they apply only to civil

rights and discrimination cases. In Local Rule 109 of the United States District Court for the District of Maryland, the Guidelines do not apply outside of these two items. Those present at the Attorneys' Subcommittee meeting were focusing on this. These cases arise in state courts, as well, and these Guidelines should apply. It ended up that the Guidelines applied across the board, and the issue is whether this is good policy.

The Style Subcommittee had discussions with Mr. Brault, and they thought that the better policy is that if the Guidelines are to apply, particularly because of the quarterly reports required throughout the litigation, this should be in the scheduling order pursuant to Rule 2-504, Scheduling Order. Everyone will know up front that the case involves the Guidelines. That decision can be made at the beginning of the litigation. However, the Guidelines should not be categorically applied to every case with fees over $5000. The Guidelines, which have already been adopted, are back before the Committee to reconsider the mandated use of the Guidelines unless it is in a scheduling order, or the judge orders it in a particular case.

Mr. Klein commented that the Discovery Subcommittee had wrestled with the same issues. It may be helpful to recap what the Guidelines mean. They could arguably be in several documents, but the federal Guidelines are rolled into one document. It is important to recognize the buckets of activity. Some of the findings apply in every case, but others, such as quarterly reporting, should be a conscious decision, and not just

a default. There is a requirement that when items are produced for the court or for the other parties, the information is to be organized in litigation phase format. This puts all of the time related to discovery collected in one place, so that people can see whether the overall fee is reasonable or not for this type of activity. Federal courts often do this in bankruptcy cases, to find out where the activity has been. It forces the person requesting the fee to organize the information for the ease of the other parties and for the court to analyze it. The Guidelines also require the quarterly reports, referred to by the Chair. These keep up with the running total of where the time has been spent. The third item required is what is reasonably charged. Is it necessary to have two attorneys at a trial, hearing, or deposition? What are reasonable copying costs? What is considered reasonable for these items? There are exceptions to this.

Mr. Klein said that he could understand why the court would not want to order all of the litigation phase analysis and quarterly reporting in every case. If one attorney is considered reasonable and two is not, it is not necessary to have a court order in every case to impose this limitation. There are three categories of cases to which these Guidelines may or may not apply. One is Rule 2-603, Costs, where a motion is filed after a judgment, and there is a very narrow area which is discovery disputes, Rule 2-433, Sanctions. The Chair pointed out that this Rule has its own format. Mr. Klein remarked that the Rule

provides that certain actions are required, and if there is any other factor in the Guidelines, this must be brought to the court's attention. For example, the attorney would explain why it was necessary that two attorneys were present at the deposition. Including quarterly reporting in Rule 2-433 made no sense. The Rule does not state that the Guidelines apply, but it provides that if someone wants to cite a factor in the motion provided for in the Guidelines, it is allowed. The third area of activity is Rule 1-341, Bad Faith - Unjustified Proceeding, which provides that unless a court orders otherwise, the Guidelines do apply.

The Chair suggested that if these issues should be separated out, the Rules will have to go back to the Subcommittee. The Style Subcommittee brought up the question of whether the factors listed in the Rule apply when a judge says that they will apply, or whether they should apply unless the judge says that they are not going to apply. Mr. Klein asked about these factors. Does a judge have to state in every case that no more than one attorney should attend a deposition? The Chair responded that this is part of the Guidelines, but it is also how one calculates travel time -- how it breaks down. The Guidelines are appropriate for the federal discrimination and civil rights cases, as well as environmental cases. Is it appropriate for a wage payment case in the Maryland circuit court? The Vice Chair asked if it is appropriate for a breach of lease case. Mr. Brault suggested that to address Mr. Klein's concern, the Guidelines could state:

"If ordered by the court in the scheduling order entered under Rule 2-504, these Guidelines or any part thereof so ordered apply." Mr. Klein responded that the Guidelines are troublesome. However, there seems to be a sense that since there are federal Guidelines, Maryland should have something similar. His impression was that judges are not sure what is fair to charge for. The Chair agreed, noting that there are cases, including a particular one in Montgomery County before the Honorable Michael D. Mason that was protracted, and one in Baltimore County that was before the Honorable Susan Souder three times, and these were similar to federal cases with huge attorneys' fees. Much of the work in the cases was done by more than one attorney. The thought was that it would be helpful for the judges to be able to refer to the Guidelines.

Mr. Maloney suggested that it would be difficult to come up with Guidelines that are "one size fits all" as to when they apply. It is going to be different for every case. It will depend on the size, complexity, and sophistication of the case. The Rule should simply state that on motion of a party, the court may excuse any part or all of the Guidelines at any time based on the sophistication or complexity of the case and on any other factor. He did not think that there should be a reference to Rule 2-504, because none of the scheduling order forms now refer in any way to the issue of attorneys' fees. The culture of the scheduling order will not accommodate this. The issue of attorneys' fees usually arises much later than the time of the

scheduling order.

The Chair commented that one would know in any case where fee-shifting is expressly permitted, either under a statute or by contract, that there is going to be a claim for attorneys' fees. Mr. Maloney reiterated that current scheduling order practice makes no reference to attorneys' fees. Mr. Brault remarked that scheduling orders are amended frequently. The Guidelines do not refer to the initial scheduling order, they refer to "a scheduling order." The Chair referred to the comment about allowing the judge to excuse the Rule itself. This may be a problem. The value of the text of the Rule, aside from the application and the Guidelines, is that it sets out a procedure for when one can ask for the fees and ask how to go about getting them. This could be helpful in any case. It also helps with the question of jurisdiction.

Mr. Howard observed that one place where there is a need for these Guidelines in State courts is cases where there have been federal 42 U.S.C. § 1983 claims. The Office of the Attorney General in Maryland has seen these cases. Something comparable to the local federal rules is needed. The Maryland Attorney General has argued that the Guidelines of the U.S. District Court ought to be borrowed. The Chair recalled that at the first Subcommittee meeting, the participants felt that those were the kind of cases for which the Guidelines were needed. The question is to what extent they are needed beyond this kind of case.

Mr. Brault commented that when the Rules were amended in the

mid-1980's, the idea was not to differentiate state practice from federal practice very much. The Vice Chair added that this would be the case unless there is good reason to do so. Mr. Brault said that when this issue came up, all of the attorneys with a civil rights practice, who came to the Subcommittee meeting, stated that they applied the federal Guidelines, because none existed in Maryland. It did not seem to be a good idea to reinvent the wheel. It would be better to address only the aspects that are different from the federal ones. The language "or any part so ordered" could be added after the word "Guidelines" and before the word "apply" in the first sentence of section (a) of the Guidelines. Many of the scheduling orders are entered by the courts, and some are entered by computers. In a complicated case, normally, the attorneys get together and work on the scheduling order. There could be a problem with a case having two attorneys, although Mr. Brault has been counsel in cases where all of the parties have two attorneys. In a case such as one in which he is counsel that has 100,000 business records, the court can decide that a portion of the Guidelines does not apply. The attorneys would all agree. It can be tailored by a scheduling order or an amended scheduling order. The idea of getting the information up front in discovery, as Mr. Klein had noted, would mean that everyone would know what the amount of the attorneys' fees is.

Mr. Maloney suggested that the Guidelines begin as follows "[if] ordered by the court in a scheduling order or

otherwise...". In Montgomery County, the scheduling orders are all on a specific computer program. If someone wants the attorneys' fees listed in the scheduling order, the clerk's office would respond that it is not in the computer program. This will be the problem statewide. The Chair said that Rule 2-504 provides that certain items shall be in the scheduling order and certain items may be. Mr. Maloney observed that the computer is driving the process and not the Rule. It will be a major cultural change around the State to get people to change the format of their scheduling order. The Guidelines should add the language "in a scheduling order or otherwise ordered by the court...". The Vice Chair agreed with Mr. Maloney that the reference to attorneys' fees should not be in the scheduling order. She also agreed with Mr. Brault as to the general policy that state practice should not be differentiated from federal practice as much as possible unless there was a good reason for deviating. The Guidelines deviate hugely from the federal rule. The federal rule refers to asking for attorneys' fees post-judgment. If the Maryland Rule were like the federal rule, she would be in favor of it, because the only time that an attorney has to go through the requirements of the Guidelines is in civil rights and discrimination cases. Otherwise, if there is a post-judgment motion for attorneys' fees, one has to set out where he or she prevailed and where he or she did not prevail. The Vice Chair expressed the view that the Guidelines overly complicate the entire circuit court practice.

Mr. Howard said that he was not clear as to what happens when there are situations with federal claims that generate protracted cases. Is there a need to do something? The Chair replied that there are two purposes of the Guidelines. One is to set out a clear procedure that is uniform as to how to ask for and contest the award of attorneys' fees. It might be helpful even if there is no reference to the Guidelines. The next issue is what one has to do to define the claim and when it should be done. Mr. Maloney commented that in fee-shifting contract cases, the prevailing party is entitled to the fees. Judge Mason's letter indicated a disparity among circuit court judges on the issue of whether one needs an expert to testify as to the fairness and reasonableness of the fees, whether they are causually related to the cause of action, and what is commonly charged in the community. The practice is all over the place on these questions. The Chair added that there is the open question of whether an attorney can get fees for preparing fee schedules. If the Guidelines apply, the fees would be substantial.

Mr. Brault said that he recently learned that the Court of Appeals has taken certiorari in three attorney fee-shifting cases. The opinions that will be issued will answer many of the questions that have been put forth today. The three cases involve a homeowner association fee, subsequent liens against title, and actions for money judgment based on the amount due. He read from the lead case that the Court is considering whether the District Court of Maryland abused its discretion when it

awarded attorneys' fees based upon a percentage of the principal sought, a practice that it consistently employs in each case coming before it, whether the District Court of Maryland abused its discretion when it refused to consider any attorneys' fees incurred by the petition when it created a lien against the respondents, and whether the circuit court abused its discretion when it refused to award any attorneys' fees incurred on the appeal of the matter despite having ruled that the attorneys' fees were reasonable. Another case had the issue of fees on fees and whether the court abused its discretion not allowing fees. The Court will have to discuss many matters. One issue in the homeowner association case involves the District Court judge who treated the fee as a debt collection, applying the ethical rules. Mr. Brault stated that every debt collection he knew about in the State was on a contingent fee basis. The homeowners claimed that they had filed a lien, so that puts the case into the context of real estate title work. The Court will have to determine the appropriateness of that argument. The cases may arise out of foreclosure problems. Many homes are being foreclosed upon, and many homeowner's fees are involved. Once the foreclosure sale takes place, the homeowners get wiped out, and the attorneys do not get their fees.

The Chair commented that when the foreclosure rules were being discussed by the Committee, the foreclosure attorneys all agreed that they are limited to fees of $800 in any transactions involving the Federal National Mortgage Association (Fannie Mae),

the Federal Home Loan Mortgage Corporation (Freddie Mac), and the Federal Housing Administration (FHA). Mr. Brault noted that fee-shifting has many applications. The goal was to generally follow the federal Guidelines, so that there will not be two different practices. The Vice Chair expressed the opinion that the Maryland Guidelines are not that similar to the federal ones. She added that she was comparing the Maryland Guidelines to section 2. of Local Rule 109. Mr. Maloney suggested that the Guidelines may have to be remanded to the Subcommittee.

The Vice Chair inquired whether the Rules before the Committee today were to be made more or less consistent with the local federal court Rule. The Guidelines are for post-judgment attorneys' fees. How to get the fees are set forth in sections 2.a and b. of Local Rule 109, and then the last sentence of section b. provides that any motion for attorneys' fees shall be prepared in accordance with the Guidelines. The proposed Maryland Guidelines are more complicated to apply. She recently tried a case in which she represented the property owner, and the tenant was a gasoline station. The case was about whether the gas station operator had contaminated the property. Her view was that if the operator did contaminate the property, the owner is indemnified for all attorneys' fees, expenses, etc. She treated this as part of her damages case and presented all of the attorneys' fees in connection with the case itself. What falls within Rule 2-603.1, Attorneys' Fees and Related Expenses, and what falls outside of it is not perfectly clear. However, the

federal rule is clear.

Mr. Klein referred to Local Rule 109, which states that the Guidelines only apply to civil rights and discrimination cases. What is being proposed is that the Guidelines in Maryland could apply to any type of case. The Vice Chair added that the Guidelines could have applied to the case to which she had just referred, and it would have been very difficult to comply with them. Mr. Klein noted that if the language of Rule 2-603.1 would provide that the Guidelines apply in civil rights and discrimination cases, it would be much simpler. The Vice Chair remarked that if the part of the Guidelines referring to one attorney and the deposition would be absolute guidelines which use the words "should" and "may" as opposed to the word "shall," she would agree with adopting them. They currently are not written like guidelines. She would agree to those Guidelines applying to all attorneys' fees cases, so that they are there for the judge to use to the extent that they are helpful to the judge without the reference to format or putting the information in a certain way in all cases.

Mr. Klein pointed out that the Guidelines do three things: they specify a certain style of organizing the data, they impose quarterly billing requirements, and in the last section, they indicate what is reasonable and what is not. Judge Pierson asked if the thought is that Rule 2-603.1, which has some prescriptive content as well as requirements regarding time, is not necessary. The Vice Chair responded that Rule 2-603.1 pertains to how one

gets attorneys' fees post-judgment. She would agree to the Rule, if it were the same as the federal rule.

Judge Pierson expressed the opinion that Rule 2-603.1 should not be limited to civil rights and other narrow categories of cases. One of the problem judges have had is that people do not know when to apply for fees, and they do not know what information to include. Applications are coming in all sorts of different times with all sorts of different content. Mr. Klein said that to the extent that quarterly reporting and the litigation format is required, this would apply to civil rights cases, but the Guidelines as to reasonableness would apply in all cases, as well as the requirement that this procedure should be followed for all post-trial cost collection. The Chair commented that the discussion is referring to cases where what is permitted either by the statute or by the contract are reasonable fees. If the statute or the contract either sets a fee or provides a formula calculating it –- so the attorney gets 15% or $300 -- the Guidelines do not apply. They apply only where the standard for determining the fee is whether the fee is reasonable. The question is how is this to be presented. In other cases, the Court of Appeals has set out what the basic standards are for determining reasonableness. The Guidelines provide how one presents this, and to some extent, what one can charge. The problem is that this covers a wide variety of cases, because almost all of the Maryland statutes that permit fee-shifting permit reasonable fees, but this is not defined.

The Vice Chair remarked that in her case, an expert was brought in to testify that the fees were reasonable. She moved that there should be a post-judgment rule relating to attorneys' fees, including what has to be in the motion and when it has to be filed. The Guidelines would only pertain to section (c) in the Appendix. They should be clearly guidelines, so that the court has discretion to take them into account to determine what is reasonable. Full compliance with the requirements to put this into a certain format should only apply in the same class of cases that the federal Guidelines do. Ms. Potter seconded the motion.

Mr. Michael observed that if Judge Mason were present, he would say that the prophylactic problem of sending these quarterly statements would be lost in that approach. The idea is to let the litigants know what they are getting into with the hope that they might be willing to discuss settlement. If this is done post-judgment, it may not work. The Chair responded that something could be added to the scheduling order. An attorney has to file an information report that will lay out what the case is about, how long it will take to try, etc. Those cases will have scheduling orders. If the case is going to go on for a year, then quarterly reports may make sense.

Mr. Maloney suggested that if this is going to be included in the Guidelines, then Rule 2-504 should be amended as well to require it; otherwise, it will not get done. Ms. Potter pointed out that the information sheets do not have a box to check off

pertaining to lodestar or attorneys' fees. In Anne Arundel and Prince George's Counties, scheduling conferences are no longer held. The information sheet is filed, and then the clerk prints out an order. If it is a fee-shifting case, a good defense attorney who has a damage question will include interrogatories that ask about attorneys's fees.

The Vice Chair commented that if the attorneys' fees are part of the damages and they are being proved during trial, the Guidelines would not apply. Mr. Brault agreed with the Vice Chair. The Vice Chair noted that the federal rule makes this perfectly clear, because it only applies to fees sought after judgment. Ms. Potter remarked that if the court puts this into the scheduling order, then this would make it apply when it usually would not apply. The Chair recalled that when the information reports were created, most of the county administrative judges tried to come up with a new form of the report to make it uniform. However, everyone seemed to want the reports a different way. One preferred to base the report on trial time, estimating how many days the case would take to try, and this would determine what track the case would be on. Others were doing this based on how much is at issue. He asked Judge Hotten if the circuit administrative judges have ever gotten together since then to develop a uniform form. Judge Hotten answered that she was not aware of this. Mr. Maloney added that the forms still vary by county. The Chair noted that Baltimore City may need to address lead paint cases in a separate

category. But it may well be that the information report should require a statement that would ask: "Are you going to be requesting fees under a fee-shifting statute or contract?" Then the scheduling order is issued.

The Vice Chair noted that her view of scheduling orders is that they are for the purpose of telling the attorney how long he or she has for discovery and when he or she has to designate the experts. The forms are not used the way they were intended to be used, which was to look at the case and figure out what kind of case it is. The Chair recalled that when the scheduling orders were before the Committee, their initial view was to have a scheduling order and to require scheduling conferences in certain cases. He remembered that Judge Kaplan had previously made the comment that Baltimore City could not handle this requirement because of the volume of cases. The Committee backed off from requiring the conferences. The thought was that Rules 2-504 and 2-504.1, Scheduling Conference, would go together. There would be a scheduling conference that would result in a scheduling order. The way the proposed fee-shifting Rule is structured now, it applies the Guidelines in every case but those where it has specifically been excepted, such as where the fee is set.

The Style Subcommittee's view was that this was too broad. They had remanded it to the Committee to find a way to limit the scope of the Rule to the cases where it would have value, but it would not be imposed in every case. The Vice Chair explained that her motion is to tailor this like the federal system. The

application of the Guidelines would be limited to post-judgment motions for attorneys' fees and other expenses. The Rule would state when the request for fees has to be filed, what it has to include, and in certain cases, that the reports would have to be filed in the necessary format. Her idea was that section (c) of the Guidelines would be in the Appendix to be applicable whenever it is appropriate as set out in the federal Guidelines. The Chair added that in federal court they apply only in civil rights and discrimination cases.

Mr. Brault read from footnote 1 of Appendix B, Rules and Guidelines for Determining Attorneys' Fees in Certain Cases, as follows: "These rules and guidelines apply to cases in which a prevailing party would be entitled, by applicable law or contract, to reasonable attorneys' fees based on a set of criteria including hours and rates." He said that he had always interpreted this to mean that it applies to civil rights, statutory fee-shifting, and contract fee-shifting cases. The Vice Chair acknowledged what Mr. Brault had said, but she pointed out that Local Rule 109 2 b. states: "Any motion for attorneys' fees in civil rights and discrimination cases shall be prepared in accordance with the Rules and Guidelines for Determining Attorneys' Fees in Certain Cases that are an appendix to these Rules." This is the only time the Guidelines apply. Mr. Brault noted that the Rule does not provide that no other claim can be made. The Vice Chair agreed that the lines are not drawn clearly when the footnote is considered. Mr. Klein added that this

conflict is probably because there were two different sets of drafters. The Vice Chair agreed, but she remarked that the language of the Rule itself is clear.

Judge Pierson said that he was personally opposed to the Guidelines, because he is opposed to the quarterly requirements. This is a trap for the unwary. It is not sensible to state that the Guidelines apply only to civil rights and discrimination cases; it makes more sense to state that they will apply if the court orders that they will apply. There may not need to be a scheduling order entered under Rule 2-504, but the limitation should be to cases where the court directs that they apply. Mr. Klein suggested a hybrid version that would state that section (c) of the Guidelines applies in every case, and the requirements of quarterly reporting and litigation phase format, which is section (b), apply on motion of a party and on order of the court. It would force someone contemplating how to deal with the fees to think about whether the Guidelines are a good idea for the case. The Chair commented that there are many permutations of this. It may be that because there are more fee-shifting cases in State courts than in U.S. District Court, there is a broader spectrum to consider. The Committee could consider that if fee-shifting is going to be requested, it should be on the information report. The Rule could require that if fee-shifting is in play, the court should consider it in a scheduling order. All or part of the Guidelines can be required. It may be better to address whether two attorneys are needed in the case at the

outset, and not much later in the case retrospectively.

The Vice Chair expressed her preference that the request be on motion of a party, so that it gets presented to a judge with reasons. Her fear is that if it goes into the scheduling order, it will be one more form included without anyone having given any real thought to whether it is appropriate or inappropriate. The Chair asked if in the Vice Chair's suggested motion to which she just referred a time will be included for filing the motion. The Vice Chair replied in the negative, adding that it can be filed at any time during the case. Mr. Brault asked what would happen if it were filed right at the end of the case, and the attorney has not notified the other side.

Mr. Maloney suggested that Rule 2-603.1 be remanded to the Subcommittee. Mr. Klein remarked that the Discovery Subcommittee needs to be part of the discussion, because of the other Rules in the package. The Chair suggested another alternative. This subject obviously involves the Attorneys Subcommittee. It also involves trial practice and may involve discovery. The best way to handle this is to form a special subcommittee on fee-shifting with representatives from the different subcommittees. By consensus, the Committee agreed with this suggestion.

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