COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in the Judicial Education and Conference Center, Training Rooms 5 and 6, 2011-D Commerce Park Drive, Annapolis, Maryland on September 8, 2011.

Members present:

Hon. Alan M. Wilner, Chair

F. Vernon Boozer, Esq.
Albert D. Brault, Esq.
James E. Carbine, Esq.
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Robert R. Michael, Esq.
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Scott G. Patterson, Esq.
Hon. W. Michel Pierson
Debbie L. Potter, Esq.
Kathy P. Smith, Clerk
Sen. Norman R. Stone, Jr.
Steven M. Sullivan, Esq.
Del. Joseph F. Vallario, Jr.
Hon. Robert A. Zarnoch

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Kara K. Lynch, Esq., Assistant Reporter
Marjorie Corwin, Esq.
Vicki King Taitano, Esq., Legal Aid Bureau, Inc.
Hon. Sheila R. Tillerson Adams
Hon. Thomas P. Smith
John Hurst
Hon. Dorothy Wilson
Lorig Charkoudian
Jonathan Rosenthal, Esq.
David A. Simison, Esq.
Anne Balcer Norton, Esq., Deputy Commissioner of Financial Regulation, DLLR
Richard Montgomery, Esq., Maryland State Bar Association
Mala Malhotra-Ortiz, Esq.
Connie Kratovil-Lavelle, Esq., Administrative Office of the Courts
Ms. Amy Womaski
Mr. Richard Bohn
Jennifer K. Cassel, Esq., Circuit Court for Anne Arundel County
Rachel Wohl, Esq., Executive Director, Maryland Mediation and Conflict Resolution Office

The Chair convened the meeting. He welcomed everyone and said that there were two preliminary matters. He told the Committee that he wanted to introduce and extend a formal welcome to three new members: James E. Carbine, Esq., who was no stranger to the Rules Committee; Robert R. Bowie, Jr., who was unable to attend because his house was flooded from the past few days of heavy rain; and Steven M. Sullivan, Esq, who is Chief of the Civil Litigation Unit of the Office of the Attorney General.

The Chair said that the other matter was to inform the Committee that a lengthy hearing, which lasted for almost four hours, took place at the Court of Appeals yesterday. The Court had considered two reports. One was a supplement to the 168th Report pertaining to Rule 4-332, Writ of Actual Innocence. The Committee had sent up two alternatives of that Rule to the Court. One was the version that the Public Defender had requested, which consisted basically of the statutory language and nothing else. An alternative version addressed two issues associated with the Rule that will have to be resolved at some point. One is whether the newly discovered evidence has to be admissible, and the other is whether there could be a petition for a writ of actual innocence based on a conviction stemming from a good guilty plea. The Committee took no real position, believing that both or either would be acceptable.

The Court opted for the simple version of the Rule, the one proposed by the Public Defender, which consisted of the statutory language, understanding that they would address these two issues

and probably a few more if and when they arise in the judicial context.

The Chair said that the major part of the hearing at the Court pertained to the 171st Report, which among other items, had in it the Rules pertaining to judgments on affidavits for the District Court. All of the Rule proposals in the 171st Report were adopted as presented. The Court made no changes to the Rules. The Rules pertaining to judgments on affidavit and most of the other Rules will take effect January 1, 2012 with several exceptions. One was Rule 16-101, Administrative Responsibility, the request by the Circuit Court for Baltimore City to permit the administrative judge to delegate postponement authority in criminal cases to one judge in the Mitchell courthouse and one judge in Courthouse East. This will take effect on October 1, 2011. The other was Rule 16-714, Disciplinary Fund, and this will also take effect on October 1, 2011. Nothing is now pending for the Committee in the Court of Appeals.

Agenda Item 1. Consideration of proposed amendments to: Rule 14-207 (Pleadings; Service of Certain Affidavits, Pleadings, and Papers), Rule 14-209 (Service in Actions to Foreclose On Residential Property; Notice), [Note: The amendments to Rule 14-209 are proposed as an alternative to adding "and (f)" to Rule 14-207 (b)(8)], Rule 14-209.1 (Owner-Occupied Residential Property), and Rule 14-211 (Stay of the Sale; Dismissal of Action)

Ms. Ogletree told the Committee that they would be considering the latest version of proposed changes to the Rules pertaining to mortgage foreclosures to implement changes made by

the legislature. The legislative changes were effective June 1, 2011, so the Rules would have to be addressed quickly to keep pace.

Ms. Ogletree presented Rule 14-207, Pleadings; Service of Certain Affidavits, Pleadings, and Papers, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-207 to add a cross reference following subsection (b)(1) regarding a lost note affidavit in an action to foreclose a lien on residential property, to amend subsection (b)(5) to conform to the amendment to Code, Real Property Article, §7-105.1 (d)(2)(v), to add to subsection (b)(8) a reference to Code, Real Property Article, §7-105.1 (f), and to add a cross reference following subsection (b)(8) regarding the form and sequence of documents accompanying an order to docket or complaint to foreclose, as follows:

Rule 14-207. PLEADINGS; SERVICE OF CERTAIN AFFIDAVITS, PLEADINGS, AND PAPERS

(a) Pleadings Allowed

(1) Power of Sale

An action to foreclose a lien pursuant to a power of sale shall be commenced by filing an order to docket. No process shall issue.

(2) Assent to a Decree or Lien Instrument With No Power of Sale or Assent to a Decree

An action to foreclose a lien pursuant to an assent to a decree or pursuant to a lien instrument that contains neither a power of sale nor an assent to a decree shall be commenced by filing a complaint to foreclose. If the lien instrument contains an assent to a decree, no process shall issue.

(3) Lien Instrument with Both a Power of Sale and Assent to a Decree

If a lien instrument contains both a power of sale and an assent to a decree, the lien may be foreclosed pursuant to either.

(b) Exhibits

A complaint or order to docket shall include or be accompanied by:

(1) a copy of the lien instrument supported by an affidavit that it is a true and accurate copy, or, in an action to foreclose a statutory lien, a copy of a notice of the existence of the lien supported by an affidavit that it is a true and accurate copy;

Cross reference: See Code, Real Property Article, §7-105.1 (d-1) concerning the contents of a lost note affidavit in an action to foreclose a lien on residential property.

(2) an affidavit by the secured party, the plaintiff, or the agent or attorney of either that the plaintiff has the right to foreclose and a statement of the debt remaining due and payable;

(3) a copy of any separate note or other debt instrument supported by an affidavit that it is a true and accurate copy and certifying ownership of the debt instrument;

(4) a copy of any assignment of the lien instrument for purposes of foreclosure or deed of appointment of a substitute trustee supported by an affidavit that it is a true and accurate copy of the assignment or deed

of appointment;

(5) an affidavit with respect to any defendant who is an individual that is in compliance with §521 of the ~~the individual is not in the military service of the United States as defined in the~~ Servicemembers Civil Relief Act, 50 U.S.C. app. §501 et seq.; ~~or that the action is authorized by the Act;~~

(6) a statement as to whether the property is residential property and, if so, statements in boldface type as to whether (A) the property is owner-occupied residential property, if known, and (B) a final loss mitigation affidavit is attached;

(7) if the property is residential property that is not owner-occupied residential property, a final loss mitigation affidavit to that effect;

(8) in an action to foreclose a lien instrument on residential property, to the extent not produced in response to subsections (b)(1) through (b)(7) of this Rule, the information and items required by Code, Real Property Article, §7-105.1 (d) and (f), except that (A) if the name and license number of the mortgage originator and mortgage lender is not required in the notice of intent to foreclose, the information is not required in the order to docket or complaint to foreclose; and (B) if the mortgage loan is owned, securitized, insured, or guaranteed by the Federal National Mortgage Association, Federal Home Loan Mortgage Corporation, or Federal Housing Administration, or if the servicing agent is participating in the federal Making Home Affordable Modification Program (also known as "HAMP"), providing documentation as required by those programs satisfies the requirement to provide a description of the eligibility requirement for the applicable loss mitigation program; and

Committee note: Subsection (b)(8) of this Rule does not require the filing of any information or items that are substantially similar to information or items provided in

accordance with subsections (b)(1) through (b)(7). For example, if a copy of a deed of appointment of substitute trustee, supported by an affidavit that it is a true and accurate copy, is filed, it is not necessary to file the original or a clerk-certified copy of the deed of appointment.

Cross reference: For the required form and sequence of documents, see Code, Real Property Article, §7-105.1 (f)(1) and COMAR 09.03.12.01 et seq.

(9) in an action to foreclose a land installment contract on property other than residential property, an affidavit that the notice required by Rule 14-205 (c) has been given.

Cross reference: For statutory "notices" relating to liens, see, e.g., Code, Real Property Article, §14-203 (b).

Committee note: Pursuant to subsections (b)(7) and (8) of this Rule, a preliminary or final loss mitigation affidavit must be filed in all actions to foreclose a lien on residential property, even if a loss mitigation analysis is not required.

(c) Service of Certain Affidavits, Pleadings, and Papers

Any affidavit, pleading, or other paper that amends, supplements, or confirms a previously filed affidavit, pleading, or other paper shall be served on each party, attorney of record, borrower, and record owner in accordance with the methods provided by Rule 1-321, regardless of whether service of the original affidavit, pleading, or paper was required.

Committee note: This Rule prevails over the provision in Rule 1-321 (a) or any other Rule that purports, where a party is represented by an attorney, to permit service on only the attorney. This Rule requires service on both.

Source: This Rule is derived in part from

the 2008 version of former Rule 14-204 (a) and (c) and is in part new.

Rule 14-207 was accompanied by the following Reporter's note.

The proposed amendments to Rule 14-207 stem from Chapter 355, Laws of 2011 (HB 728) and Chapter 478, Laws of 2011 (HB 412), which amend Code, Real Property Article, §7-105.1.

A cross reference to Code, Real Property Article, §7-105.1 (d-1) is added following subsection (b)(1). This section of the statute was added by Chapter 478 and sets forth the circumstances under which a court may accept a lost note affidavit in lieu of a copy of the debt instrument in an action to foreclose a lien on residential property.

An amendment is added to subsection (b)(5) regarding the Servicemembers Civil Relief Act (the "Act"). The amendment to subsection (b)(5) tracks the new language in Code, Real Property, §7-105.1 (d)(2)(v), which cites a specific section of the Act and changes the language "authorized by the Act" to "in compliance with [the Act]."

Chapter 355 amends Code, Real Property Article, §7-105.1 (f) to require that the grantor or mortgagor be served with a copy of the order to docket or complaint to foreclose on residential property and all other papers filed with it "in the form and sequence adopted by the Commissioner of Financial Regulation, accompanied by the documents required under paragraphs (2), (3), and (4) of this subsection...."

The amendment to Rule 14-207 (b)(8) requires that the additional documents listed in paragraphs (2), (3), and (4) of section (f) of the statute accompany the order to docket or complaint to foreclose. The amendment to subsection (b)(8) therefore requires that the additional documents not only be served upon the grantor or mortgagor,

but also be filed with the court.[1]

A cross reference to the statute and the regulations adopted by the Commissioner of Financial Regulation is proposed following subsection (b)(8). The relevant regulations will become effective on October 25, 2011.

Ms. Ogletree explained that with one exception, the proposed changes to Rule 14-207, conform to the legislation. The first change was a cross reference that is to be added after subsection (b)(1). It references the new statutory requirements for a lost note affidavit. The second change was in subsection (b)(5) of Rule 14-207 to comply with subsection (d)(2)(v) on page 7 of the statute. This provision of the Rule picks up the statutory language. Another change was in subsection (b)(8). Rule 14-207 would require that all of the extra documents be filed with the court and served on the mortgagor. Jeffrey Fisher, Esq. had asked if the documents have to be filed with the court. This was why section (f) of the statute was referenced. The fourth change was the proposed addition of a cross reference after subsection (b)(8). The cross reference is to Code, Real Property Article, §7-105.1 (f)(1) and COMAR 09.03.12.01 et seq., because the statute now requires that certain documents be served in a specified form and sequence. The question is whether the required information should be filed with the court in the same sequence. This issue is related to the one already raised by Mr.

[1] See Rule 14-209 for an alternative approach, which does not require the additional documents to be filed with the court.

Fisher, and he recommended that the Committee consider the alternative in Rule 14-209. Other than this change, the rest are simply conforming changes. The Chair asked if anyone had any comments concerning Rule 14-207. There being none, Rule 14-207 was approved as presented.

Ms. Ogletree presented Rule 14-209, Service in Actions to Foreclose on Residential Property; Notice, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-209 to conform to the amendment to Code, Real Property, §7-105.1 (f) by adding to sections (a) and (b) the requirement that additional papers be served on the borrower and record owner, as follows:

Rule 14-209. SERVICE IN ACTIONS TO FORECLOSE ON RESIDENTIAL PROPERTY; NOTICE

(a) Service on Borrower and Record Owner by Personal Delivery

[This is an alternative approach to adding "and (f)" to Rule 14-207 (b)(8)]

When an action to foreclose a lien on residential property is filed, the plaintiff shall serve on the borrower and the record owner a copy of all papers filed to commence the action <u>in the form and sequence as prescribed by regulations adopted by the Commissioner of Financial Regulation, accompanied by the documents required under Code, Real Property Article, §7-105.1 (f)</u>.

Service shall be accomplished by personal delivery of the papers or by leaving the papers with a resident of suitable age and discretion at the borrower's or record owner's dwelling house or usual place of abode.

(b) Service on Borrower and Record Owner by Mailing and Posting

[This is an alternative approach to adding "and (f)" to Rule 14-207 (b)(8)]

If on at least two different days a good faith effort was made to serve a borrower or record owner under section (a) of this Rule and service was not successful, the plaintiff shall effect service by (1) mailing, by certified and first-class mail, a copy of all papers filed to commence the action in the form and sequence as prescribed by regulations adopted by the Commissioner of Financial Regulation, accompanied by the documents required under Code, Real Property Article, §7-105.1 (f), to the last known address of each borrower and record owner and, if the person's last known address is not the address of the residential property, also to that person at the address of the property; and (2) posting a copy of the papers in a conspicuous place on the residential property. Service is complete when the property has been posted and the mailings have been made in accordance with this section.

(c) Notice to All Occupants by First-Class Mail

When an action to foreclose on residential property is filed, the plaintiff shall send by first-class mail addressed to "All Occupants" at the address of the property the notice required by Code, Real Property Article, §7-105.9 (b).

(d) If Notice Required by Local Law

When an action to foreclose on residential property is filed with respect to

a property located within a county or a municipal corporation that, under the authority of Code, Real Property Article, §14-126 (c), has enacted a local law requiring notice of the commencement of a foreclosure action, the plaintiff shall give the notice in the form and manner required by the local law. If the local law does not provide for the manner of giving notice, the notice shall be sent by first-class mail.

(e) Affidavit of Service, Mailing, and Notice

(1) Time for Filing

An affidavit of service under section (a) or (b) of this Rule, mailing under section (c) of this Rule, and notice under section (d) of this Rule shall be filed promptly and in any event before the date of the sale.

(2) Service by an Individual Other than a Sheriff

In addition to other requirements contained in this section, if service is made by an individual other than a sheriff, the affidavit shall include the name, address, and telephone number of the affiant and a statement that the affiant is 18 years of age or older.

(3) Contents of Affidavit of Service by Personal Delivery

An affidavit of service by personal delivery shall set forth the name of the person served and the date and particular place of service. If service was effected on a person other than the borrower or record owner, the affidavit also shall include a description of the individual served (including the individual's name and address, if known) and the facts upon which the individual making service concluded that the individual served is of suitable age and discretion.

(4) Contents of Affidavit of Service by

Mailing and Posting

An affidavit of service by mailing and posting shall (A) describe with particularity the good faith efforts to serve the borrower or record owner by personal delivery; (B) state the date on which the required papers were mailed by certified and first-class mail and the name and address of the addressee; and (C) include the date of the posting and a description of the location of the posting on the property.

(5) Contents of Affidavit of Notice Required by Local Law

An affidavit of the sending of a notice required by local law shall (A) state (i) the date the notice was given, (ii) the name and business address of the person to whom the notice was given, (iii) the manner of delivery of the notice, and (iv) a reference to the specific local law of the county or municipal corporation, or both, requiring the notice and (B) be accompanied by a copy of the notice that was given.

Cross reference: See the Servicemembers Civil Relief Act, 50 U.S.C. app. § 501 et seq.

Source: This Rule is derived in part from the 2008 version of former Rule 14-204 (b) and is in part new.

Rule 14-209 was accompanied by the following Reporter's note.

The amendments to Rule 14-209 (a) and (b) are proposed in light of Chapter 355, Laws of 2011 (HB 728). Chapter 355 amends Code, Real Property Article, §7-105.1 (f) to require that the mortgagor or grantor be served with a copy of the order to docket or complaint to foreclose on residential property and all other papers filed with it "in the form and sequence as prescribed by regulations adopted by the Commissioner of Financial Regulation, accompanied by the

> documents required under paragraphs (2), (3), and (4) of this subsection....” The amendments to Rule 14-209 (a) and (b) track the new statutory language.

Ms. Ogletree told the Committee that this is an alternative approach to adding the language “and (f)” to subsection (b)(8) of Rule 14-207. This would add the sequencing language to the Rule pertaining to service and take it out of the provision dealing with what is filed with the court. Basically, it is the same language that was considered earlier. The change would add the language to section (a) of Rule 14-209. Ms. Ogletree expressed the view that this is a better alternative.

The Chair pointed out that if this addition is approved, then the language “and (f)” would not be added to Rule 14-207 (b)(8). Judge Smith remarked that he had not been aware of the legislation. He explained that he was in charge of foreclosures in Prince George’s County. He had sent the Committee a memorandum about this issue. (See Appendix 1). Filing the foreclosure documents in a given order is a benefit to the court. He had to deal with about 14,000 cases. Each of the trustees and law firms handle the procedures differently, but the same information is there. It is very difficult finding out where each law firm puts the information that Judge Smith looks for when he hears the foreclosure cases. Forms for service are a necessity.

Judge Smith said that his fear was that under the statute, sequence would be construed to be a necessity, but he expressed

the view that it is not a good idea. Often, there are debates between the process server and the homeowner. The server states that he or she served the homeowner in the correct form and sequence, and the homeowner denies this. No objective standard exists to make a determination. In almost every other dispute over service of process, there are objective standards, so the court will know that the document was served. In a regular case, the process server would serve and would report that he or she served a specific person on a specific date at a specific time. The server could describe the person incorrectly. The person would come into court, and the confusion would be resolved. The foreclosure situation cannot be resolved. The court will have to try to figure it out.

Judge Smith commented that in his memorandum, he had pointed out that he could not see the benefit of the provisions requiring service-sequencing of papers. The persons being served are defendants in a court case, a foreclosure proceeding. The purpose of service is notice and then the opportunity to be heard. The object that is standard for what is filed and presumptively what is served is the court file. He had read the statute many times, and his view was that there is no choice. He suggested that either the Conference of Circuit Court Judges or some other entity might want to suggest to the General Assembly that service in a specified sequence should be eliminated in the future. He asked that sequence for filing be included, because this helped him. The Chair asked Judge Smith if he favored the

addition of the language "and (f)" to Rule 14-207 (b)(8). Judge Smith responded affirmatively. He noted that this adds more work, but it makes it easier for the court and the clerks to administer the cases fairly based on objective standards. But as far as service is concerned, the statute does not offer a choice. It does need to be addressed at a later date. He thanked the Committee for their attention. The Chair thanked him for his comments.

Ms. Norton told the Committee that she was the Deputy Commissioner of Financial Regulation. Her office "takes the blame" for the statute. The reason for the statutory language prescribing form and sequence was based on how the homeowner-defendant is served and receives the papers. A mediation is available to homeowners after they have exhausted all other potential remedies, and it is viewed as the last step before a property goes to foreclosure. She and her colleagues have found that the manner in which the papers are served serves the court's purpose as it should; however, a defendant receives them with language referring to "an order to docket," and it does not mean anything to the defendant. The reason for requesting form and sequence was that through regulation, her office could prescribe that the top page of the packet that a homeowner receives when served is a bright yellow paper. It tells the homeowner, "You are in foreclosure. Call for help."

Ms. Norton said that she and her colleagues had attempted to put the regulations into The Maryland Register, but it had not

yet been published. They were trying to make clear that their intent was never to create a technical defense. If a homeowner receives the packet of papers, and the yellow paper is the second page of the packet, or the paper is not yellow, this alone would not be grounds for dismissal of a case. A burden should not be placed on the clerk to have to ascertain that papers are received in a certain order. She obviously would like to do what is best for the courts, but they wanted to make clear that when they approached the General Assembly, their intention was not to create what could become a technical defense if pages are out of order or not in the form prescribed by law.

Judge Pierson commented that he had the previous draft of the regulations. At one point, one of the regulations provided that failure to comply fully with the regulation, which would include the sequencing, would be grounds for dismissal. Ms. Norton responded that it should not be grounds for dismissal. The Chair inquired if the final (at this point) regulations that are sitting in the AELR Committee now specifically provide that it is not a defense if the papers are out of order. Ms. Norton answered that they went as far as their counsel would allow them to go, which was to provide that the order and sequence shall not be grounds for dismissal.

Mr. Klein asked Ms. Ogletree why she had recommended the language to be added to Rule 14-209. Ms. Ogletree replied that after hearing Judge Smith's comments, she could see that there is a great deal of benefit to the papers being in a certain order,

so the court can go through them and ascertain that all of the necessary documents are there. However, when the packets go out, they are about a half-inch thick, and this is what the homeowner gets. She agreed that at least if the papers are in some sequence, whoever looks at them may be able to find what is there, and then again if there is going to be some kind of big notice on the front page that states that the recipient is in foreclosure and should get help, this is a benefit. She said that Judge Smith had made a very good point. Her county, where there are about 200 foreclosures a year, is different from Prince George's County, where there are 14,000 a year.

Mr. Klein asked what change to the Rules Ms. Ogletree was recommending. She answered that it is probably better to leave the words "and (f)" in Rule 14-207 (b)(8), and then the extra language in Rule 14-209 would not be needed, because it already uses the language "all papers filed to commence the action...". The Chair pointed out that there may be a middle ground to provide that benefit to the court but also to implement the intent that Ms. Norton had spoken about. Variations would not be the grounds for dismissal, which the Chair was not sure could be provided for by regulation. The Court of Appeals would do this by rule. He suggested that the language "and (f)" could be left in Rule 14-207 (b)(8), but language could be added to provide that if the papers in the foreclosure packet are out of order in some way, it is not grounds for dismissal. Ms. Ogletree said that the Subcommittee would accept this suggestion.

The Chair asked Ms. Corwin if she had any comments about this. Ms. Corwin told the Committee that she represented the Maryland Bankers Association. When she had first looked at the Rules today, she had preferred the second alternative, because she understood the legislation. This is what the court needs to look at. She understood that Code, Real Property Article, §7-105.1 (f) refers to service on the defendant or the borrower-homeowner and not to what they filed in court. She continued to believe that the second alternative was better. However, she expressed the view that the compromise suggested by the Chair improved the first alternative. The concern in the first alternative was the technical defense. Most people would not view a packet that has one page out of order as a reason to dismiss the case, but any other opinion is possible. There needs to be flexibility in getting the papers into the court record.

The Chair inquired if it would be a problem for Ms. Norton's office if the sequence is required to be filed, but the court makes clear that it is not grounds for dismissal if the papers are out of order. Ms. Norton responded that obviously, they would not like the plaintiffs to disregard the intent of the legislation. If the first sheet of paper that is required to be served on the defendant is yellow without a case caption, will the court accept it? Judge Pierson remarked that he did not see how the language "and (f)" would completely advise the foreclosure attorneys that they have to file the papers in sequence. He did not read this provision as being so explicit a

directive that the papers have to be filed in sequence by just adding the language "and (f)." The Reporter commented that at the end of subsection (b)(8) of Rule 14-207, a cross reference to the Code and to COMAR directs the reader to get the required form and sequence. Judge Pierson reiterated that the language "and (f)" do not constitute an explicit directive. Ms. Ogletree noted that the Rule tells the person where to find the statute. It may not be as clear as it could be.

Mr. Sullivan asked if it would be possible to have a more substantive message in the cross reference that gives some hint as to what the required form and sequence are. Judges are far more likely to have the Rules at hand rather than COMAR and the entire Code of Maryland when they need to know the answer on the spot. The Chair pointed out that subsection (f)(1) of Code, Real Property Article, §7-105.1, which is located on page 9 of Chapter 355, House Bill 728, discusses service. It provides that a copy of the order to docket or complaint to foreclose on residential property and all other papers filed with it shall be filed in the form and sequence prescribed by the regulations. This is ambiguous as to whether the language "in the form and sequence as prescribed by regulations" modifies the word "filed," or if it relates only to service. It could be read either way. Judge Smith added that it could modify both filing and service. The Chair said that it clearly applies to service, because that is what this section of the statute addresses.

Ms. Corwin noted that section (d) of Code, Real Property

Article, §7-105.1 pertains to what is filed with the court. It begins with the language "[a]n order to docket or a complaint to foreclose a mortgage or deed of trust on residential property shall include...". There is some ambiguity, but she thought that section (d) pertains to what is filed with the court, and section (f) addresses service. Judge Smith commented that with all due respect to the Department of Labor, Licensing, and Regulation (DLLR), their statement that a certain action is not grounds for dismissal would not apply to judges. Other language is necessary to encourage plaintiffs or their counsel to comply with the requirements of the statute. It could then be in the regulations and would not have to be in the Rules.

Ms. Ogletree said that the Subcommittee had no objection to including the compromise language suggested by the Chair. The Chair explained that particularly in the metropolitan courts, where the foreclosure information is screened to make sure that all of the papers are there, if a requirement of sequence of papers were to apply, and then some papers are out of sequence, the court would dismiss it, because it is not the way the statute requires it to be. The concern is that this should not happen. On the other hand, if the requirement has no teeth to it, it may be a problem.

Judge Pierson asked how this could be in a rule, but the rule provides that it does not have to be obeyed. Ms. Ogletree remarked that it would be substantial compliance with the statute. Judge Pierson questioned whether the court can

determine this on a case-by-case basis without having language in the Rule that states that the Rule need not be complied with. The Chair responded that this would not be appropriate. One view is that section (f) of the statute does not apply to what has to be filed, only what has to be served. This does not necessarily resolve the problem, because the defendant says that he or she got a stack of papers that were not in the proper sequence. Is that a defense? This issue is lurking.

The Chair said that he understood that this is what the DLLR was trying to address. It is a separate issue if the statute is to be construed in some way as meaning that what is filed has to also be in the sequence, and what would happen if it is not filed this way. The court is probably never going to see a case in which a defendant says that he or she did not get the papers in the right sequence, but the court will see whether what is filed is in the right sequence. The Reporter remarked that when the Rule was being drafted, the drafters thought that it would almost be a protection for the plaintiff to be able to file it that way. There is a presumption that if the plaintiff can get the papers filed with the court in the right sequence the papers served were probably in the right sequence as well.

Mr. Carbine commented that it is important to be careful not to make a mountain out of a molehill with this issue. One way to handle it is that there is an affidavit of service that explicitly lists what was served. The plaintiff gives the package to the process server telling the server to make sure

that the affidavit of service is in a certain form. If the affidavit of service lists the documents served in the proper sequence, that creates a rebuttable presumption that it was served in the sequence. In the rare instance where the homeowner has compelling evidence that he or she did not get the documents in the proper sequence, it gives the judge a chance to go back and start over. The Chair said that he was not sure, but he thought that a judge or a screening master would see what is filed, not what is served. When the papers are screened, the masters or judges are probably not waiting for answers to be filed. Judge Pierson commented that there are no answers in foreclosure cases. The Chair explained that he meant any kind of response.

Judge Pierson remarked that the clerks in Baltimore City take the packet of foreclosure papers and rearrange them. It would be difficult to stop them from doing this. He observed that it is similar to the State's Attorney putting the Brady information in the court file, which provides some evidence that there was notice to the defense attorney. It would have the same function. However, the statute does not require that it be filed in sequence, only that it be served in sequence. If the plaintiffs are told to file the papers in sequence, some of them will do it some of the time, and it will help the court. While it is not required by the statute, it is useful to tell the plaintiffs to do this.

The Chair remarked that presumably if the plaintiffs are

careful, they will put the papers in sequence anyway, because if they have to put them in a sequence to serve them, they are likely to file them in the same sequence. Ms. Corwin noted that she would like the Committee to see the sequence by looking at the proposed regulations that should be published shortly. The sequence has only three documents when the final loss mitigation is filed. There is also a sequence when the preliminary loss mitigation is filed. In the final loss mitigation, three documents are filed, and the rest can be filed in any order. The three are: (1) a notice of foreclosure action, which is a new form, (2) a request for foreclosure mediation, and (3) the final loss mitigation affidavit where the secured party explains why there is no loss mitigation available.

Ms. Corwin remarked that Ms. Norton had mentioned that the notice of foreclosure action has no case file. It has no specific information as to what cases have been filed, because the regulation requires that the notice be on a colorful piece of paper, usually a yellow piece of paper, to attract the attention of the homeowner that something important is happening. The concern is that when this notice is presented to the court, it may never even get in the file, because it does not have a case number and it does not have information on it specific to that action. The Rule should require that the documents be in sequence. Judge Pierson said that he was not sure that the sequence has much significance.

The Chair asked the Committee how to proceed. Ms. Ogletree

inquired if the Committee prefers Alternative 2. Mr. Sullivan responded that he had no objection to the Rule telling the plaintiffs that they can do this, but he asked whether the Rule could provide that the judge need not proceed with the foreclosure unless the judge is satisfied that the required documents are present in the file in the correct sequence. This would afford some prophylactic value for people who want their foreclosure to proceed in a prompt manner, so they would be more inclined to file it that way. Ms. Ogletree remarked that this would mean retraining most of the foreclosure bar. The Chair noted that it was pointed out earlier that the problem is that this only refers to three documents. How onerous would it be to the court if those three documents are not in the right order? Mr. Sullivan said that he was referring to Judge Smith's comments about the 17 other documents. In any case, the judge does not have to move forward with the case, if the judge cannot make sense of the file. Ms. Ogletree observed that in almost every foreclosure case, the papers will come in a different order, and they have to be sorted through to figure out whether they are all there. In her county, they use checklists to see whether the documents are there. It means sorting through the entire court file, which is very labor-intensive.

Judge Pierson pointed out that if a sequence is going to be required, it will be necessary to enact an entire sequence structure, because it is not in the regulations. He expressed the view that the sequence should be taken out of the filing.

Judge Smith remarked that if the discussion had been referring to only the three documents, he wanted to point out the other 17 documents that are very difficult for the judges to handle. If it is only three documents, the judges can resolve this. Special process servers will certify that the documents were served in the right order. Where the property is posted, the server will take a photograph. If this discussion only refers to those three documents, then service is appropriate, and filing can be left out.

Ms. Norton commented that the General Assembly would not have given the DLLR authority by regulation if they thought that they were going to dictate the entire page by page filing. They did not ask for that authority. The filing is so voluminous that they did not want the DLLR to tell the General Assembly how to file the documents page by page.

Mr. Klein inquired if these documents all come in at one time. Ms. Ogletree answered that they have to be filed with the initial petition. Mr. Klein asked if it would be a good idea to include a certification of counsel that the papers were checked. Ms. Ogletree replied that there are enough affidavits to file already. Mr. Klein said that it would be something that forces the attorneys to swear that all necessary documents are in the package. The Chair noted that the attorney has to file an affidavit of service anyway. Ms. Ogletree added that it could be an affidavit of attempts to serve, but then there would be posting and mailing. The Chair questioned whether the affidavit

states that the server certifies that he or she served the following documents on someone. Ms. Ogletree replied that affidavits vary from process server to process server. It is a whole industry that has sprung up, and it is not inexpensive, either.

Mr. Klein inquired if the servers could be forced to use checklists as part of the affidavit. The Chair commented that this procedure should not be onerous. Section (f) of Code, Real Property Article, §7-105.1 requires that these packets of foreclosure information be served. What if the affidavit of service were to provide that the person certifies that he or she served the following documents or all of the required documents in the sequence required by law? Ms. Ogletree said that she thought that this is what would happen. The Chair asked if this would help resolve the problems. He noted that Judge Smith had said that he was not concerned about the three documents that had been filed, as long as the certificate of service provides that the server has served all of the required documents in the sequence required. Judge Smith remarked that special process servers almost inevitably now list every document that they have served. This is not onerous for anyone.

Judge Kaplan suggested that the Rule list the sequence of the three documents, and the servers can certify that they served the other documents but not in any particular order. The Chair referred to the point raised by Ms. Norton that it would not be a good idea to make this issue a defense, so that the court can

dismiss the case if one of those documents is out of order. There seems to be a consensus to not include the language "and (f)" in Rule 14-207 (b)(8). The Chair added that it is not necessary to file in sequence. By consensus, the Committee agreed with the Chair's two statements.

Ms. Ogletree said that the alternative approach for Rule 14-209 would be adopted, which would be the underlined language in section (b). She was not sure where the suggested language referring to the technical defense would go. It may be that providing for substantial compliance with the form and sequence is sufficient. She thought that this was what the DLLR was advocating. The Reporter asked if the language could be "...in substantial compliance with the form and sequence...".

Ms. Taitano told the Committee that she represented the Legal Aid Bureau. She expressed the view that the point of the legislation was to make sure people were aware of the new mediation requirements. Nothing like this had ever been available before. It is not supposed to be a technical defense for foreclosure if the papers are not in the right place. Ms. Ogletree remarked that the language "substantial compliance" would meet the point made by Ms. Taitano. If the papers are not one of the first three documents that are required, then there has been no substantial compliance, or if a paper is missing, there has not been substantial compliance. If the order is document #3, document #2, document #1, instead of #1, #2, #3, at least it is substantial compliance that those documents are the

first items in the packet. Ms. Norton stated that her office approves of this language.

Mr. Klein said that he read Rule 14-209 to mean that the packet has to be served in this form and this sequence. He did not see any reference in the Rule to the content of the affidavit of service. Ms. Ogletree responded that the private processors have been listing all of it. Mr. Klein asked if Rule 14-209 should require it. The Rule would require that the affidavit of service provide that the server state that he or she served the following documents in the form and order prescribed by _____. The Reporter inquired if the process server is competent to swear to that. They are just the employees. Mr. Klein remarked that if the sequence is known, the servers can be required to list the sequence.

Ms. Ogletree explained that the foreclosure firms will give the servers an affidavit form used by the firm. She was not sure that requiring this by rule would make it happen. Problems getting the affidavits correct exist within that industry. Mr. Klein noted that everyone seems to be looking for some kind of prima facie evidence that the statute was in fact complied with, but the Rule is not requiring that prima facie evidence. Ms. Ogletree commented that if the affidavit states that the server served the papers in the form and sequence as required by the Rule and regulations, that will be prima facie evidence, and it will be up to the defendant to come in and say that the papers were not served appropriately.

Judge Smith observed that having reviewed thousands of these sets of papers, he had seen that the special process servers' affidavits list what they had served. Mr. Klein asked if Judge Smith was satisfied that it is not necessary to require this in the Rule. Judge Smith answered that the three documents, which are the notice of foreclosure action, the request for foreclosure mediation, and the final loss mitigation affidavit, will be required to be listed first. Whatever problems the foreclosure bar had several years ago, they are smart people, and they will amend their practice regarding service of process to comply with what is required. He suggested that the DLLR may want to add a footnote requiring that the affidavit of service indicate this. Judge Sheila R. Tillerson Adams addresses the foreclosure bar on a fairly regular basis and informs them of the actions the judges would like the bar to take. This is sent out by email and by regular mail. It is not necessary to over-regulate the group, because of what happened a few years ago. This is not causing the judges a problem. Ms. Ogletree reiterated that adding the language "in substantial compliance with" would cover the problems raised at today's meeting.

The Reporter pointed out that in subsection (b)(8) of Rule 14-207, the suggested language "and (f)" was not added. Was the proposed cross reference at the end of that provision also deleted? Ms. Ogletree replied that this should remain in the Rule. The Chair asked if the language "in substantial compliance with" should be added to Rule 14-209, and Ms. Ogletree replied

affirmatively. Judge Pierson noted that he was not in favor of this.

Ms. Ogletree moved to add this language in Rule 14-209 (a) and (b) before the language "the form and sequence." The Chair noted that the discussion had addressed sequence, and he asked Ms. Norton if form should also be addressed. Did the DLLR intend that the form can be deviated from what is prescribed by regulations? Ms. Norton answered that they use that language in the forms that are in the regulations. They expect that people will reproduce the forms. The covers should look substantially the same in yellow paper. If changing the form means not having it on yellow paper, that would be a problem. Ms. Ogletree remarked that she was not sure that this would be substantial compliance. The Chair added that it may not be.

Judge Pierson questioned whether this even needs to be in the Rule. The documents that the DLLR is requiring are documents required by statute. Technically speaking, they may not even be papers filed to commence the action. They are somewhat different -- they are certain notices required by the statute. Two ways to change the Rule would be either to take it out entirely, or to add the language "and all other documents required by Code, Real Property Article, §7-105.1." It is not necessary to address form and sequence, which is regulated by the DLLR regulations with which people are required to comply.

The Chair pointed out that section (d) of the statute provides what has to be filed. Section (f) addresses service.

The language is “[a] copy of the order to docket or complaint to foreclose...and all other papers filed with it...shall be served...”. It appears to be an identity of documents that get filed and have to be served. Judge Pierson commented that the statute is kind of circular, because it defines what has to be sent, and then it provides that this has to be filed. One has to serve what he or she filed, and file what he or she served.

The Chair said that the person filing has to attach an affidavit that a notice of intent to foreclose was sent, and the date that it was sent, but it seems that the notice itself does not have to be filed. Judge Pierson reiterated that the statute is circular. The Chair pointed out that the notice of intent to foreclose is sent before the order to docket is filed. The plaintiff has to attach an affidavit that this had been done. The notice of intent to foreclose is not filed. He asked Ms. Ogletree if this notice is ever filed. Ms. Ogletree replied that she had seen some cases where it was filed, and some where it was not.

The Chair cautioned that Rule 14-209 should not create a trap. Judge Pierson suggested that the Rule could state: “... all papers filed to commence the action and all documents required under Code, Real Property Article, §7-105.1.” Ms. Ogletree noted that when this was first discussed, the issue was whether the Rule should simply reference the statute, or whether language should be added to tell people what they had to do. The decision was to reference the statute. It is up to the

Committee to make the determination. A copy of the intent to foreclose is required under subsection (d)(2)(vi). The cases that Ms. Ogletree had seen that do not have this are commercial properties where it is not required.

The Chair said that there was a motion on the floor to add the language "in substantial compliance with" to sections (a) and (b) of Rule 14-209. There was no second to the motion. Judge Pierson moved to take out the language "form and sequence as prescribed by regulations adopted by the Commissioner of Financial Regulation" from sections (a) and (b) of Rule 14-209. The Reporter noted that if this change were made the language of section (a) would read as follows: "...commence the action accompanied by the documents required under Code, Real Property Article, §7-105.1 (f)." The motion was seconded.

The Chair asked Ms. Norton for her opinion. She expressed some concern about it being removed completely from the Rule. Practitioners are likely to look to the Rule before they look at the regulations. The Reporter suggested moving the cross reference that is at the end of Rule 14-207 (b)(8) to the end of section (a) of Rule 14-209 or keeping it at the end of Rule 14-207 (b)(8) and repeating it also at the end of section (a). Ms. Ogletree commented that there should be some kind of a flag in Rule 14-209 that indicates someone has to do more than just look at the statute. Mr. Klein asked Judge Pierson if this would be an acceptable amendment. Judge Pierson answered affirmatively.

The Chair reiterated that the language that reads "in the

form and sequence as prescribed by regulations adopted by the Commissioner of Financial Regulation" would be deleted from sections (a) and (b). He asked where the cross reference would go. Ms. Ogletree responded that the same cross reference that is at the end of Rule 14-207 (b)(8) would also go at the end of section (a) of Rule 14-209. The Reporter pointed out that cross references have been duplicated in other Rules. Ms. Ogletree read the cross reference: "For the required form and sequence of documents, see Code, Real Property Article, §7-105.1 (f)(1) and COMAR 09.03.12.01 et seq." By consensus, the Committee approved this suggestion. The Reporter inquired if the cross reference should go after section (a) or (b) or after both. Ms. Ogletree replied that it would only be needed after section (a). The Reporter noted that section (b) refers to service by mailing and posting. Ms. Ogletree said that the cross reference is needed in both places.

The Chair called for a vote on the motion to delete language that is in the underlined language in sections (a) and (b) of Rule 14-209 and add the same cross reference that is at the end of Rule 14-207 (b)(8) after sections (a) and (b) of Rule 14-209. The motion carried unanimously.

By consensus, the Committee approved Rule 14-209 as amended.

Ms. Ogletree presented Rule 14-209.1, Owner-Occupied Residential Property, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-209.1 to add the word "and" to subsection (c)(2), to amend subsection (d)(1) to require the Office of Administrative Hearings, if it has granted an extension, to notify the court of the new date by which foreclosure mediation shall be completed, to extend the number of days that the Office of Administrative Hearings is given to notify the court of such extension, and to require that the court be notified regarding any subsequent extension, as follows:

Rule 14-209.1. OWNER-OCCUPIED RESIDENTIAL PROPERTY

(a) Applicability

This rule applies to an action to foreclose a lien on residential property that is owner-occupied residential property, or where it is unknown whether the property is owner-occupied residential property at the time the action is filed.

(b) Advertising of Sale

A sale may not be advertised until the 20 days after a final loss mitigation affidavit is filed, but if a request for foreclosure mediation is filed within that time and not stricken, a sale may not be advertised until the report from the Office of Administrative Hearings is filed with the court.

(c) Foreclosure Mediation

(1) Request; Transmittal

(A) Filing of Request

The borrower may file a request for foreclosure mediation within the time allowed by Code, Real Property Article, §7-105.1 (h)(1). The request shall contain the caption of the case and the names and addresses of the parties and be accompanied by the foreclosure mediation filing fee required by Code, Real Property Article, §7-105.1 (h)(1)(ii) or a written request in accordance with Rule 1-325 for an order waiving or reducing the fee. The borrower shall serve a copy of the request on the other parties. The clerk shall not accept for filing a request for foreclosure mediation that does not contain a certificate of service or is not accompanied by the required fee or request for an order waiving or reducing the fee.

Cross reference: See Rules 1-321 and 1-323. For the Request for Foreclosure Mediation form prescribed by regulation adopted by the Commissioner of Financial Regulation, see COMAR 09.03.12.05.

(B) Transmittal of Request

Subject to section (e) of this Rule, the clerk shall transmit notice of the request to the Office of Administrative Hearings no later than five days after the request is filed.

Committee note: The transmittal to the Office of Administrative Hearings shall be made within the time required by subsection (c)(1)(B) of this Rule, regardless of the status of a request for waiver or reduction of the foreclosure mediation filing fee.

(C) Ruling on Request for Fee Waiver or Reduction

The court promptly shall rule upon a request for an order waiving or reducing the foreclosure mediation filing fee. The court may make its ruling ex parte and without a hearing. If the court does not waive the fee in its entirety, the court shall specify in its order the dollar amount to be paid and the amount of time, not to

exceed ten days, within which the sum shall be paid. The order shall direct the clerk to strike the request for foreclosure mediation if the sum is not paid within the time allowed and, if the request is stricken, to promptly notify the Office of Administrative Hearings that the request for foreclosure mediation has been stricken.

(2) Motion to Strike Request for Foreclosure Mediation

No later than 15 days after service of a request for foreclosure mediation, the secured party may file a motion to strike the request. The motion shall be accompanied by an affidavit that sets forth with particularity reasons sufficient to overcome the presumption that the borrower is entitled to foreclosure mediation and why foreclosure mediation is not appropriate.

(3) Response to Motion to Strike

No later than 15 days after service of the motion to strike, the borrower may file a response to the motion.

(4) Ruling on Motion

After expiration of the time for filing a response, the court shall rule on the motion, with or without a hearing. If the court grants the motion, the clerk shall notify the Office of Administrative Hearings that the motion has been granted.

(d) Notification from Office of Administrative Hearings

(1) If Extension Granted

If the Office of Administrative Hearings extends the time for completing foreclosure mediation pursuant to Code, Real Property Article, §7-105.1 (i)(2)(ii), it shall notify the court no later than ~~65~~ 67 days after the court transmitted the request for foreclosure mediation and specify the date by which mediation shall be completed. If the Office of Administrative Hearings

extends the time for completing foreclosure mediation more than once, it shall notify the court of each extension and specify the new date by which mediation shall be completed.

(2) Outcome of Foreclosure Mediation

Within the time allowed by Code, Real Property Article, §7-105.1 (j)(3), the Office of Administrative Hearings shall file with the court a report that states (A) whether the foreclosure mediation was held and, if not, the reasons why it was not held, or (B) the outcome of the foreclosure mediation. The Office of Administrative Hearings promptly shall provide a copy of the report to each party to the foreclosure mediation.

(e) Electronic Transmittals

By agreement between the Administrative Office of the Courts and the Office of Administrative Hearings, notifications required by this Rule may be transmitted by electronic means rather than by mail and by a department of the Administrative Office of the Courts rather than by the clerk, provided that an appropriate docket entry is made of the transmittal or the receipt of the notification.

(f) Procedure Following Foreclosure Mediation

(1) If Agreement Results from Foreclosure Mediation

If the foreclosure mediation results in an agreement, the court shall take any reasonable action reasonably necessary to implement the agreement.

(2) If No Agreement

If the foreclosure mediation does not result in an agreement, the secured party may advertise the sale, subject to the right of the borrower to file a motion pursuant to Rule 14- 211 to stay the sale and dismiss the action.

(3) If Foreclosure Mediation Fails Due to the Fault of a Party

(A) If the foreclosure mediation is not held or is terminated because the secured party failed to attend or failed to provide the documents required by regulation of the Commissioner of Financial Regulation, the court, after an opportunity for a hearing, may dismiss the action.

(B) If the foreclosure mediation is not held or is terminated because the borrower failed to attend or failed to provide the documents required by regulation of the Commissioner of Financial Regulation, the secured party may advertise the sale.

Source: This Rule is new.

Rule 14-209.1 was accompanied by the following Reporter's note.

Two amendments are proposed to Rule 14-209.1 (d)(1) in light of Chapter 355, Laws of 2011 (HB 728), which amends Code, Real Property Article, §7-105.1, and took effect on June 1, 2011.

Code, Real Property Article, §7-105.1 (i)(2)(i) requires the Office of Administrative Hearings ("OAH") to conduct a foreclosure mediation within 60 days after the transmittal of the request for mediation. Prior to the amendment, Code, Real Property Article, §7-105.1 (i)(2)(ii) authorized the Office of Administrative Hearings ("OAH"), for good cause, to extend the time for completing mediation for a period not exceeding 30 days. Chapter 355 amended Code, Real Property Article, §7-105.1 (i)(2)(ii) to authorize the OAH, if all parties agree, to extend the time for completing foreclosure mediation "for a longer period of time." The amendment permits the OAH to extend the time to complete mediation beyond 90 days after the transmittal of the request, and in fact does not limit the number of days that the OAH can extend the time for completing mediation.

Current Rule 14-209.1 (d)(1) requires the OAH to notify the court if it has granted an extension of time. The amendment to Rule 14-209.1 (d)(1) requires that the OAH also specify the date by which foreclosure mediation must be completed. If the OAH extends the date multiple times, it must inform the court of the new date by which the foreclosure mediation shall be completed. The amendment is intended to ensure that the court is kept informed regarding the status of the foreclosure mediation.

Chapter 355 also amended Code, Real Property Article, §7-105.1 (j)(3)(i), which governs the time within which the OAH must file a report with the court regarding the outcome of the foreclosure mediation. Prior to the amendment, if the OAH conducted mediation before the expiration of the original 60-day time period, the OAH was required to file a report with the court regarding the outcome of the mediation no later than 5 days after the OAH held the mediation. Accordingly, current Rule 14-209.1 (d)(1) requires the OAH to notify the court regarding any extension no later than 65 days after the court transmitted the request for mediation. Shortly after day 65, the court would either have the OAH mediation report, or would have been informed that the OAH extended the time for completing mediation.

Chapter 355 amended Code, Real Property Article, §7-105.1 (j)(3)(i)to give the OAH 7 days, instead of 5, to submit the report to the court. An amendment to Rule 14-209.1 (d)(1) tracks the change in the statute by increasing the time by which the OAH must notify the court that it has extended the time for completing mediation to 67 days after the court transmitted the request for mediation.

Additionally, a “housekeeping” amendment to Rule 14-209.1 (c)(2) corrects a typographical error.

Ms. Ogletree explained that the changes to subsection (d)(1)

of Rule 14-209.1 were to comport with the statutory changes. Formerly, the Office of Administrative Hearings (OAH) had a certain time frame to complete foreclosure mediation, and they had to file a report within a certain time. They can now get one or more extensions, so that there is no specified end date. This would require the OAH to notify the court of the new date by which the mediation would be completed, so the time period would start to run. The change for notifying the court from 65 to 67 days after the court transmitted the request for foreclosure mediation is to conform to the statute. The Chair asked whether the OAH had been notified of this language, and if they had approved it. The Reporter replied that the OAH had approved it. They had not liked the original draft, but they had approved of the Rule as it ended up.

By consensus, the Committee approved Rule 14-209.1 as presented.

Ms. Ogletree presented Rule 14-211, Stay of the Sale; Dismissal of Action, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-211 to add to subsection (a)(2)(A)(iii)(c) language which is consistent with the amendment to Code, Real Property Article, §7-105.1(i), and to delete language which is inconsistent with the amendment to Code, Real Property Article, §7-105.1(i), as follows:

Rule 14-211. STAY OF THE SALE; DISMISSAL OF ACTION

(a) Motion to Stay and Dismiss

(1) Who May File

The borrower, a record owner, a party to the lien instrument, a person who claims under the borrower a right to or interest in the property that is subordinate to the lien being foreclosed, or a person who claims an equitable interest in the property may file in the action a motion to stay the sale of the property and dismiss the foreclosure action.

Cross reference: See Code, Real Property Article, §§7-101 (a) and 7-301 (f)(1).

(2) Time for Filing

(A) Owner-occupied Residential Property

In an action to foreclose a lien on owner-occupied residential property, a motion by a borrower to stay the sale and dismiss the action shall be filed no later than 15 days after the last to occur of:

(i) the date the final loss mitigation affidavit is filed;

(ii) the date a motion to strike foreclosure mediation is granted; or

(iii) if foreclosure mediation was requested and the request was not stricken, the first to occur of:

(a) the date the foreclosure mediation was held;

(b) the date the Office of Administrative Hearings files with the court a report stating that no foreclosure mediation was held; or

(c) the expiration of 60 days after transmittal of the borrower's request for

foreclosure mediation or, if the Office of Administrative Hearings extended the time to complete the foreclosure mediation, ~~90 days after the date of the transmittal~~, the expiration of the period of the extension.

(B) Other Property

In an action to foreclose a lien on property, other than owner-occupied residential property, a motion by a borrower or record owner to stay the sale and dismiss the action shall be filed within 15 days after service pursuant to Rule 14-209 of an order to docket or complaint to foreclose. A motion to stay and dismiss by a person not entitled to service under Rule 14-209 shall be filed within 15 days after the moving party first became aware of the action.

(C) Non-compliance; Extension of Time

For good cause, the court may extend the time for filing the motion or excuse non-compliance.

Cross reference: See Rules 2-311 (b), 1-203, and 1-204, concerning the time allowed for filing a response to the motion.

(3) Contents

A motion to stay and dismiss shall:

(A) be under oath or supported by affidavit;

(B) state with particularity the factual and legal basis of each defense that the moving party has to the validity of the lien or the lien instrument or to the right of the plaintiff to foreclose in the pending action;

Committee note: The failure to grant loss mitigation that should have been granted in an action to foreclose a lien on owner-occupied residential property may be a defense to the right of the plaintiff to foreclose in the pending action. If that defense is raised, the motion must state

specific reasons why loss mitigation pursuant to a loss mitigation program should have been granted.

(C) be accompanied by any supporting documents or other material in the possession or control of the moving party and any request for the discovery of any specific supporting documents in the possession or control of the plaintiff or the secured party;

(D) state whether there are any collateral actions involving the property and, to the extent known, the nature of each action, the name of the court in which it is pending, and the caption and docket number of the case;

(E) state the date the moving party was served or, if not served, when and how the moving party first became aware of the action; and

(F) if the motion was not filed within the time set forth in subsection (a)(2) of this Rule, state with particularity the reasons why the motion was not filed timely. To the extent permitted in Rule 14-212, the motion may include a request for referral to alternative dispute resolution pursuant to Rule 14-212.

(b) Initial Determination by Court

(1) Denial of Motion

The court shall deny the motion, with or without a hearing, if the court concludes from the record before it that the motion:

(A) was not timely filed and does not show good cause for excusing non-compliance with subsection (a)(2) of this Rule;

(B) does not substantially comply with the requirements of this Rule; or

(C) does not on its face state a valid defense to the validity of the lien or the lien instrument or to the right of the

plaintiff to foreclose in the pending action.

Committee note: A motion based on the failure to grant loss mitigation in an action to foreclose a lien on owner-occupied residential property must be denied unless the motion sets forth good cause why loss mitigation pursuant to a loss mitigation program should have been granted is stated in the motion.

(2) Hearing on the Merits

If the court concludes from the record before it that the motion:

(A) was timely filed or there is good cause for excusing non-compliance with subsection (a)(2) of this Rule,

(B) substantially complies with the requirements of this Rule, and

(C) states on its face a defense to the validity of the lien or the lien instrument or to the right of the plaintiff to foreclose in the pending action, the court shall set the matter for a hearing on the merits of the alleged defense. The hearing shall be scheduled for a time prior to the date of sale, if practicable, otherwise within 60 days after the originally scheduled date of sale.

(c) Temporary Stay

(1) Entry of Stay; Conditions

If the hearing on the merits cannot be held prior to the date of sale, the court shall enter an order that temporarily stays the sale on terms and conditions that the court finds reasonable and necessary to protect the property and the interest of the plaintiff. Conditions may include assurance that (1) the property will remain covered by adequate insurance, (2) the property will be adequately maintained, (3) property taxes, ground rent, and other charges relating to the property that become due prior to the hearing will be paid, and (4) periodic

payments of principal and interest that the parties agree or that the court preliminarily finds will become due prior to the hearing are timely paid in a manner prescribed by the court. The court may require the moving party to provide reasonable security for compliance with the conditions it sets and may revoke the stay upon a finding of non-compliance.

(2) Hearing on Conditions

The court may, on its own initiative, and shall, on request of a party, hold a hearing with respect to the setting of appropriate conditions. The hearing may be conducted by telephonic or electronic means.

(d) Scheduling Order

In order to facilitate an expeditious hearing on the merits, the court may enter a scheduling order with respect to any of the matters specified in Rule 2-504 that are relevant to the action.

(e) Final Determination

After the hearing on the merits, if the court finds that the moving party has established that the lien or the lien instrument is invalid or that the plaintiff has no right to foreclose in the pending action, it shall grant the motion and, unless it finds good cause to the contrary, dismiss the foreclosure action. If the court finds otherwise, it shall deny the motion.

Committee note: If the court finds that the plaintiff has no right to foreclose in the pending action because loss mitigation should have been granted, the court may stay entry of its order of dismissal, pending further order of court, so that loss mitigation may be implemented.

Source: This Rule is new.

Rule 14-211 was accompanied by the following Reporter's

note.

The amendment to Rule 14-211 is proposed in light of Chapter 355, Laws of 2011 (HB 728), which took effect on June 1, 2011.

Code, Real Property Article, §7-105.1 (i)(2) requires the Office of Administrative Hearings ("OAH") to conduct a foreclosure mediation no later than 60 days after the court transmitted the borrower's request for mediation. Prior to the recent amendment, the statute further provided that, for good cause, the OAH may extend the time for completing mediation for a period not exceeding 30 days. Therefore, prior to the amendment to the statute, the OAH was required to conduct the mediation no later than 90 days from the date of the transmittal of the request.

The amendment to Code, Real Property Article, §7-105.1 (i)(2)(ii) changes the time frame within which the OAH must conduct mediation by authorizing the OAH, if all parties agree, to extend the time for completing mediation "for a longer period of time." The statute does not limit the number of days that the OAH may extend the time. Presumably, the OAH has the authority to extend the time for completing mediation for months or even years, as long as the parties agree to the extension.

In its current form, Rule 14-211 (a)(2)(A)(iii)(c) assumes that foreclosure mediation must be conducted within 60 days after the transmittal of the request for mediation or within 90 days if the OAH granted an extension. Accordingly, the current Rule ties the time within which a borrower may file a motion to stay the sale and dismiss the action to the expiration of either 60 days or 90 days after transmittal of the request.

The assumption that mediation must be completed within 90 days after the date of transmittal is no longer accurate in light of the amendment to Code, Real Property Article, §7-105.1 (i)(2)(ii). The proposed amendment

> to Rule 14-211 (a)(2)(A)(iii)(c) tracks the statutory amendment by linking the time within which a borrower may file a motion to stay the sale and dismiss the action to the original 60 day period or, if OAH granted an extension, to the day that the extension period expires.

Ms. Ogletree told the Committee that there is a change in subsection (a)(2)(A) of Rule 14-211 pertaining to the priority of events for the time for filing a motion to stay the sale and dismiss the action to be filed. Subsection (a)(2)(A)(iii)(c) removes the requirement of filing 90 days after the date of the transmittal of the borrower's request for foreclosure mediation if the OAH extended the time to complete the foreclosure mediation. Instead, the motion shall be filed no later than 15 days after the expiration of the period of extension, since now there is no definite number of days by which an extension period expires. This change conforms to the statutory change.

By consensus, the Committee approved Rule 14-211 as presented.

Ms. Ogletree credited Ms. Lynch, an Assistant Reporter, for drafting the appropriate changes to the Rules.

Agenda Item 3. Consideration of "housekeeping" amendments to: Rule 3-722 (Receivers) and Rule 9-105 (Show Cause Order; Disability of A Party; Other Notice)

The Chair said that Agenda Item 3 would be considered next, because it was very short. Ms. Lynch said that two "housekeeping" amendments had been proposed.

Ms. Lynch presented Rule 3-722, Receivers, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 700 - SPECIAL PROCEEDINGS

AMEND Rule 3-722 to correct obsolete citations in the cross reference following section (a), as follows:

Rule 3-722. RECEIVERS

(a) Applicability

This Rule applies to a receiver appointed to take charge of property for the enforcement of a local or state code or to abate a nuisance.

Cross reference: For the power of the District Court to appoint a receiver, see Code, Courts Article, §§4-401 ~~(7)(i)~~ (8) and 4-402 (b); Code, Real Property Article, §14-120; and Baltimore City Building Code, ~~1997~~ 2011 Edition, §~~123.9~~ 121.

. . .

Rule 3-722 was accompanied by the following Reporter's note.

The proposed amendments delete obsolete references to Code, Courts Article, §4-401 (7)(i) and Baltimore City Building Code, 1997 Edition, §123.9, and replace those references with updated references to Code, Courts Article, §4-401 (8) and Baltimore City Building Code, 2011 Edition, §121.

Ms. Lynch told the Committee that the Assistant Commissioner for Litigation of Baltimore City Housing had pointed out obsolete references to the Real Property Article and to the Baltimore City

Building Code in Rule 3-722. Those references were corrected. By consensus, the Committee approved Rule 3-722 as presented.

Ms. Lynch presented Rule 9-105, Show Cause Order; Disability of a Party; Other Notice, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 100 - ADOPTION; GUARDIANSHIP

TERMINATING PARENTAL RIGHTS

AMEND Rule 9-105 to delete the obsolete citation to Code, Article 27A, §4 in the cross reference following section (b), and to replace it with the updated citation to Code, Criminal Procedure Article, §16-204.

Rule 9-105. SHOW CAUSE ORDER; DISABILITY OF A PARTY; OTHER NOTICE

. . .

(b) Appointment of Attorney for Disabled Party

(1) If the parties agree that a party who is not represented has a disability that makes the party incapable of consenting or participating effectively in the proceeding, the court shall appoint an attorney who shall represent the disabled party throughout the proceeding.

(2) If there is a dispute as to whether a party who is not represented has a disability that makes the party incapable of consenting or participating effectively in the proceeding, the court shall:

(A) hold a hearing promptly to resolve the dispute;

(B) appoint an attorney to represent the alleged disabled party at that hearing;

(C) provide notice of that hearing to all parties; and

(D) if the court finds at the hearing that the party has such a disability, appoint an attorney who shall represent the disabled party throughout the proceeding.

Cross reference: See Code, Family Law Article, §§5-307 as to a Public Agency Guardianship; 5-307 as to a Public Agency Adoption without Prior TPR; 5-3A-07 as to a Private Agency Guardianship; and 5-3B-06 as to an Independent Adoption. For eligibility of an individual for representation by the Office of the Public Defender, see Code, Family Law Article §5-307 and ~~Code, Article 27A, §4~~ Code, Criminal Procedure Article, §16-204.

. . .

Rule 9-105 was accompanied by the following Reporter's note.

The proposed amendment deletes an obsolete reference to Code, Article 27A, §4 and replaces it with an updated reference to Code, Criminal Procedure Article, §16-204.

Ms. Lynch said that at a Subcommittee meeting, an obsolete reference to "Code, Article 27A §4" had been found in the cross reference after section (b) of Rule 9-105. The correct reference, which is "Code, Criminal Procedure Article, §16-204," was substituted.

By consensus, the Committee approved Rule 9-105 as presented.

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

Mr. Klein noted that many consultants had helped with the first major overhaul of the Alternative Dispute Resolution (ADR) Rules since they were first adopted in 1999. There had been a few minor changes before now. The proposed Rules before the Committee included a set of ADR Rules for the District Court. The Rules additionally took into account the perspective of the Conference of Circuit Court Judges and the views of many of the ADR practitioners. The Rules had been reorganized, so that Chapter 100 contains general provisions that affect all courts. Chapter 200 specifically affects practice in the circuit court, and Chapter 300 addresses practice in the District Court. There are some differences between the circuit courts and the District Court, but to the extent that they are not different, the Subcommittee tried to be consistent in language and terminology. The table of contents has reserved places for possible rules for the Court of Special Appeals and for the Orphans' Court.

Mr. Klein said that at the last full Committee meeting in June, the discussion of these Rules had been tabled to allow additional time for the practitioners to provide written comment, which they had sent during the summer, and then to meet with the ADR Subcommittee to provide further amplification of those comments. What is before the Committee today is what Mr. Klein hoped was a consensus view based on a process that had taken place over the past year or so. He told the Committee that he would present a few of the broad concepts to remind everyone of the fundamental structure of the current Rules, which are for the

circuit courts only. Under the current Rules, the court cannot force fee-for-service ADR in any form if a party objects. The Chair added that this is correct under Title 17.

Mr. Klein commented that under the proposed Rules, two alternatives exist for the circuit courts. One maintains the position just stated. The court can force a free settlement conference even under the current Rules but cannot force a fee-for-service ADR proceeding. The second alternative is that the court could cause two free ADR opportunities. One could be any form of ADR, including a settlement conference, and the second would be a settlement conference.

Mr. Klein explained that the difference between the circuit courts and the District Court is that the latter does not have multiple forms of ADR. The only two forms are settlement conferences or mediation. All ADR in the District Court is non-fee-for-service. The court can require either a settlement conference or mediation, but not both. Mr. Klein told the Committee that he would be working from the unmarked copies of the Rules, because they are easier to read than the marked copies. He added that he would try to highlight any significant differences from the current Rules unless the difference is a matter of style.

Mr. Simison said that he was the Vice Chair of the ADR Section of the Maryland State Bar Association (MSBA). At the last meeting, he had addressed the Committee and asked for time to comment on the proposed Rules. He and his colleagues

appreciated that the Committee had given them some time for their comments. They had been able to meet with the ADR Subcommittee of the Rules Committee, and they appreciated working with the Subcommittee and appreciated that the Subcommittee had listened to them. They endorsed the proposed Rules that were before the Committee. Although there were problems with drafting that could take a long time to discuss, they were basically pleased with the result. Mr. Klein responded that the Subcommittee appreciated the input of the ADR Section. The package of Rules was better as a result of their comments. He asked if the comment made by Mr. Simison referred to drafting settlement agreements, not drafting the language in the Rules. Mr. Simison answered that he had referred to drafting settlement agreements.

Mr. Klein pointed out that the general provisions are in Title 17, Chapter 100. He presented Rule 17-101, Applicability, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 – GENERAL PROVISIONS

Rule 17-101. APPLICABILITY

(a) General Applicability of Title

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

Committee note: The Rules is this Title do not apply to an ADR process in which the parties participate without a court order of referral to that process.

(b) Exceptions

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

(1) an action or order to enforce a contractual agreement to submit a dispute to ADR;

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

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

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

(c) Applicability of Chapter 200

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

(d) Applicability of Chapter 300

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

Source: This Rule is derived from former Rule 17-101 (2011).

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

Rule 17-101 outlines the applicability

of the Rules in Title 17.

Mr. Klein said that section (a) of Rule 17-101 provides that the Rules in this Title apply to the referral by a court of all or part of a civil action pending in the court to an ADR process. The Rules have no impact whatsoever on anything that is not based in the courts. Private mediation is totally unaffected by these Rules. Section (b) lists exceptions to the scope of Title 17, because certain kinds of actions are handled more specifically in other ways. There is no change from the current Rule. Foreclosure, health care, and child custody proceedings are addressed by rules in other titles.

There being no comments, by consensus, Rule 17-101 was approved as presented.

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

MARYLAND RULES OF PROCEDURE

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 – GENERAL PROVISIONS

Rule 17-102. DEFINITIONS

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

(a) ADR

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

(b) ADR Organization

"ADR organization" means an entity, including an ADR unit of a court, that is designated by the court to select individuals who possess the applicable qualifications required by Rule 9-205 or the Rules in this Title to conduct a non-fee-for-service ADR ordered by the court.

(c) ADR Practitioner

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

(d) Alternative Dispute Resolution

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

(e) Arbitration

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

Committee note: Under the Federal Arbitration Act, the Maryland Uniform Arbitration Act, the International Commercial Arbitration Act, at common law, and in common usage outside the context of court-referred cases, arbitration awards are binding unless the parties agree otherwise.

(f) Fee-for-service

"Fee-for-service" means that a party will be charged a fee by an individual designated by a court to conduct ADR under the Rules in this Title.

(g) Mediation

"Mediation" means a process in which the parties work with one or more impartial mediators who, without providing legal advice, assist the parties in reaching their own voluntary agreement for the resolution of the dispute or issues in the dispute.

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

(h) Mediation Communication

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

(i) Neutral Case Evaluation

"Neutral case evaluation" means a process in which (1) the parties, their attorneys, or both appear before an impartial evaluator and present in summary fashion the evidence and arguments supporting their respective positions, and (2) the evaluator renders an evaluation of their positions and an opinion as to the likely outcome of the dispute if determined through the litigation process.

(j) Neutral Expert

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

(k) Neutral Fact-finding

"Neutral fact-finding" means a process in which (1) the parties, their attorneys, or both appear before an impartial individual and present evidence and arguments supporting their respective positions as to particular disputed factual issues, and (2) the

individual makes findings of fact as to those issues. Unless the parties otherwise agree in writing, those findings are not binding.

(l) Settlement Conference

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

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

Source: This Rule is derived as follows:
Section (a) is new.
Section (b) is new.
Section (c) is new.
Section (d) is derived from former Rule 17-102 (a) (2011).
Section (e) is derived from former Rule 17-102 (b) (2011).
Section (f) is derived from former Rule 17-102 (c) (2011).
Section (g) is derived from former Rule 17-102 (d) (2011).
Section (h) is derived from former Rule 17-102 (e) (2011).
Section (i) is derived from former Rule 17-102 (f) (2011).
Section (j) is new.
Section (k) is derived from former Rule 17-102 (g) (2011).
Section (l) is derived from former Rule 17-102 (h) (2011).

Rule 17-102 was accompanied by the following Reporter's note.

> Rule 17-102 carries forward from current Rule 17-102 the definitions of “Alternative Dispute Resolution,” “Fee-for- service,” “Mediation,” “Mediation Communication,” “Neutral Case Evaluation,” “Neutral Fact-finding,” and “Settlement Conference.” Changes to those definitions are primarily stylistic, with the exception of the transfer of the last two sentences of the current definition of “mediation” to a separate Rule [Rule 17-103, Role of Mediator], and the addition of the concept of “evaluating” a mediation or mediator to the definition of “mediation communication.”
>
> The definitions of “ADR,” “ADR Practitioner,” and “Neutral Expert” are new.

Mr. Klein noted that new in the Rules is the fact that the words “Alternative Dispute Resolution” would be noted throughout the Rules as the acronym “ADR” to avoid repetition. Another new item is a definition of “ADR Organization.” In the definition, the language “... non-fee-for-service ADR entered by the court” had been suggested by the MSBA. The term “non-fee-for-service” appears later in the definitions. Section (c) of Rule 17-102 defines “ADR Practitioner” as an individual, as opposed to an organization, who conducts ADR under the Rules in Title 17. Section (f) clarifies the meaning of the term “fee-for-service.” The last version of the definition had the language “will or may be charged a fee.” With the agreement of the MSBA, the language has been changed to “will be charged a fee.” The definition of the term “mediation” has not been changed. The definition of the term “Neutral Expert” has been added to section (j). In the definition of the term “Settlement Conference” in section (l),

some language has been added to the very last sentence, “[t]he impartial individual shall chair the conference...”. The Committee note after section (l) has been added to indicate that nothing in these Rules is intended to restrict the use of consensus-building to assist in the resolution of disputes.

Mr. Michael asked if the language in section (l) that reads, “...may recommend the terms of an agreement” is a way to expand the powers of the mediators, so that they are not restricted. Mr. Klein answered that this refers to settlement conferences and not mediations. A later Rule addresses the role of the mediator. The language “may recommend the terms of an agreement” is in the current Rule. Purists would say that a settlement conference is very different from a mediation in terms of the role of the individual who is in charge. Mr. Sullivan remarked that he had never been in that pure environment where there is a noticeable difference between a mediation and a settlement conference. He was mystified by the insistence in the Rule that they are two different procedures.

Mr. Klein responded that there are hybrid forms, but if they are being strictly referred to as one or the other, the theorists that were consulted have maintained that there is a difference. The distinctions are in the Rules for a reason. It does not mean that one cannot be changed into the other as long as the parties understand what is going on. The mediator is not taking a position as to whether the decision benefits one party or the other. The chair of a settlement conference may take a position,

because it is not mediation. This is not a change from the current Rule. The Subcommittee did not recommend a change from the current Rule. Neither the circuit judges nor the MSBA recommended a change.

Mr. Klein agreed that the distinction is not always clear. Particularly in the private mediation world, some mediators, who are former judges, make it known what they feel about the decision that was worked out. The Rule being discussed pertains to court-ordered mediation. The idea was to respect the boundaries of how definitions are used in the Rules. Mr. Sullivan pointed out the language in section (h) that reads "a communications." Is this supposed to be the words "a communication" or the word "communications?" The Reporter replied that it should read "a communication." By consensus, the Committee agreed to change this language to "a communication."

By consensus, the Committee approved Rule 17-102 as amended.

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

MARYLAND RULES OF PROCEDURE

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 – GENERAL PROVISIONS

Rule 17-103. ROLE OF MEDIATOR

A mediator may help identify issues and options, assist the parties and their attorneys in exploring the needs underlying their respective positions, and, upon

request, record points of agreement expressed and adopted by the parties. While acting as a mediator, the mediator does not engage in any other ADR process and does not recommend the terms of an agreement.

Committee note: Mediators often will record points of agreement expressed and adopted by the parties to provide documentation of the results of the mediation. Because a mediator who is not a Maryland lawyer is not authorized to practice law in Maryland, and a mediator who is a Maryland lawyer ordinarily would not be authorized to provide legal advice or services to parties in conflict, a mediator should not be drafting agreements regarding matters in litigation for the parties to sign. If the parties are represented by counsel, the mediator should advise them not to sign the document embodying the points of agreement until they have consulted their attorneys. If the parties, whether represented or not, choose to sign the document, a statement should be added that the points of agreement as recorded by the mediator constitute the points of agreement expressed and adopted by the parties.

Source: This Rule is derived from the last two sentences of former Rule 17-102 (d) (2011).

Rule 17-103 was accompanied by the following Reporter's note.

Rule 17-103 is derived from the last two sentences of current Rule 17-102 (d) with clarifying and stylistic changes. A Committee note provides guidance concerning a mediator's role in recording points of agreement expressed and adopted by the parties.

Mr. Klein told the Committee that a few new items had been added to Rule 17-103. In the first sentence, the language

“expressed and adopted” had been added. The reason for this was contained in the Committee note that had been added at the end of the Rule. The second sentence pertains to when the mediator is acting as a mediator, and it does not mean that the parties cannot agree that they would like to shift into something other than mediation. The court has ordered mediation, and this means that the mediator remains neutral and is not taking a position on whether the terms of the agreement are appropriate. The Committee note is new, and the Subcommittee felt that it was an improvement on the existing note. It attempts to draw the line between the need for the parties to get something down in writing about what they had agreed to without having the mediator engage in the unlawful practice of law if not an attorney, and engage in representing conflicting interests if the person is an attorney.

Mr. Klein noted that the language “expressed and adopted” appears in the first sentence of the Committee note. The reason for this language is that parties in their discussion with the mediator may make statements that may not be clear, or they may use slang which the mediator may then try to put into clearer language. The mediator may restate something that the parties have just said. If this is adopted, the mediator can write it down as a point of agreement expressed and adopted by the parties, even though the mediator may have put the statements into better language. The second sentence means that where the parties have agreed to such issues as who gets the house and who gets custody of the children, a mediator should not be putting in

choice-of-law provisions and other kinds of provisions that may be boilerplate.

Mr. Klein noted that Rule 17-103 addresses a very thorny area of ADR, and the Subcommittee's view was that the language of the Rule and the Committee note was the best that they could do. Judge Norton said that he had a comment that may be related to mediator training. Parties in mediation come back and tell him about their agreement, which may fit under any one of six legal umbrellas, and they have no idea when Judge Norton asks which of the six is appropriate. Is it a dismissal with a stipulation, a consent judgment, a continuance? He was not sure whether this would be just a matter of training mediators to explain the possibilities to the parties, or whether language pertaining to the parties recording what legal umbrella the agreement falls under should be added to the Rule. Mr. Klein responded that the Subcommittee had not considered that specific issue. They did consider the fact that in the area of child custody, there are certain forms that courts like to receive.

Mr. Rosenthal commented that this has less to do with writing agreements and more to do with how a judge dockets a case once an agreement has been reached. Judge Wilson, who is chair of the ADR Committee for the District Court and Mr. Rosenthal had discussed trying to create a document that may be entitled "case disposition information sheet," which would explain all of the possibilities just enumerated by Judge Norton in lay-person terms. When figuring out how to mark the case, such as whether

it should stay open or be dismissed with or without prejudice, the parties would understand what all of the possible dispositions meant, so the parties would come to the court informed about what the possibilities were and tell the judge what disposition they would like to have. Judge Norton inquired if this is better handled administratively or by adding language to the Rule.

The Chair remarked that in the court-annexed mediation, the objective is to resolve the case if possible. It is an open case. Would it be part of a mediator's job, assuming the mediator gets an agreement in substance, to tell the parties what the options are to implement the agreement and ask them which option they would like? Whatever they express and adopt would be put into the agreement. Is this a proper role for the mediator? It is not the mediator suggesting what the parties should do.

Ms. Wohl replied that mediators routinely reality-test the agreements, asking the parties what the agreement would mean if they chose a certain arrangement. The consultants can work together to institute this type of procedure for the circuit court ADR coordinators, so that they can give out forms to mediators which would explain the options to the parties. Also, in the family cases, *pro se* parties often do not know what their rights are when they make agreements. There is a kind of information form that the consultants would like the parties to get.

The Chair asked Ms. Wohl if she was satisfied that providing the disposition options would fall under Rule 17-103 whether the options are presented in a form or in the memorandum agreement. Ms. Wohl answered that mediators are prohibited from giving legal advice, but this is different than legal information. Legal advice would mean that the mediator could state how he or she believes that the law applies to the parties' situation. Legal information is the mediator giving the parties the information and asking them what they would like to do. Judge Norton observed that this could be handled administratively.

Delegate Vallario inquired who would prepare the agreement if the mediator is not allowed to. If the parties are represented by counsel, they could agree that the mediator would be allowed to draft the mediation agreement. The Chair responded that the first time the Committee addressed this issue, it was in the context of custody and visitation. At the time, the Rule was restricted. The court could not refer one of these cases unless both sides were represented by counsel. The Rule specified that whatever the parties agreed to in mediation, the mediator would draft a document containing the terms of the agreement and send it to counsel. They would presumably then draft the agreement and submit it to the court.

The Chair said that a few years later somehow the requirement that both parties be represented dropped out. When Title 17 was drafted, the requirement that both parties be represented was never in the Rules. This is what has created the

issue of how far a mediator should be permitted to go in actually drafting an agreement for parties who are in conflict. Mr. Klein had mentioned mediators telling the parties about choice of law. There are many other topics as well that the mediator could tell the parties about. This was discussed by the Court of Appeals when Title 17 was first presented to the Court. There was fairly significant discussion by the Court about this. At the time, the Court preferred the language: "the mediator should be like a scribe." The mediator would write down what the parties had said in the mediation and nothing more. The word "scribe" is no longer being used. The problem still exists. What is the role of the mediator who may not be an attorney? Or the mediator may be an attorney but should not be giving legal advice to parties in conflict.

Delegate Vallario expressed his concern about the mediator not being able to draft the agreements. Mr. Klein explained that the mediator may record the points of agreement. He noted the interplay between the words "record" and "draft." The mediator can write down the words as a point of agreement. The word "drafting" is used in the sense that if an attorney was advocating for one side or the other in a conflict, the attorney would tell the parties to think about various issues. There could have been many subjects that the parties had never discussed. The mediator could have a checklist of issues that may arise in that kind of case and may encourage the parties to think about this.

Mr. Klein observed that if two attorneys settle a case, one will send the other a release. The attorney may put language in the release that had never been discussed, and the two attorneys may talk back and forth about whether the one attorney agrees to what the other one put in the release. The mediator is not in a position to do this. This is not to say that the mediator cannot write something down, but there is a limit to what the mediator can write down. It is limited to what the parties said, or what the mediator had said, and the parties had adopted. Delegate Vallario expressed the concern that the mediators should be able to draft if the parties have agreed and are represented by counsel. The Rule should not prevent the mediator from drafting. The Chair pointed out that it would be a problem if the Rule does not refer to this. The mediators may put in "legalese" what had never been discussed.

Mr. Klein inquired if Rule 17-103 should use the words "crafting agreements." He suggested that in the body of Rule 17-103, the language could be that the mediator may record points of agreement. This would not be in the Committee note. The idea is that the mediator should not be generating complex law. Is the word "crafting" an improvement on the word "drafting?" Mr. Sullivan replied that he was not sure that the word "crafting" meant something different than the word "drafting." Mr. Klein remarked that the word "record" has a specific meaning. Judge Kaplan expressed the opinion that it is a good idea not to have the mediator prepare the agreement. He had conducted many

mediations and settlement conferences, and he was not sure of the difference between the two. At the mediation or settlement conference, if there is counsel, Judge Kaplan tells them to prepare an agreement if one is reached. They submit the agreement, and if anyone has any changes to suggest, this can be discussed and decided upon. Judge Kaplan then signs the agreement.

Mr. Carbine inquired if the Rule means that the mediator has the ability, based on his or her experience, to look at an agreement made by two parties, represented or not, and if the mediator knows that the agreement will do more harm than good and not solve the problems, the mediator has the power to advise the parties to think about what they had agreed to, or if it means that the mediator's hands are tied. The Chair commented that it is a fine line between suggesting that there may be a problem that the parties may need to think about and giving legal advice to the parties that if they do what they had agreed to, a certain result will happen. To call attention to potential implementation problems may be an appropriate role for the mediator.

Ms. Wohl observed that the agreement is supposed to be informed and voluntary, so if the mediator sees that the agreement is illegal or feels it is something that one of the parties may regret, the mediator cannot be prevented from drawing attention to problems. Mr. Klein remarked that if the parties insist on going down a certain path, the mediator will have to

tell the parties to get counsel and then come back. At the end of the day, the mediator cannot take a position. Ms. Wohl responded that the mediator may raise the issue or issues for the parties. The parties are the ones who have to take the position. In the extreme circumstance, if the parties want to do something that is outrageous under the law or that will have a terrible result, the mediator can withdraw.

Mr. Brault remarked that he would approach this problem from the world of enforcement. He did not name the sessions he had attended as "mediations," because a mediation requires special training. The biggest problem in ADR is reneging. Whenever he and his colleagues are involved in an ADR session, the question is always how to conclude the conference in a manner that concludes the case. Many times, they have had agreements, and then a party will renege. A motion is then filed, and because it is an enforceable agreement, the trial court has the authority to enforce it and require the party to abide by the agreement. This means that an agreement has to be produced from these ADR conferences.

Mr. Brault remarked that he had learned from experience that in every session in which he and his colleagues participate, they write down the points of agreement. It may involve money or payment over time; it may be injunctive relief. Everyone should have to sign the agreement. Usually, an agreement is subject to a full release and agreement later, but the points in that agreement are agreed to, and they are signed by the parties. The

Rule provides that the mediator cannot have the parties sign. Mr. Klein responded that the Rule does not do that. The Chair added that the Rule provides that if the parties are represented by counsel, they do not have to sign the agreement until they have spoken with their attorney.

Mr. Johnson referred to the question raised before about drafting the agreement. What is really at issue is the fact that the mediator should not be authoring the terms of the agreement. The mediator should be only recording the points of agreement between the two parties. The word "authoring" may get to what is trying to be accomplished, instead of the word "drafting." The mediators should be recording the points of agreement between the parties. This is addressed in the beginning of the Rule. Ms. Wohl expressed the opinion that this a good idea, because the word "drafting" is confusing. Mr. Klein asked if the word "drafting" should be changed to the word "authoring" in the Committee note. The Subcommittee agreed to this change, and by consensus, the Committee approved of the change.

Mr. Simison commented that in the situation where there is a mediator, and the parties are represented by counsel, the Committee note makes it clear that ordinarily an attorney in Maryland should not be providing services to the parties in conflict. Under the Rules, an attorney can provide services to parties in conflict if there is informed consent. It may be that *pro se* litigants cannot offer informed consent, but when parties

are represented, informed consent may be occurring when the attorneys ask the mediator, who is an attorney, to draft something for the attorneys to look at. Mr. Klein expressed the view that it is a substantive issue whether this is consent or not as opposed to a procedural issue. He said that he was inclined not to address with this in the Committee note, but he added that he did not disagree with Mr. Simison in terms of the probable legal consequences of that set of facts.

By consensus, the Committee approved Rule 17-103 as amended.

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

MARYLAND RULES OF PROCEDURE

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 – GENERAL PROVISIONS

Rule 17-104. BASIC MEDIATION TRAINING PROGRAMS

To qualify under Rule 17-205 or 17-304, a basic mediation training program shall include the following:

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

(b) mediation skills and techniques; including information-gathering skills; communication skills; problem-solving skills, interaction skills, conflict management skills; negotiation techniques; caucusing; cultural, ethnic, and gender issues; and strategies to (i) identify and respond to power imbalances, intimidation, and the

presence and effects of domestic violence, and (ii) safely terminate a mediation when such action is warranted;

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

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

Source: This Rule is derived from former Rule 17-106 (a) (2011).

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

Rule 17-104 lists the required components of a basic mediation program. It is derived from current Rule 17-106 (a). Rule 17-104 adds to the current Rule required training regarding (1) ethnic issues, (2) strategies to identify and respond to intimidation and to the presence and effects of domestic violence, and (3) strategies to safely terminate a mediation when necessary.

Subsection (a)(4) of current Rule 17-106, which requires training regarding rules, statutes, and practice in the circuit courts, is not included in the new Rule because Rule 17-104 is a general Rule, which does not solely apply to the circuit courts. This concept has therefore been transferred to Rule 17-205 (a)(3) and Rule 17-304 (a)(3). Rule 17-205(a)(3) requires a mediator to be "familiar" with the rules, statutes and practices governing mediation in the circuit court. Rule 17-304 (a)(3) requires a mediator to be familiar with the Rules in Title 17 of the Maryland Rules.

Mr. Klein explained that Rule 17-104 prescribes what is called the "basic mediation" training for all levels of the court

system. Later on, there are more specific additional qualifications for the circuit court as opposed to the District Court, and within the circuit court, there are different kinds of cases and different tracks of cases, such as Business and Technology, Domestic, etc. Rule 17-104 sets out the bare minimum requirements that every mediator must have no matter where he or she practices in court-referred mediation but not in private mediation. Mr. Klein told the Committee that what was new in the Rule was that language had been added to section (b). There is a list of items that the training course has to cover. What had been added was the word "ethnic" and most of the last four lines, "strategies to (i) identify and respond to" (the words "power imbalances" were already in the Rule) as well as "intimidation, and the presence and effects of domestic violence, and (ii) safely terminate a mediation when such action is warranted."

By consensus, the Committee approved Rule 17-104 as presented.

Mr. Klein presented Rule 17-105, Mediation Confidentiality, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 – GENERAL PROVISIONS

Rule 17-105. MEDIATION CONFIDENTIALITY

(a) Mediator

Except as provided in sections (c) and (d) of this Rule, a mediator and any person present or otherwise participating in the mediation at the request of the mediator shall maintain the confidentiality of all mediation communications and may not disclose or be compelled to disclose mediation communications in any judicial, administrative, or other proceeding.

(b) Parties

Subject to sections (c) and (d) of this Rule:

(1) A party to a mediation and any person present or who otherwise participates in a mediation at the request of a party may not disclose or be compelled to disclose a mediation communication in any judicial, administrative, or other proceeding; and

(2) The parties may enter into a written agreement to maintain the confidentiality of mediation communications and to require all persons who are present or who otherwise participate in a mediation at the request of a party also to maintain the confidentiality of mediation communications.

Cross reference: See Rule 5-408 (a)(3).

(c) Signed Document

A document signed by the parties that records points of agreement expressed and adopted by the parties or that constitutes an agreement reached by the parties as a result of mediation is not confidential, unless the parties agree in writing otherwise.

Cross reference: See Rule 9-205 (g) concerning the submission of a document embodying the points of agreement to the court in a child access case.

(d) Permitted Disclosures

In addition to any disclosures required by law, a mediator, a party, and a person who was present or who otherwise

participated in a mediation may disclose or report mediation communications:

(1) to a potential victim or to the appropriate authorities to the extent that they reasonably believe necessary to help: prevent serious bodily harm or death to the potential victim;

(2) when relevant to the assertion of or defense against allegations of mediator misconduct or negligence; or

(3) when relevant to the assertion of or defense against a claim or defense that because of fraud, duress, or misrepresentation a contract arising out of a mediation should be rescinded.

Cross reference: For the legal requirement to report suspected acts of child abuse, see Code, Family Law Article, §5-705.

(e) Discovery; Admissibility of Information

Mediation communications that are confidential under this Rule are not subject to discovery, but information that is otherwise admissible or subject to discovery does not become inadmissible or protected from disclosure solely by reason of its use in mediation.

Cross reference: See Rule 5-408 (b).

Source: This Rule is derived from former Rule 17-109 (2011).

Rule 17-105 was accompanied by the following Reporter's note.

Rule 17-105 is derived from current Rule 17-109, Mediation Confidentiality.

Section (a) is carried forward, without change.

Sections (b) and (d) are restyled for

clarity.

Section (c) is restyled to reflect the terminology used in new Rule 17-103 regarding the recordation of points of agreement expressed and adopted by the parties.

In section (e), the words “privileged and” are deleted.

A Committee Note pertaining to neutral experts is deleted.

Cross references to Rule 5-408 are added.

Mr. Klein said that part of Rule 17-105 was new. Language had been added to section (c) necessitated by the addition of the language “expressed and adopted” to Rule 17-103. Section (c) now reads, “[a] document signed by the parties that records points of agreement expressed and adopted by the parties or that constitutes an agreement reached by the parties as a result of mediation is not confidential...”. Section (d) states what communications that were made in the course of a mediation a mediator or a party may disclose. The Subcommittee expanded the opening sentence to also sweep in persons who were present or otherwise participated in a mediation. Ms. Potter expressed the view that the language of subsection (d)(3) was awkward and could be tightened up to state “when relevant to an assertion of or defense against fraud, duress, or misrepresentation...”. This may be a style issue. The Reporter commented that when the Rules were cleaned up, the Subcommittee was working off of the marked copy.

Mr. Klein noted that the language "the assertion of or defense against" could be deleted. He suggested that the language should be "...when relevant to a claim or defense that because of fraud, duress, or misrepresentation a contract arising out of a mediation should be rescinded." Mr. Sullivan remarked that it would be easier to follow if the last clause that reads "a contract arising out of a mediation" preceded the language "because of fraud, duress, or misrepresentation." The operative part of this is that a contract arising out of a mediation should be rescinded. The reason that it needs to be rescinded is because of fraud, duress, or misrepresentation. Mr. Klein said that subsection (d)(3) would read "when relevant to a claim or defense that a contract arising out of a mediation should be rescinded because of fraud, duress, or misrepresentation." By consensus, the Committee approved this change.

Mr. Klein said that the other change to Rule 17-105 was in section (e). The Subcommittee struck the words "privileged and" from section (e). The problem is that a privilege cannot be created by rule. It is a matter of substantive law.

By consensus, the Committee approved Rule 17-105 as amended.

Mr. Klein told the Committee that the next set of Rules to be considered were in Chapter 200, which comprised the Rules at the circuit court level.

Mr. Klein presented Rule 17-201, Authority to Order ADR, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 200 – PROCEEDINGS IN CIRCUIT COURT

Rule 17-201. AUTHORITY TO ORDER ADR

(a) Generally

A circuit court may order a party and the party's attorney to participate in ADR but only in accordance with the Rules in this Chapter and in Chapter 100 of this Title.

(b) Referral Prohibited

The court may not enter an order of referral to ADR in a protective order action under Code, Family Law Article, Title 4, Subtitle 5, Domestic Violence.

Committee note: Mediation is not precluded in a peace order proceeding under Code, Courts Article, Title 3, Subtitle 15, but the court should be especially careful in its determination as to whether mediation is appropriate where the parties are in an intimate relationship and there has been the equivalent of domestic violence.

(c) Mediation of Child Access Disputes

Rule 9-205 governs the authority of a circuit court to order mediation of a dispute as to child custody or visitation, and the Rules in Title 17 do not apply to proceedings under that Rule except as otherwise provided in that Rule.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 17-103 (a) (2011).
Section (b) is new.
Section (c) is derived from former Rule 17-103 (c)(1) (2011).

Rule 17-201 was accompanied by the following Reporter's

note.

> Rule 17-201 is derived in part from current Rule 17-103.
>
> Section (a) generally states a circuit court's authority to order ADR.
>
> Section (b) prohibits the court from entering an order of referral to ADR in a protective order action.
>
> Mediation is not precluded in a peace order proceeding. *See* Code, Courts Article, §3-1505 (d)(1)(v). A Committee note following section (b) suggests that the court use caution in determining whether mediation is appropriate in a peace order proceeding where the parties are in an intimate relationship and there has been the equivalent of domestic violence.
>
> Section (c) states that Rule 9-205 governs child access disputes and that the Rules in Title 17 do not apply, except as otherwise provided in that Rule.

Mr. Klein noted that section (a) of Rule 17-201 had been restyled to state the same concept that the current Rule does, but in a more positive way. The Subcommittee added a Committee note after section (b) pertaining to peace orders. The practitioners of this type of work had told the Subcommittee that this Committee note was needed. Mediation is not appropriate where such a power imbalance exists.

By consensus, the Committee approved Rule 17-201 as presented.

Mr. Klein presented Rule 17-202, General Procedure, for the Committee's consideration.

Alternative A
[one (free) settlement conference may be required]

MARYLAND RULES OF PROCEDURE

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 – PROCEEDINGS IN CIRCUIT COURT

Rule 17-202. GENERAL PROCEDURE

(a) Scope

This Rule does not apply to a health care malpractice action under Code, Courts Article, Title 3, Subtitle 2A.

(b) Participation Requirements

The court may refer an action or matter to one ADR process in accordance with sections (c), (d), and (e) of this Rule, but participation in that ADR may not be required if a timely objection to participation is filed. The court may also require the parties and their attorneys to participate in one non-fee-for-service settlement conference, which should generally be conducted, if at all, subsequent to an earlier ADR process. Any objection to participation in the ADR process selected by the court, other than a non-fee-for-service settlement conference, or to the ADR practitioner designated by the court shall be made in accordance with section (f) of this Rule.

(c) Designation of ADR Practitioner

(1) Direct Designation

In an order referring an action or matter to ADR, the court may designate, from a list of approved ADR practitioners maintained by the court pursuant to Rule 17-207, an ADR practitioner to conduct ADR.

(2) Indirect Designation

Alternatively, if the ADR is non-fee-for-service, the court may delegate to an ADR organization from a list maintained by the court pursuant to Rule 17-207, or to an ADR unit of the court, the authority to select an ADR practitioner qualified under Rules 17-205 or 17-206, as applicable, to conduct ADR. An individual selected by the ADR organization pursuant to the court order shall be deemed to be a court-designated ADR practitioner.

Committee note: Examples of the use of indirect designation are referrals of indigent litigants to publicly funded community mediation centers and referrals of one or more types of cases to a mediation unit of the court.

(d) Discretion in Designation

In designating an ADR practitioner, the court is not required to choose at random or in any particular order from among the qualified ADR practitioners or organizations on its lists. Although the court should endeavor to use the services of as many qualified persons as possible, the court may consider, in light of the issues and circumstances presented by the action or the parties, any special training, background, experience, expertise, or temperament possessed by the available prospective designees.

(e) Contents of Order of Referral; Termination or Extension of ADR; Restriction on Fee Increase

An order of referral to ADR shall specify a maximum number of hours of participation by the parties. If the order is to a fee-for-service ADR, it shall also specify the hourly rate that the ADR practitioner may charge for ADR services in the action, which may not exceed the maximum stated in the applicable fee schedule. The parties may participate for less than the number of hours stated in the order if they

and the ADR practitioner agree that no further progress is likely. The parties may, by agreement, extend the ADR beyond the number of hours stated in the order. During any extension of the ADR, the ADR practitioner may not increase the practitioner's hourly rate for providing services relating to the action.

Committee note: Having a maximum number of hours in the court's order of referral encourages participation in ADR by assuring the parties that the ADR does not require an open-ended commitment of their time and money. Although the parties, without further order of court, may extend the ADR beyond the maximum, an amendment to the time requirements contained in a scheduling order may be made only by order of the court.

Cross reference: See Rule 2-504, concerning scheduling orders, and Rule 17-208, concerning fee schedules and sanctions for noncompliance with an applicable schedule.

(f) Objection

(1) Applicability

This section applies to an objection to a referral to ADR other than a non-fee-for-service settlement conference.

(2) Notice and Opportunity to Object

(A) If the court enters an order referring an action or matter to ADR, the court, in the order, shall inform the parties that they have a right within 30 days (i) to object to the referral, (ii) to offer an alternative proposal, or (iii) to agree on another individual to conduct ADR and submit to the court a "Request to Substitute ADR Practitioner" substantially in the form set forth in subsection (f)(2)(C) of this Rule. If the order designates an ADR Organization to select an ADR practitioner, the objection may be filed within 30 days after the party is notified by the ADR organization of the selection.

(B) If the court announces a determination to enter an order referring a matter to ADR, the court, at the time of the announcement, shall provide the information set forth in section (f)(2)(A) of this Rule.

(C) A Request to Substitute ADR Practitioner shall be substantially in the following form:

[Caption of Case]

Request to Substitute ADR Practitioner and

Selection of ADR Practitioner by Stipulation

We agree to attend ADR conducted by _____

_____.
(Name, address, and telephone number of ADR Practitioner)

We have made payment arrangements with the ADR Practitioner and we understand that the court's fee schedules do not apply to this ADR. We request that the court substitute this ADR Practitioner for the ADR Practitioner designated by the court.

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

[Add additional signature lines for any additional parties and attorneys.]

I, _____,
(Name of ADR Practitioner)

agree to conduct the following ADR in the above-captioned case

[check one]:

❑ mediation in accordance with Rules 17-103 and 17-105.

❑ ADR other than mediation:_____[specify type of ADR].

At the conclusion of the ADR, I agree to comply with the provisions of Rule 17-202 (g).

I solemnly declare and affirm under the penalties of perjury that I have the qualifications prescribed by the following Rules [check all that are true]:

❑ Rule 17-205 (a) [Basic mediation]

❑ Rule 17-205 (b) [Business and Technology]

❑ Rule 17-205 (c) [Economic Issues - Divorce and Annulment]

❑ Rule 17-205 (d) [Health Care Malpractice]

❑ Rule 17-205 (e) [Foreclosure]

❑ Rule 17-206 [ADR other than mediation]

❑ None of the above.

_____
Signature of ADR Practitioner

(3) **Ruling on Objection**

If a party timely objects to a referral, the court shall revoke its order. If the parties offer an alternative proposal or agree on a different ADR practitioner, the court shall revoke or modify its order, as appropriate.

(4) If No Objection

If an objection is not filed within the time allowed by this Rule, the order of referral shall be implemented in accordance

with its terms, subject to modifications by the court.

(g) Evaluation Forms; Notification to Court

At the conclusion of an ADR, the ADR practitioner shall give to the parties any ADR evaluation forms and instructions provided by the court and promptly advise the court whether all, some, or none of the issues in the action have been resolved.

Source: This Rule is derived in part from former Rule 17-103 (b) and (c)(2)-(4) (2011) and is in part new.

Rule 17-202 was accompanied by the following Reporter's note.

Rule 17-202 outlines the general procedure for participating in ADR and for designating an ADR practitioner. It is derived, in part, from current Rule 17-103.

Section (a) states that the Rule does not apply to health care malpractice actions under Code, Courts Article, Title 3, Subtitle 2A. ADR in these actions is addressed in Rule 17-203.

Two alternatives are presented for section (b), Participation Requirements. Alternative A provides that the court may require the parties to participate in one non-fee-for- service settlement conference. Alternative B provides that the court may require the parties to participate in one non-fee-for- service settlement conference plus one non-fee-for-service ADR.

Section (c) prescribes the procedures for direct and indirect designation of an ADR practitioner. An ADR practitioner may be selected from a list of approved ADR practitioners maintained by the court, or, if the ADR is non-fee-for-service, the court may delegate the authority to select an ADR practitioner to an ADR organization or to an ADR unit of the court.

A Committee note following section (c) provides examples of the use of indirect designation.

Section (d) is derived from current Rule 17-103 (c)(4). It provides that, in designating an ADR practitioner, the court is not required to choose at random or in any particular order from among the qualified ADR practitioners or organizations on its lists.

Section (e) is new. It provides that an order of referral to ADR shall specify a maximum number of hours of participation by the parties. As stated in a Committee Note following section (e), this encourages parties to participate in ADR by assuring that the ADR does not require an open-ended commitment of time and money. The parties may agree to extend the ADR beyond the maximum number of hours; however, any time requirements in a scheduling order that would be affected are not changed unless the court amends its scheduling order. Section (e) also prohibits an ADR practitioner from increasing the practitioner's hourly rate in the event that the parties agree to extend the ADR beyond the maximum number of hours.

A cross reference is added following section (e) to Rule 2-504, concerning scheduling orders, and Rule 17-208, concerning fee schedules and noncompliance with an applicable schedule.

Section (f) provides the procedure for objecting to a referral to ADR other than a non-fee-for-service settlement conference. Section (f) also provides a form for a Request to Substitute ADR Practitioner.

Two alternatives are presented for subsection (f)(3), Ruling on Objection, which correspond to the two alternatives presented for section (b), which are explained above.

Alternative A for subsection (f)(3) provides that, if a party timely objects to a referral, the court shall revoke its order. If the parties offer an alternative proposal

or agree on a different ADR practitioner, the court shall revoke or modify its order, as appropriate.

Alternative B for subsection (f)(3) provides that, if a party timely objects to a fee-for-service referral, the court shall revoke its order. Because section (b) of Alternative B authorizes the court to require the parties to participate in one non-fee-for-service ADR (in addition to one non-fee-for-service settlement conference), Alternative B for subsection (f)(3) contains an additional subsection regarding a timely objection to a non-fee-for-service ADR. The court must give fair and prompt consideration to any such objection. If the parties offer an alternative proposal or agree on a different ADR practitioner, the court, unless it finds good cause to the contrary, is required to revoke or modify its order and make reasonable accommodations to permit the parties to implement their agreement.

Section (g) is new. It requires the ADR practitioner to give to the parties any evaluation forms and instructions provided by the court and to notify the court whether all, some, or none of the issues in the action have been resolved. This section is added at the request of a circuit court judge. This section ensures that the parties have the opportunity to evaluate the ADR practitioner, that the court is informed regarding the status of the case, and that the court receives information from which statistics can be generated.

Alternative B
[one (free) settlement conference PLUS one (free) ADR may be required]

Rule 17-202. GENERAL PROCEDURE

(a) Scope

This Rule does not apply to a health care malpractice action under Code, Courts Article, Title 3, Subtitle 2A.

(b) Participation Requirements

The court may refer an action or matter to one ADR process in accordance with sections (c), (d), and (e) of this Rule and, if the ADR is non-fee-for-service, require participation by the parties and their attorneys. The court may not require participation in that ADR if the ADR is fee-for-service and a timely objection to participation is filed. The court may also require the parties and their attorneys to participate in one non-fee-for-service settlement conference, which should generally be conducted, if at all, subsequent to an earlier ADR process. Any objection to participation in the ADR process selected by the court, other than a non-fee-for-service settlement conference, or to the ADR practitioner designated by the court shall be made in accordance with section (f) of this Rule.

(c) Designation of ADR Practitioner

(1) Direct Designation

In an order referring an action or matter to ADR, the court may designate, from a list of approved ADR practitioners maintained by the court pursuant to Rule 17-207, an ADR practitioner to conduct ADR.

(2) Indirect Designation

Alternatively, if the ADR is non-fee-for-service the court may tentatively delegate to an ADR organization from a list

maintained by the court pursuant to Rule 17-207, the authority to select an ADR practitioner qualified under Rules 17-205 or 17-206, as applicable, to conduct ADR. An individual selected by the ADR organization pursuant to the court order shall be deemed to be a court-designated ADR practitioner.

Committee note: Examples of the use of indirect designation are referrals of indigent litigants to publicly funded community mediation centers and referrals of one or more types of cases to a mediation unit of the court.

(d) Discretion in Designation

In designating an ADR practitioner, the court is not required to choose at random or in any particular order from among the qualified ADR practitioners or organizations on its lists. Although the court should endeavor to use the services of as many qualified persons as possible, the court may consider, in light of the issues and circumstances presented by the action or the parties, any special training, background, experience, expertise, or temperament possessed by the available prospective designees.

(e) Contents of Order of Referral; Termination or Extension of ADR; Restriction on Fee Increase

An order of referral to ADR shall specify a maximum number of hours of participation by the parties. If the order is to a fee-for-service ADR, it shall also specify the hourly rate that the ADR practitioner may charge for ADR services in the action, which may not exceed the maximum stated in the applicable fee schedule. The parties may participate for less than the number of hours stated in the order if they and the ADR practitioner agree that no further progress is likely. The parties may, by agreement, extend the ADR beyond the number of hours stated in the order. During any extension of the ADR, the ADR practitioner may not increase the

practitioner's hourly rate for providing services relating to the action.

Committee note: Having a maximum number of hours in the court's order of referral encourages participation in ADR by assuring the parties that the ADR does not require an open-ended commitment of their time and money. Although the parties, without further order of court, may extend the ADR beyond the maximum, an amendment to the time requirements contained in a scheduling order may be made only by order of the court.

Cross reference: See Rule 2-504, concerning scheduling orders, and Rule 17-208, concerning fee schedules and sanctions for noncompliance with an applicable schedule.

(f) Objection

(1) Applicability

This section applies to an objection to a referral to ADR other than a non-fee-for-service settlement conference.

(2) Notice and Opportunity to Object

(A) If the court enters an order referring an action or matter to ADR, the court, in the order, shall inform the parties that they have a right within 30 days (i) to object to the referral, (ii) to offer an alternative proposal, or (iii) to agree on another individual to conduct ADR and submit to the court a "Request to Substitute ADR Practitioner" substantially in the form set forth in subsection (f)(2)(C) of this Rule. If the order designates an ADR Organization to select an ADR practitioner, the objection may be filed within 30 days after the party is notified by the ADR organization of the selection.

(B) If the court announces a determination to enter an order referring a matter to ADR, the court, at the time of the announcement, shall provide the information set forth in section (f)(2)(A) of this Rule.

(C) A Request to Substitute ADR Practitioner shall be substantially in the following form:

[Caption of Case]

Request to Substitute ADR Practitioner and

Selection of ADR Practitioner by Stipulation

We agree to attend ADR conducted by _____

_____.
(Name, address, and telephone number of ADR Practitioner)

We have made payment arrangements with the ADR Practitioner and we understand that the court's fee schedules do not apply to this ADR. We request that the court substitute this ADR Practitioner for the ADR Practitioner designated by the court.

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

[Add additional signature lines for any additional parties and attorneys.]

I, _____,
(Name of ADR Practitioner)

agree to conduct the following ADR in the above-captioned case [check one]:

❑ mediation in accordance with Rules 17-103 and 17-105.

❑ ADR other than mediation:_____[specify type of ADR].

At the conclusion of the ADR, I agree to comply with the provisions of Rule 17-202 (g).

I solemnly declare and affirm under the penalties of perjury that I have the qualifications prescribed by the following Rules [check all that are true]:

- ❑ Rule 17-205 (a) [Basic mediation]
- ❑ Rule 17-205 (b) [Business and Technology]
- ❑ Rule 17-205 (c) [Economic Issues - Divorce and Annulment]
- ❑ Rule 17-205 (d) [Health Care Malpractice]
- ❑ Rule 17-205 (e) [Foreclosure]
- ❑ Rule 17-206 [ADR other than mediation]
- ❑ None of the above.

_____
Signature of ADR Practitioner

(3) **Ruling on Objection**

(A) If a party timely objects to a referral to a fee-for-service ADR, the court shall revoke its order.

(B) If a party timely objects to a referral to a non-fee-for-service ADR, the court shall give fair and prompt consideration to the objection and to any alternative proposed by the party. If the parties offer an alternative proposal or agree on a different ADR practitioner, the court, unless it finds good cause to the contrary, shall revoke or modify its order and make reasonable accommodations to permit the parties to implement their agreement.

(4) If No Objection

> If an objection is not filed within the time allowed by the court or this Rule, the order of referral shall be implemented in accordance with its terms, subject to modifications by the court.
>
> (g) Evaluation Forms; Notification to Court
>
> At the conclusion of an ADR, the ADR practitioner shall give to the parties any ADR evaluation forms and instructions provided by the court and promptly notify the court whether all, some, or none of the issues in the action have been resolved.
>
> Source: This Rule is derived in part from former Rule 17-103 (b) and (c)(2)-(4) (2011) and is in part new.

Rule 17-202 was accompanied by the following Reporter's note.

> See the Reporter's note to Rule 17-202 Alternative A.

Mr. Klein noted that the alternatives he had previously mentioned appear in Rule 17-202. The first six pages plus the Reporter's note at the end constitute Alternative A. This is basically the current practice. Alternative B comes right after Alternative A. This essentially provides that the court cannot require fee-for-service ADR if a party objects, but the court can require a non-fee-for-service, i.e. a free settlement conference. Section (a) of Rule 17-202 contains new language that makes it clear that health care malpractice actions have specific statutory requirements, and therefore this Rule does not apply to those actions. They will be addressed later on in the Rules. Section (b) is the main part of the Rule. The theory of the

second sentence is that settlement conferences generally go at the end of the litigation process after an attempt at mediation or some other form of ADR. There could also be a settlement conference up front followed by another settlement conference.

The Chair pointed out that in section (b), the language in the second sentence that reads: "...if at all, subsequent to an earlier ADR process..." the word "an" should be changed to the word "any." Otherwise, it would suggest that there has to be an earlier ADR process. By consensus, the Committee approved this change.

Judge Pierson said that he had a question that applies to both Alternatives A and B. He had made a suggestion to the Subcommittee, which had rejected it. This is not the codification of existing law. Existing law does not limit the court's authority to order a settlement conference to only one settlement conference. He vigorously opposed restricting the court's authority to one settlement conference. He did not know of any reason for this. In Baltimore City, there can be resistence to multiple ADR opportunities, but usually the resistence is to the mediation, not to the settlement conference. However, what the Rule provides is that if a judge has a settlement conference, and the parties are close to settlement, but for whatever reason, they do not reach settlement that day, the judge would not have any power to order another settlement conference. Why should the court's power be restricted this way? The Chair asked Judge Pierson if he were treating this as two

separate settlement conferences. Judge Pierson replied that his point was that it could give rise to an argument like that. Even if it is not that circumstance, why can the court not order more than one settlement conference? They are free.

Ms. Potter asked what was the opposition to Alternative B. Mr. Klein responded that the reasons that he had heard for not choosing Alternative B were that parties cannot be forced to settle a case. Nothing is free, because typically, the attorneys are being paid. At some point, a party is entitled to have his or her case heard by the court, ruled upon, and disposed of. Mr. Klein added that this was not his personal position; he was representing the argument against Alternative B.

Judge Pierson commented that in many settlement conferences, the parties tell him that they are unable to settle the case. If he would accept the parties' evaluation, then they could discontinue the settlement conference; however, Judge Kaplan would say that many cases settle even when the parties firmly believe that they cannot settle. In Judge Pierson's view, to impose a standard that there can only be one settlement conference unduly restricts the court's powers. Could the Rule require that there can be only one day of trial in a case? The Chair answered negatively but noted that the Rule could require only one trial.

Ms. Potter remarked that the benefit of choosing Alternative B would be that many times at the mediation conference, it is her client's first time being in a courthouse. Mediation can be a

very effective tool if it is held in the courthouse. The more times the parties can talk and narrow the issues, the better off they are. The Chair said that Judge Pierson had raised an interesting point, but settlement conferences in the Court of Special Appeals may be adjourned and reconvened, so that if the parties preferred to talk or seek advice, this would not be regarded as two settlement conferences. Ms. Potter noted that in Anne Arundel County, the trial dates are given out at the settlement conferences.

Judge Pierson remarked that they get much resistence, and, as Mr. Klein had said, many attorneys would seize the opportunity to say that they do not have to go to a settlement conference. Ms. Potter observed that this may vary from jurisdiction to jurisdiction. In Anne Arundel County, depending on which judge is assigned that day, at the settlement conference, either only the trial date is given out and nothing else goes on, or discussions will take place. In that county, if there is a mediation and a settlement conference, at least at the mediation, the attorneys will not be pushed into agreeing.

Mr. Klein looked at the current Rule. He asked Judge Pierson if the problem was the language "one non-fee-for-service settlement conference." Subsection (c)(3) states: "The court may not require an objecting party or the attorney of an objecting party to participate in an alternative dispute resolution proceeding other than a non-fee-for-service settlement conference." He noted that the article used before the language

"non-fee-for-service settlement conference" is "a" and not "one." This could mean one or of that type. Judge Pierson said that he was satisfied with the language of the current Rule. He added that he was opposed to the word "one." This appears in both alternatives. Mr. Klein pointed out that this is in the second sentence of Alternative A and the third sentence of Alternative B. If the word "one" is changed to the word "a," it would track the current Rule more precisely. He added that he did not think that the Subcommittee intended a departure from the current Rule. It would depend on how the word "a" is interpreted.

The Chair noted that in the third sentence of section (b) of Alternative A and the fourth sentence of Alternative B, the word "a" is used before the language "non-fee-for-service settlement conference." Ms. Wohl expressed her agreement with changing the word "one" to the word "a," and by consensus, the Committee approved of this change. The Chair remarked that this probably will not cause a problem, and the issue, which is implicit in the alternative with the mediation and had been discussed in terms of the District Court Rule, was that if the parties go to a settlement conference (non-fee-for-service, usually before a judge), and they do not arrive at an agreement, the judge may order them to another settlement conference. This was the problem. Judge Pierson commented that he is too busy to require settlement conferences frequently. He objected to the fact that the Rule provides that as a matter of law, in no case, can a judge order more than one settlement conference.

Mr. Klein said that the Reporter's notes will be changed to reflect the change to the Rule. Also, the language at the top of both Alternatives referring to "one free settlement conference" will have to be eliminated. Mr. Johnson inquired if there is a fee-for-service settlement conference, and Mr. Klein answered negatively. The point of this language is to make it clear that a fee cannot be charged.

Mr. Klein pointed out that because of the addition of the new definition that addresses ADR organizations, section (c) refers to how one goes about designating an ADR practitioner indirectly, which is when someone appoints an organization to select the ADR practitioner who has to meet the same qualifications as anyone else. The clarification added by the Subcommittee to subsection (c)(2) was that these designations are for non-fee-for-service ADR. Mr. Klein told the Committee that section (e) was new. It addresses the contents of an order of referral. The purpose of this provision was to get some uniformity and clarity in terms of what is expected by the parties and by the ADR practitioner when they get appointed. What is the extent of the commitment, both in terms of time and money? A Committee note explaining the intent of this provision was added.

Mr. Klein said that section (f) deals with objection to referral to ADR other than a non-fee-for-service settlement conference. A notice provision was added, subsection (f)(2), indicating that if the court enters an order referring an action

to ADR, the order shall inform the parties of their rights to object. Under subsection (f)(2)(C), if the parties would like to substitute an ADR practitioner for the one initially identified by the court, the Rule provides them with a form for making this substitution. The form makes clear that the parties have made payment arrangements with the practitioner and understand that the court's fee schedules do not apply. There are other items in the form that the ADR practitioner certifies.

Judge Pierson told the Committee that he had made another suggestion that had not been adopted. The suggestion had been made at the request of the ADR administrator, and it was that instead of a right to object within 30 days in all cases, it should be 30 days or such other longer periods as may be set by the court. Mr. Klein responded that he was not sure that the Subcommittee had focused on that suggestion, and it may have been overlooked. The Reporter noted that it had been discussed in the context of the health care cases.

Judge Pierson explained that the reason for the suggestion was that as part of the efforts to encourage litigants to use ADR, they had been trying various strategies. One was that if the court imposes the mediation order too early in the case, the parties may not have time to assess whether they really want to go to ADR or not. It may be that a 60-day period would be necessary. The Chair inquired if what Judge Pierson was suggesting was 60 days to object. Judge Pierson answered affirmatively, pointing out that it could be 60 days or such

longer period as the court may set.

Mr. Klein remarked that the did not have a problem with this suggestion. He asked the Subcommittee if they approved of the suggestion. The Chair asked if the cases should be slowed down this way. He added that the time standards have to be taken into consideration. This is an administrative issue. Judge Pierson commented that this would not impact on the time standards. Many other factors may be more significant.

The Chair inquired if Judge Pierson envisioned this as the court routinely setting those cases in at a given point. Judge Pierson responded that they have a variety of scheduling tracks, and it has gotten to the point where they are requiring mediation in virtually all civil cases. They have certain tracks for motor tort cases with a specific damage amount and certain tracks in other tort cases with other amounts. They have problems getting the parties to go to mediation in motor tort cases. They had been trying various experiments to lessen that reluctance. The Chair asked how this would be implemented. Judge Pierson replied that in certain mediation orders on certain scheduling tracks, 60 days would be a matter of course. The time period would vary according to the track.

Mr. Klein asked what would happen if the court waited to issue the order of referral. The Chair remarked that he thought that differentiated case management (DCM) courts did that in the different tracks. They would have a different date for when ADR would be ordered. They may want to wait until discovery is over.

Judge Pierson said that they issue their mediation orders the same time that they issue their scheduling orders. The Reporter noted that the Rule does not state when the mediation has to be finished. It just provides when the parties have to file their objection, stating that they do not want to go to ADR at all or they would like a different mediator. Judge Pierson responded that this was the issue to which he had referred.

Mr. Johnson questioned why Rule 17-202 should not keep the 30-day time period. Then one of the parties can come in and ask for more time before going to the settlement conference rather than the Rule providing for 60 days in all cases. Judge Pierson said that Baltimore City has many cases involving insurers. The judges cannot make up their minds within 30 days whether they want mediation. The Chair noted that Mr. Johnson had suggested that the Rule should build in the ability of the court in a given case to extend the time period on request, and the Chair's view was that this is appropriate. If Judge Pierson is going to routinely put 60 days or 90 days or more in every order in a given track, this will affect the time standards.

Mr. Michael observed that in Montgomery County, those orders are dealt with by the parties, not only extending the date but picking the meeting places, particularly in the medical malpractice arena where there are 30-day orders, so it is all taken care of. He was not sure how well this procedure would work in other kinds of cases. Judge Pierson said that this is the procedure in the medical malpractice cases in Baltimore City,

and it does not create any problems. The parties know that they have to mediate. The Chair pointed out that medical malpractice cases are different. Extensions in routine motor tort cases would double or triple the time. Judge Pierson asked if this would be true with extending the time to object.

Mr. Johnson commented that if a 60-day time period to object is added, parties will ask for even more time, so he suggested leaving the 30-day period in, so that the parties can ask for time above and beyond the 30 days. The Chair inquired if the Court of Appeals should authorize a greater time period. It would automatically double the time in a substantial number of cases that are already being delayed. Judge Pierson responded that the cases would not be delayed, because mediation does not delay the trial date, the date to complete discovery, or the date of the pretrial conference. Baltimore City has a one-year trial in all of their motor tort cases, except for the cases under $30,000. Extending the time to allow the parties to object to mediation would not affect all of the rest of it. The Chair said that there would be an effect if they pick the time when the mediation can take place. If discovery is going to be held up, this is one of the possible delays.

Judge Pierson noted that Baltimore City had passed a mediation order that provides the name of the mediator and states that the parties have to mediate. They passed a scheduling order that provides that the parties have to finish their mediation by a certain date. It may depend on the particular track, it may be

a discovery deadline, or it may be 30 days after a discovery deadline. Allowing the parties to object to a mediation does not affect any of those other deadlines. If the parties would like to opt out of the mediation, it may delay their decision to opt out, but it does not change the date when they must have the mediation. The Chair inquired why the scheduling of the mediation would not be affected if there are 60 days to object as opposed to 30 days. If the time period is 30 days, and no one objects, the mediation can then be scheduled. If it is necessary to wait 60 days or 90 days to determine if anyone objects, that could cause a delay. Judge Pierson responded that no one schedules a mediation before the discovery deadline, or it is very rare.

Judge Kaplan commented that he might be referring to a former procedure, but he recalled that in Baltimore City, they used to file a management plan with the Court of Appeals who decided which track would be handled in which amount of time. This is what was done every year. He expressed the view that extending the time to object would be a mistake. If people would like to ask for a change in the time to designate which way they are going to handle the case, they can ask to do so. The change to 60 days would prolong the agony for no legitimate purpose. Most of the civil cases are motor tort cases. Medical malpractice cases cause no problems. They are usually worked out before they even get to the settlement court. In the motor tort cases, the defendants are all represented by house counsel for

insurance companies such as State Farm, Allstate, Geico, Progressive, Nationwide, and a few others. They come to the settlement conference and make an offer. If they cannot deviate from that offer, the case will have to be tried.

The Chair asked Judge Pierson if there are motor tort cases being referred to mediation or some kind of non-binding arbitration or neutral evaluation. Judge Pierson answered that they are being referred to mediation. Some years ago, they started referring the motor tort cases, which are their largest single category of cases, to mediation. The vast majority of those cases (probably 75%) opt out. They do not want to pay for the mediation unless they think that they are going to get some benefit. An attorney for the largest insurer had told him that when a case is filed, they were not in a position to make a determination whether mediation is useful or not.

The Chair responded that this gets to the question of whether mediation should be ordered that early by the court if the judge knows that the parties are not ready to negotiate, because there has been no discovery. Judge Pierson commented that waiting to do the order later will have more impact on time standards. Ms. Potter remarked that the order in Anne Arundel County provides that the mediation will be scheduled within 60 days of the pretrial conference. The mediation can take place whenever the parties are willing as long as it is within 60 days of the pretrial conference.

Mr. Klein noted that the issue is when a party has to file

an objection to the mediation or to the person conducting the mediation. The Chair commented that the parties may not want to go to mediation, because they do not want to pay for it. Judge Kaplan remarked that the parties can file a motion stating that they do not want to pay for the mediation and that they are willing to go to a settlement conference. The attorneys are usually employees of the insurance companies. Judge Pierson added that they make their own evaluation. In certain cases, they decide that the case may be worth more than what was initially offered. They are willing to talk about some cases. The attorneys had said that they were not willing to sort the cases out in 30 days. Mr. Klein inquired if this is because they are overworked or because they need more information about the case. Judge Pierson replied that it is because they need more information.

Mr. Brault told the Committee that house counsel are programmed to pay a certain amount of money. The large insurance companies plug into their computers all of the client's medical bills, lost wages, the nature of the injury, and the degree of permanency of the injury. The computer replies what should be paid. The attorney comes to the settlement conference and offers only the amount determined by the computer. The courts are now dealing with the average payments determined by computerized programs. Mr. Brault said that among other reasons, he assumed that they do not want to mediate because of this fixed amount.

The Chair pointed out that when the first court-annexed

mediation was recommended to the Court of Appeals by the Rules Committee, it was part of a management-of-litigation package of rules, one of which required differentiated case management. The second provided for automatic disclosure of basic information that tracked Fed. R. Civ. Pro. 26, Duty to Disclose; General Provisions Governing Discovery. The Court of Appeals said that if basic information that discloses up front (because it has to be disclosed at some point) is required, that would compress the time needed, and so ADR could follow. But the Litigation Section of the MSBA disapproved heartily of requiring the disclosure of something that was not asked for and they succeeded in having the Court defer adoption of that proposal. They would wait and see how this played out in the federal courts. Part of the original plan was to compress the time. Since the proposal was not adopted, the parties rely on discovery to get the necessary information, the medical bills, and the identity of the witnesses. The Chair added that he could understand the unwillingness of the insurance companies to mediate, except in special cases, until they get the necessary information.

Mr. Brault commented that other problems exist. Because this is the medicare age, if the injured driver of the car was 67 years old, nothing will happen until Medicare states what their federal lien is. It is never clear how long this will take. The attorney has to be sure that it is accurate. If an attorney settles a case without obtaining an accurate written statement from the Enforcement Division of Medicare, not only the patient

is liable to reimburse the attorneys, but the attorneys on both sides are liable, and the insurance company for the defendant is liable. Anyone involved in the case is liable for the lien.

The Chair observed that this still gets back to the issue being discussed. Understanding all of this and given the experience that the insurance companies are not willing to discuss a greater amount to settle the case, either mediation should be delayed until the parties are able to go if they wish to, or mediation should be required early even though the court knows that the parties are going to need more time to object. Judge Pierson explained that he was asking for the power to extend the time. The Chair cautioned that Judge Pierson had asked for the power to extend the time routinely. Judge Pierson responded that this would only apply to certain tracks. The Chair noted that motor tort cases would be one of those tracks.

Mr. Klein asked if anyone would second a motion if Judge Pierson wanted to put his request in the form of a motion. Mr. Leahy suggested that the Rule could provide for a right to object to mediation within 30 days or such other time as ordered by the court. Judge Pierson responded that this was what he had asked for. Judge Pierson moved that the Rule provide for a right to object to mediation within 30 days or such other time as ordered by the court. The motion was seconded, and it failed with only three in favor. The Chair noted that even though the motion failed, it should be understood that the parties can always request more time to object, and the court has the

discretion to grant the request. Mr. Brault added that the time can be extended under Rule 1-204, Motion to Shorten or Extend Time Requirements.

Mr. Klein drew the Committee's attention to subsection (f)(3) and reminded them that this is in the context of non-fee-for-service settlement conferences. The first sentence of subsection (f)(3) is the current Rule. No one can be forced to fee-for-service ADR. Section (g) is new. This is a "housekeeping" matter. It provides the court some closure with respect to its referral.

After the lunch break, Mr. Klein said that the discussion of Alternative A had been completed. He added that before considering Alternative B, he had a question for the ADR Subcommittee. During the break, he had been trying to remember, which constituency was the proponent of Alternative B. Neither the Chair nor the Reporter could remember. Mr. Klein asked Ms. Wohl if she could remember. She replied that she did not exactly know where it came from, but whoever had proposed it had not considered the implications of this provision. The sentiment had been that if the court can order a family conference non-fee-for-service over the parties' objection, why can they not order a mediation non-fee-for-service over the parties' objection? However, mediation is not mandatory in certain areas. Alternative B would require someone to go to mediation against his or her will if the parties do not have to pay for it. She said that she did not see the point of this.

Mr. Klein remarked that if no one on the Subcommittee disagreed, the Subcommittee would withdraw Alternative B. No objections were made, so Mr. Klein told the Committee that the Subcommittee withdrew Alternative B from consideration. This would mean that the Rule would be the same as the current Rule including the word "a" before the words "non-fee-for-service settlement conference."

By consensus, the Committee approved Alternative A of Rule 17-202 as amended.

Mr. Klein presented Rule 17-203, Health Care Malpractice Actions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 – PROCEEDINGS IN CIRCUIT COURT

Rule 17-203. HEALTH CARE MALPRACTICE ACTIONS

(a) Applicability

This Rules applies to health care malpractice actions under Code, Courts Article, Title 3, Subtitle 2A.

(b) Mandatory Referral to ADR; Timing

Within 30 days after the later of the filing of the defendant's answer to the complaint or the defendant's certificate of a qualified expert under Code, Courts Article, Title 3, Subtitle 2A-04, the court shall enter a scheduling order requiring the parties to engage in ADR at the earliest possible date, unless all parties file with the court an agreement not to engage in ADR and the court finds that ADR would not be

productive.

Cross reference: See Rule 2-504 (b)(2)(C) and Code, Courts Article, §3-2A-06C (b).

(c) Designation

(1) By the Parties

Within 30 days after the later of the filing of the defendant's answer to the complaint or the defendant's certificate of a qualified expert under Code, Courts Article, Title 3, Subtitle 2A-04, the parties may choose an ADR practitioner. If the parties agree on an ADR practitioner, the parties promptly shall notify the court of the name of the ADR practitioner. A Notice of Selection of ADR Practitioner shall be substantially in the following form:

[Caption of Case]

Notice of Selection of ADR Practitioner by Stipulation

We agree to attend ADR conducted by _____

_____.

(Name, address, and telephone number of ADR Practitioner)

We have made payment arrangements with the ADR Practitioner and we understand that the court's fee schedules do not apply to this ADR. We request that the court designate this ADR Practitioner in lieu of any court-appointed ADR Practitioner.

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

[Add additional signature lines for any additional parties and attorneys.]

I, _____,
(Name of ADR Practitioner)

agree to conduct the following ADR in the above-captioned case [check one]:

❑ mediation in accordance with Rules 17-103 and 17-105.

❑ ADR other than mediation:_____[specify type of ADR].

At the conclusion of the ADR, I agree to comply with the provisions of Rule 17-203 (f).

I solemnly declare and affirm under the penalties of perjury that I have the qualifications prescribed by the following Rules [check all that are true]:

❑ Rule 17-205 (a) [Basic mediation]

❑ Rule 17-205 (b) [Business and Technology]

❑ Rule 17-205 (c) [Economic Issues - Divorce and Annulment]

❑ Rule 17-205 (d) [Health Care Malpractice]

❑ Rule 17-205 (e) [Foreclosure]

❑ Rule 17-206 [ADR other than mediation]

❑ None of the above.

_____
Signature of ADR Practitioner

(2) By the Court

If the parties do not notify the court within the time required under

subsection (c)(1) of this Rule that they have agreed upon an ADR practitioner, the court promptly shall appoint a mediator who meets the qualifications prescribed by Rule 17-205 (d) and notify the parties. Within 15 days after the court notifies the parties of the name of the mediator, a party may object in writing, stating the reason for the objection. If the court sustains the objection, the court shall appoint a different mediator.

(d) Initial conference; Outline of Case

The ADR practitioner shall schedule an initial conference with the parties as soon as practicable. At least 15 days prior to the initial conference, each party shall send to the ADR practitioner a brief written outline of the strengths and weaknesses of the party's case. A party is not required to provide the outline to any other party, and the ADR practitioner shall not disclose the outline or its contents to anyone unless the disclosure is authorized by the party who submitted the outline.

Cross reference: See Code, Courts Article, §3-2A-06C (h)(2) and (k).

(e) Discovery

If the ADR practitioner determines that the parties need to engage in discovery in order to facilitate the ADR, the ADR practitioner, consistent with the scheduling order, may mediate the scope and schedule of discovery needed to proceed with ADR, adjourn the initial conference, and reschedule an additional conference for a later date.

(f) Evaluation Forms

At the conclusion of the ADR, the ADR practitioner shall give to the parties any ADR evaluation forms and instructions provided by the court.

(g) Notification to the Court

The parties shall notify the court if

the case is settled. If the parties agree to settle some but not all of the issues in dispute, the ADR practitioner shall notify the court by filing a notice of partial settlement with the court. If the parties have not agreed to a settlement, the ADR practitioner shall file a notice with the court that the case was not settled.

(h) Costs

Unless otherwise agreed by the parties, the costs of the ADR shall be divided equally between the parties.

Source: This Rule is new.

Rule 17-203 was accompanied by the following Reporter's note.

New Rule 17-203 is proposed because health care malpractice actions are governed by a statute that includes a mandatory referral to ADR. *See* Code, Courts Article, Title 3, Subtitle 2A. A specific Rule, pertaining only to health care malpractice actions, is warranted in order to implement the statute and to ensure that the ADR process conforms with the statute.

Section (a) states that the Rule applies to health care malpractice actions.

Section (b) prescribes the procedure for the mandatory referral to ADR. In practice, courts order ADR in the scheduling order. The Rule codifies this practice.

Section (c) prescribes the procedure for selecting an ADR practitioner, and provides a form for this purpose. The procedure for selecting the practitioner is derived from Code, Courts Article, §3-2A-06C (e) and (f).

Section (d) addresses the scheduling of an initial conference and the parties' submission of written case outlines to the ADR practitioner. Section (d) is derived from Code, Courts Article, §3-2A-06C (g) and

(h).

Section (e) provides that the ADR practitioner may mediate the scope and schedule of discovery needed to proceed with ADR, and may adjourn and reschedule the initial conference. This acknowledges the reality that the productivity of ADR in medical malpractice actions depends, in large part, on the amount of discovery that has taken place. Section (e) is derived in part from Code, Courts Article, §3-2A-06C (i).

Section (f) requires the ADR practitioner to give to the parties any ADR evaluation forms and instructions provided by the court. A similar provision is included in new Rule 17-202. It is intended to ensure that the parties have the opportunity to evaluate the ADR practitioner and that the court receives information from which statistics can be generated.

Section (g) requires the parties to notify the court regarding the outcome of the ADR and is derived from Code, Courts Article, §3-2A-06C (n).

Section (h) provides that, unless the parties agree otherwise, the costs of ADR shall be divided equally between the parties. This section is derived from Code, Courts Article, §3-2A-06C (o).

Mr. Klein noted that Rule 17-203 is new and addresses specifically with the unique situation created by statute for health care malpractice actions. He thanked Judge Pierson for his assistance in helping develop this Rule. This is an effort to address the requirements of the health care statute, Code, Courts Article, Title 3, Subtitle 2A. Judge Pierson had handled many of these cases, and he was satisfied that this addresses the issues. The feedback that Mr. Klein had received from other

medical malpractice attorneys was that this is consistent with current practice.

The Chair pointed out language in section (b) that read "...at the earliest possible date...", but the language of the first sentence of section (d) read "...as soon as practicable." He asked if the word "possible" should be changed to the word "practicable" in section (b). By consensus, the Committee approved changing the word "possible" to the word "practicable." The Chair noted that the Reporter had checked the statute, and it uses the language "possible date." The Reporter remarked that this could be interpreted to mean "practicable."

Mr. Klein said that Rule 17-203 uses a similar form to the one in Rule 17-202 for the situation when the parties want to select their own ADR practitioner with the understanding that this is outside of the fee schedule set by the court. Mr. Brault asked why the form has to be in the Rule. He and other medical malpractice attorneys often select their own ADR practitioners and this form complicates the procedure. Mr. Klein responded that some people select their own ADR practitioners frequently, but some do not. The form provides a benefit to the court, and makes clear what the rules are about payment. Mr. Brault commented that any medical malpractice attorney who gets an ADR practitioner will obviously pay for the person's services. Mr. Klein noted that the Rule sets out the Notice of Selection of ADR Practitioner "substantially in the following form." Mr. Brault pointed out that people may be reluctant to fill out the forms.

Mr. Klein responded that there is only one form in the Rule.

Mr. Brault observed that Mr. Michael had done a great amount of medical malpractice mediation from both sides. Mr. Klein stated that this Rule applies to court-annexed mediation and not to private mediation. Everything in this title is only for mediation that is under the auspices of the court. Mr. Michael noted that the court can do whatever it wants, and he had no objection to the form.

By consensus, the Committee approved Rule 17-203 as amended.

Mr. Klein presented Rule 17-204, Neutral Experts, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 200 - PROCEEDINGS IN CIRCUIT COURT

Rule 17-204. NEUTRAL EXPERTS

(a) Appointment

With the consent of all parties participating in the ADR, a court-designated ADR practitioner may select a neutral expert to participate in the ADR. The expense of the neutral expert shall be allocated among the parties in accordance with their agreement.

(b) Confidentiality

(1) Mediation Proceedings

In a mediation, the provisions of Rule 17-105 apply to the neutral expert.

(2) Other ADR

> In all ADR other than mediation, the parties and the ADR practitioner may require the neutral expert to enter into a written agreement binding the neutral expert to confidentiality. The written agreement may include provisions stating that the expert may not disclose or be compelled to disclose any communications related to the ADR in any judicial, administrative, or other proceedings. Communications related to the ADR that are confidential under an agreement allowed by this subsection are not subject to discovery, but information otherwise admissible or subject to discovery does not become inadmissible or protected from disclosure solely by reason of its use related to the ADR.
>
> Source: This Rule is derived from former Rule 17-105.1 (2011).

Rule 17-204 was accompanied by the following Reporter's note.

> Rule 17-204 is derived from current Rule 17-105.1. The Rule deletes the definition of the term "neutral expert" because this term is defined in new Rule 17-102 (j).
>
> The entire Rule is restyled for clarification.

Mr. Klein explained that Rule 17-204 was essentially a restyled version of current Rule 17-105.1, Neutral Experts. Nothing in the Rule was substantively new.

By consensus, the Committee approved Rule 17-204, as presented.

Mr. Klein presented Rule 17-205, Qualifications of Court-designated Mediators, for the Committee's consideration.

Rule 17-205. QUALIFICATIONS OF COURT-DESIGNATED MEDIATORS

(a) Basic Qualifications

To be designated by the court as a mediator, an individual shall:

(1) unless waived by the parties, be at least 21 years old;

(2) have completed at least 40 hours of basic mediation training in a program meeting the requirements of (A) Rule 17-104 or (B) for individuals trained prior to [effective date of the Rule], former Rule 17-106;

(3) be familiar with the rules, statutes, and practices governing mediation in the circuit courts;

(4) have mediated or co-mediated at least two civil cases;

Committee note: The experience requirement of subsection (a)(4) may be met by mediating in the District Court or the Court of Special Appeals.

(5) complete in each calendar year four hours of continuing mediation-related education in one or more of the topics set forth in Rule 17-104;

(6) abide by any mediation standards adopted by the Court of Appeals;

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

(8) comply with procedures and requirements prescribed in the court's case management plan filed under Rule 16-202 b. relating to diligence, quality assurance, and

a willingness to accept a reasonable number of referrals on a reduced-fee or pro bono basis upon request by the court.

(b) Business and Technology Cases

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

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

(2) within the two-year period preceding application for approval pursuant to Rule 17-207, have served as a mediator in at least five non-domestic civil mediations, at least two of which involved the types of conflicts that are assigned to the Business and Technology Case Management Program.

(c) Economic Issues in Divorce and Annulment Cases

To be designated by the court as a mediator with respect to issues in divorce or annulment cases other than those subject to Rule 9-205, the individual shall:

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

(2) have completed at least 20 hours of skill-based training in mediation of economic issues in divorce and annulment cases; and

(3) have served as a mediator or co-mediator in at least two mediations involving marital economic issues.

(d) Health Care Malpractice Claims

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

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

(2) within the two-year period preceding application for approval pursuant to Rule 17-207, have served as a mediator in at least five non-domestic civil mediations, at least two of which involved the types of conflicts that are assigned to the Health Care Malpractice Claims ADR Program;

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

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

Cross reference: See Code, Courts Article, §3-2A-06C.

(e) Foreclosure Cases

Except for an ADR practitioner chosen by the Office of Administrative Hearings to conduct a "foreclosure mediation" pursuant to Code, Real Property Article, §7-105.1 and Rule 14-209.1, to be designated by the court as a mediator in a proceeding to foreclose a lien instrument, other than by agreement of the parties, the individual shall:

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

(2) through experience, training, or education, be knowledgeable about lien instruments and federal and Maryland laws, rules, and regulations governing foreclosure proceedings.

Source: This Rule is derived in part from former Rule 17-104 (a),(c),(d),(e), and (f) (2011) and is in part new.

Rule 17-205 was accompanied by the following Reporter's note.

Rule 17-205, Qualifications of Court-Designated Mediators, is derived from current Rule 17-104 (a), (c), (d), (e), and (f).

Subsection (a)(1) omits the requirement that a court-designated mediator have at least a bachelor's degree. The Subcommittee has been advised that studies indicate that a mediator's formal education is not particularly relevant to the mediator's success in resolving disputes. Another change to subsection (a)(1) permits the parties, instead of the court, to waive the requirement that a mediator be at least 21 years of age.

Subsection (a)(2) requires the completion of 40 hours of basic mediation training in a program that meets the requirements of new Rule 17-104. Individuals who were trained prior to the effective date of the Rule must have completed a training program that meets the requirements of current Rule 17-106.

Subsection (a)(3) requires a mediator to be "familiar" with the rules, statutes, and practices governing mediation in the circuit courts. This concept replaces a similar concept in current Rule 17-106 (a)(4), which requires the mediation training program to include the rules, statutes, and practices governing mediation in the circuit courts.

Subsection (a)(4) adds a requirement for the mediator to have mediated or co-mediated at least two civil cases. A Committee Note following subsection (a)(4) clarifies that the experience requirement may be met by mediating in the District Court or the Court of Special Appeals.

Subsection (a)(5) requires a mediator to complete four hours of continuing mediation-related education per year. This concept replaces a similar concept in current Rule 17-104 (a)(3), which requires a mediator to complete eight hours of continuing mediation-related training in every two-year period.

A stylistic change is made to the introductory clause of section (b), Business and Technology Cases. Subsection (b)(1) is carried forward from current Rule 17-104 (c), without change.

In subsection (b)(2), the requirements of current Rule 17-104 (c)(2) have been revised and replaced with a requirement that the mediator, within the two-year period preceding the mediator's application, must have served as mediator in at least five non-domestic civil mediations, at least two of which involved the types of conflicts assigned to the Business and Technology Program. The language requiring that the mediations be "circuit court" mediations of "comparable complexity" is deleted.

The language in current Rule 17-104 (c)(3), which requires a mediator to agree to serve as co-mediator with individuals who have not yet met the requirements of the Rule, is deleted.

In section (c), Economic Issues in Divorce and Annulment Cases, the word "annulment" is added. A requirement that the mediator must have served as a mediator or co-mediator in at least two mediations involving marital economic issues replaces the requirement in current Rule 17-104 (d)(3), which requires the mediator to have observed or co-mediated at least eight hours of divorce mediation sessions involving marital property issues.

In section (d), Health Care Malpractice Claims, the vague phrase "of comparable complexity" is deleted. A requirement is added that, in the two-year period preceding the mediator's application for approval, the mediator must have served as mediator in at least five non-domestic civil mediations, at least two of which involved the types of conflicts assigned to the Health Care Malpractice ADR program. The requirement that the mediations be "circuit court" mediations is deleted.

In section (e), Foreclosure Cases, language from current Rule 17-104 (f)(2), which requires a mediator to have completed at least five non-domestic circuit court mediations or five non-domestic non-circuit court mediations of comparable complexity, is deleted. In subsection (e)(2), a broader and

> continuing requirement of knowledge regarding the federal and Maryland laws, rules, and regulations governing foreclosure proceedings replaces the general requirement in current Rule 17-104 (f)(3) that the mediator "be knowledgeable about lien instruments and foreclosure proceedings."
>
> Subsections (c)(4), (e)(4), and (f)(4) of current Rule 17-104, pertaining to continuing education training, are deleted. Continuing education requirements are set forth in subsection (a)(5).

Mr. Klein told the Committee that Rule 17-205 contains some changes from current section (a) of current Rule 17-104, Qualifications and Selection of Mediators. Section (a) of Rule 17-205 addresses basic qualifications of court-designated mediators in the circuit court. Later sections address certain types of cases or tracks of cases. Section (a) has the common requirements for mediators for all cases. Subsection (a)(1) uses the language "unless waived by the parties," while the current Rule uses the language "unless waived by the court." The requirement in the current Rule that the person must have a bachelor's degree from an accredited college or university has been deleted, because studies do not show a correlation between possession of a bachelor's degree and efficacy as a mediator. There are a number of cases handled at the circuit court level where they would like to appoint people who do not have that degree but are excellent mediators. The Subcommittee thoroughly debated this requirement and ultimately concluded that it be removed.

Mr. Klein said that subsection (a)(2) requires that a mediator have completed at least 40 hours of basic mediation training. The last phrase in subsection (a)(2) refers to people trained prior to a certain effective date, and this is a "grandfather" clause for those who took a course such as the 40-hour one given by the Maryland Institute for the Continuing Professional Education of Lawyers (MICPEL), which did not necessarily include certain of the new topics that added to the requirements of basic mediator training. It seemed inappropriate to ask people to go back and retake a 40-hour course to pick up a few subjects that may have been covered but were not expressly required by the prior Rule.

Mr. Klein pointed out that the other difference from the current Rule is in subsection (a)(5), which would require that in each calendar year, a mediator must complete four hours of continuing mediation-related education. The current Rule has a requirement of eight hours but every two years. He had spoken with people from the Maryland Mediation and Conflict Resolution Office (MACRO) and the District Court office who had lived under these Rules for some time, and based on that experience, the consensus was that more frequent training was better than more training over a longer period of time. Various iterations of this Rule had been considered pertaining to the number of hours of education, and the Subcommittee settled on four hours each year. Before this decision was made, the Subcommittee members satisfied themselves that educational opportunities exist and

that there is sufficient training available so that this requirement would not be difficult to meet.

The Chair commented that the Reporter had pointed out a question about subsection (a)(4). Does the language "two civil cases" mean cases in litigation? If it had been an out-of-court pre-litigation mediation, it really would not have been a case. Was this intended to require that the prior mediation be a case that is already in litigation? Mr. Klein responded that he did not think that the Subcommittee had discussed this. Ms. Wohl remarked that this was intended to also refer to District Court or Court of Special Appeals cases as is stated in the Reporter's note. The Chair pointed out that the term "civil case" suggests that it has to do with something that is already in litigation. Mr. Klein said he would read it that way. He did not think that this was a change from the current Rule.

Ms. Kratovil-Lavelle commented that she thought that the Subcommittee meant that mediators had conducted mediations in cases in the circuit court or District Court. The Chair pointed out that pre-litigation mediation would not count. Mr. Klein noted that this is a new requirement. He thought that it came from the Conference of Circuit Court Judges. Ms. Wohl expressed the opinion that it would be appropriate for the language of subsection (b)(4) to be "mediated two civil disputes."

Mr. Carbine observed that if this provision is opened up, it would lose its structure. Mr. Klein added that the experience is not verifiable. Mr. Carbine remarked that the first

interpretation, which was that the mediation has to be for cases already in litigation, was the correct one. Mr. Klein said that this provision had been presented to the Subcommittee as a suggestion from the Conference of Circuit Court Judges, but he did not know if MACRO had asked for it. Ms. Wohl responded that MACRO intended it to be for cases in litigation. Mr. Klein stated that the Subcommittee's intention was that subsection (b)(4) only applied to cases already in litigation.

Mr. Klein said that section (b) addresses additional requirements for persons who wish to mediate on the Business and Technology track cases. Subsection (b)(2) has the additional requirement beyond the basic qualifications in section (a) that within the two-year period preceding application for approval of the mediator's track, the person must have served as a mediator in at least five non-domestic civil mediations. The Chair inquired if this means cases. Mr. Rosenthal remarked that this is not new. Mr Klein noted that the only new language in section (c) is the addition of the word "annulment." Section (d) is similar to the provision in the current Rule as is the language of section (e).

Mr. Klein said that the major changes to Rule 17-205 are in section (a), the continuing education requirement and the deletion of the bachelor's degree requirement. He asked the Chair if the Rule should be changed because of the confusion about what the word "cases" means. Ms. Wohl pointed out that in subsection (b)(2), the words "circuit court" have been dropped,

because in the Business and Technology area, it is necessary that the mediators be sophisticated. Many of them are in private practice involved in pre-filing of commercial cases, and they did not want those persons to be excluded as mediators in the Business and Technology ADR. The Reporter noted that part of the change to section (b) was eliminating the words "comparable complexity," because the meaning was not clear.

By consensus, the Committee approved Rule 17-205 as presented.

Mr. Klein presented Rule 17-206, Qualifications of Court-designated ADR Practitioners other than Mediators, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 200 – PROCEEDINGS IN CIRCUIT COURT

Rule 17-206. QUALIFICATIONS OF COURT-DESIGNATED ADR PRACTITIONERS OTHER THAN MEDIATORS

(a) Generally

Except as provided in section (b) of this Rule or unless the parties agree otherwise, to be designated by the Court to conduct ADR other than mediation, an individual shall:

(1) abide by any applicable standards adopted by the Court of Appeals;

(2) submit to periodic monitoring of court-ordered ADR proceedings by a qualified person designated by the county

administrative judge;

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

(4) either (A) be a member in good standing of the Maryland bar and have at least five years experience in the active practice of law as (i) a judge, (ii) a practitioner, (iii) a full-time teacher of law at a law school accredited by the American Bar Association, or (iv) a Federal or Maryland administrative law judge, or (B) have equivalent or specialized knowledge and experience in dealing with the issues in dispute; and

(5) have completed any training program required by the court.

(b) Judges and Masters

An active or retired judge or a master of the court may chair a non-fee-for-service settlement conference.

Cross reference: Rule 16-813, Maryland Code of Judicial Conduct, Canon 4F and Rule 16-814, Maryland Code of Conduct for Judicial Appointees, Canon 4F.

Source: This Rule is derived from former Rule 17-105 (2011).

Rule 17-206 was accompanied by the following Reporter's note.

Rule 17-206 is derived from current Rule 17-105. Stylistic changes are made to the introductory clause of section (a) and to subsection (a)(1).

Subsections (a)(2), (3), and (4) are carried forward, without change.

Subsection (a)(5) changes the requirements of current Rule 17-105 (a)(5). Under current Rule 17-105 (a)(5), unless waived by the court, an ADR practitioner other than a mediator must have completed a training program that has been approved by the county administrative judge and is at least eight hours long. New subsection (a)(5) requires a court-designated ADR practitioner, other than a mediator, to complete any training program required by the court.

Stylistic changes are made to subsection (b) to clarify that an active or retired judge or a master may chair a non-fee-for-service settlement conference.

Mr. Klein explained that Rule 17-206 had essentially been restyled. Section (b) had one minor change, the addition of the phrase "active or retired" to modify the word "judge." This would clarify that either active or retired judges could chair settlement conferences.

By consensus, the Committee approved Rule 17-206 as presented.

Mr. Klein presented Rule 17-207, Procedure for Approval, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 200 – PROCEEDINGS IN CIRCUIT COURT

Rule 17-207. PROCEDURE FOR APPROVAL

(a) Generally

(1) Applicability

This section applies to persons who seek eligibility for designation by a court to conduct ADR pursuant to Rule 9-205, Rule 14-212, or Rule 17-201 other than in actions assigned to the Business and Technology Case Management Program or the Health Care Malpractice Claims ADR Program.

(2) Application

A person seeking designation to conduct ADR shall file an application with the clerk of the circuit court from which the person is willing to accept referrals. The application shall be substantially in the form approved by the State Court Administrator and shall be available from the clerk of each circuit court. The clerk shall transmit each completed application, together with all accompanying documentation, to the county administrative judge or the judge's designee.

(3) Documentation

(A) If the application is for designation as a mediator, it shall be accompanied by documentation demonstrating that the applicant meets the requirements of Rule 17-205 (a) and, if applicable, Rule 9-205 (c)(2) and Rule 17-205 (c) and (e).

(B) If the person is applying for designation to conduct ADR other than mediation, the application shall be accompanied by documentation demonstrating that the applicant is qualified as required by Rule 17-206 (a).

(C) The State Court Administrator may require the application and documentation to be provided in a word processing file or other electronic format.

(4) Action on Application

After any investigation that the county administrative judge deems appropriate, the county administrative judge or designee shall notify the applicant of the approval or disapproval of the application

and the reasons for a disapproval.

(5) Court-Approved ADR Practitioner and Organization Lists

The Administrative Office of the Courts shall prepare a list of mediators found by the Committee to meet the qualifications required by Rule 17-104 and a list of persons found by the Committee to meet the qualifications required by Rule 17-105 (a). The Administrative Office of the Courts shall (A) attach to the lists such additional information as the State Court Administrator specifies; (B) keep the lists current; and (C) transmit a copy of each current list to the clerk of each circuit court, who shall make them available to the public.

The county administrative judge or designee of each circuit court shall maintain a list:

(A) of mediators who meet the qualifications set forth in Rule 17-205 (a), (c), and (e);

(B) of mediators who meet the qualifications of Rule 9-205 (c);

(C) of other ADR practitioners who meet the applicable qualifications set forth in Rule 17-206 (a); and

(D) of ADR organizations approved by the county administrative judge.

(6) Public Access to Lists

The county administrative judge or designee shall provide to the clerk of the court a copy of each list, together with a copy of the application filed by each individual on the lists. The clerk shall make these items available to the public.

(7) Removal from List

After notice and a reasonable opportunity to respond, the county

administrative judge may remove a person from a court-approved practitioner list for failure to maintain the required under Rule 17-205, Rule 9-205 (c), or Rule 17-206 (a) or for other good cause.

(b) Business and Technology and Health Care Malpractice Programs

(1) Applicability

This section applies to persons who seek eligibility for designation by a court to conduct ADR pursuant to Rule 17-201 in an action assigned to the Business and Technology Case Management Program or pursuant to Rule 17-203 in an action assigned to the Health Care Malpractice Claims ADR Program.

(2) Application

A person seeking designation to conduct ADR shall file an application with the Administrative Office of the Courts, which shall transmit the application to the Committee of Program Judges appointed pursuant to Rule 16-108 b. 4. The application shall be substantially in the form approved by the State Court Administrator and shall be available from the clerk of each circuit court.

(3) Documentation

(A) If the application is for designation as a mediator, it shall be accompanied by documentation demonstrating that the applicant meets the applicable requirements of Rule 17-205.

(B) If the person is applying for designation to conduct ADR other than mediation, the application shall be accompanied by documentation demonstrating that the applicant is qualified as required by Rule 17-206 (a).

(C) The State Court Administrator may require the application and documentation to be provided in a word processing file or

other electronic format.

(4) Action on Application

After any investigation that the Committee of Program Judges deems appropriate, the Committee shall notify the Administrative Office of the Courts that the application has been approved or disapproved, and if disapproved, shall state the reasons for the disapproval. The Administrative Office of the Courts shall notify the applicant of the action of the Committee and the reasons for a disapproval.

(5) Court-Approved ADR Practitioner Lists

The Administrative Office of the Courts shall maintain a list:

(A) of mediators who meet the qualifications required of Rule 17-205 (b);

(B) of mediators who meet the qualifications of Rule 17-205 (d); and

(C) of other ADR practitioners who meet the qualifications of Rule 17-206 (a).

(6) Public Access to Lists

The Administrative Office of the Courts shall:

(A) attach to the lists such additional information as the State Court Administrator specifies;

(B) keep the lists current; and

(C) transmit a copy of each current list and attachments to the clerk of each circuit court, who shall make these items available to the public.

Committee note: Examples of information that the State Court Administrator may specify as attachments to the lists include information about the person's qualifications, experience, and background and any other information that would be helpful to

litigants selecting a person best qualified to conduct ADR in a specific case.

(7) Removal from List

After notice and a reasonable opportunity to respond, the Committee of Program Judges may remove a person from a court-approved practitioner list for failure to maintain the qualifications required under Rule 17-205 or Rule 17-206 (a) or for other good cause.

Source: This Rule is derived in part from former Rule 17-107 (2011) and is in part new.

Rule 17-207 was accompanied by the following Reporter's note.

Rule 17-207 is derived in part from current Rule 17-107 (a) and (b).

Subsection (a)(1) states that section (a) does not apply to actions assigned to the Business Technology Case Management Program or the Health Care Malpractice ADR Program.

Language is added to subsection (a)(2) which provides that the clerk is responsible for transmitting each completed application and accompanying documentation to the county administrative judge or the judge's designee.

Subsection (a)(3) outlines the required documentation to accompany an application.

Subsection (a)(4) is changed to allow a designee of the county administrative judge to provide the required notification as to the approval or disapproval of an application.

Subsection (a)(5) requires the county administrative judge or the judge's designee to maintain a list of court-approved mediators, other ADR providers, and approved ADR organizations.

Subsection (a)(6) provides for public access to all lists, and to the applications

filed by each individual on the lists.

Stylistic changes are made to subsection (a)(7).

Section (b) carves out similar procedures for the Business and Technology Case Management Program and the Health Care Malpractice Claims ADR Program.

The lists in section (b) are state-wide, whereas the lists in section (a) are specific to each county. The Committee on Program Judges makes decisions on applications under section (b), whereas, the county administrative judges make decisions on applications under section (a).

Mr. Klein told the Committee that Rule 17-207 was largely unchanged. Subsection (a)(1) makes it clear that the Rule applies to cases other than those assigned to the Business and Technology Case Management Program or the Health Care Malpractice Claims ADR Program, which are addressed in section (b) of the Rule. The last sentence of subsection (a)(2) is new. This tells the clerk what he or she has to do after getting the application of the person seeking to conduct ADR. Subsection (a)(6) may be new. There is a requirement that the clerk shall make available to the public the list of mediators and any application filed by someone who wants to be on the list. The Reporter noted that the list has always been in the Rule, but the application aspect is new in terms of what is available.

By consensus, the Committee approved Rule 17-207 as presented.

Mr. Klein presented Rule 17-208, Fee Schedules, for the

Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 200 – PROCEEDING IN CIRCUIT COURT

Rule 17-208. FEE SCHEDULES

(a) Authority to Adopt

Subject to the approval of the Chief Judge of the Court of Appeals, the county administrative judge of each circuit court shall develop and adopt maximum hourly rate fee schedules for court-designated individuals conducting each type of. In developing the fee schedules, the circuit administrative judge shall take into account the availability of qualified persons willing to provide those services and the ability of litigants to pay for them.

(b) Compliance

A court-designated ADR practitioner may not charge or accept a fee for the ADR in excess of that allowed by order, which may not exceed the fee stated in the applicable schedule. Violation of this Rule shall be cause for removal from court-approved ADR practitioner lists.

Committee note: The maximum hourly rates in a fee schedule may vary based on the type the alternative dispute resolution proceeding, the complexity of the action, and the qualifications of the ADR practitioner.

Source: This Rule is derived from former Rule 17-108 (2011).

Rule 17-208 was accompanied by the following Reporter's note.

Rule 17-208 is derived from current Rule 17-108.

> In section (a), three changes are made from current Rule 17-108. Rule 17-208 states that the **"county administrative judge"** of each circuit court **"shall"** develop and adopt maximum hourly rate fee schedules for court-designated individuals conducting fee-for-service ADR. Current Rule 17-108 states that the "circuit administrative judge" "may" develop and adopt maximum fee schedules fee schedules. Also, Rule 17-208 requires the adoption of maximum **"hourly rate"** fee schedules, whereas, under the current Rule, the fee schedules could be based upon per hour, per case, or per session charges.
>
> Section (b) provides that an ADR practitioner may not accept or charge for ADR in a particular case a greater fee than that allowed by the court's order in that case. The fee allowed by the court's order may not exceed the maximum hourly rate set by the fee schedule. Violation of this Rule is cause for removal from court-approved ADR provider lists.
>
> A Committee note following section (b) notes that the maximum hourly rates in the fee schedule may vary based on several factors.

Mr. Klein said that at the end of the last sentence of section (a) of Rule 17-208, some words have been accidentally omitted. The sentence should read "...court-designated individuals conducting each type of fee-for-service ADR." The current Rule provides for the court to specify a fee schedule. The words "hourly rate" have been added before the word "fee" in section (a). This clarifies that it is the unit measure for these fee schedules. Judge Pierson pointed out that the first sentence in section (a) provides that the county administrative judge of each circuit court shall develop and adopt maximum

hourly rate fee schedules, but the second sentence refers to the "circuit administrative judge." The Reporter said that the second sentence should refer to the "county administrative judge." By consensus, the Committee agreed to make this change.

Mr. Klein drew the Committee's attention to section (b). It provides that a court-designated ADR practitioner may not charge or accept a fee for the ADR in excess of that allowed by the order appointing the person. This may not exceed the fee stated in the applicable schedule. The consequence of violating this is potential removal from the list of ADR practitioners.

By consensus, the Committee approved Rule 17-208 as amended. Mr. Klein stated that this completes the review of the circuit court Rules.

Mr. Klein told the Committee that the Rules in Chapter 300 are all new. There have never been District Court ADR Rules before. He reiterated that in District Court, either a mediation or a settlement conference is available, but not both. ADR is always free in the District Court. This is a distinction from the circuit court.

Mr. Klein presented Rule 17-301, ADR Office, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 300 – PROCEEDINGS IN THE DISTRICT COURT

Rule 17-301. ADR OFFICE

(a) Existence

The ADR Office is an acronym for the District Court Alternative Dispute Resolution Office, which exists as a unit within the Office of the Chief Judge of the District Court.

(b) Duties

The ADR Office is responsible for administering the ADR programs of the District Court. Its duties include processing ADR practitioner applications, conducting orientations for approved ADR practitioners and applicants who wish to be approved, arranging the scheduling of ADR practitioners at each District Court location, collecting and maintaining statistical information about the District Court ADR programs, and performing such other duties involving those programs required by the Rules in this Chapter or assigned by the Chief Judge of the District Court.

Source: This Rule is new.

Rule 17-301 was accompanied by the following Reporter's note.

Rule 17-301 explains that the ADR Office exists as a unit within the Office of the Chief Judge of the District Court, and outlines the duties of the ADR Office.

Mr. Klein said that Rule 17-301 recognizes the existence of the District Court ADR Office and the duties of that office.

By consensus, the Committee approved Rule 17-301 as presented.

Mr. Klein presented Rule 17-302, General Procedures and Requirements, for the Committee's consideration.

Rule 17-302. GENERAL PROCEDURES AND REQUIREMENTS

(a) Authority to Order ADR

Subject to sections (b) and (c) of this Rule and Rule 17-303, the court, on or before the day of a scheduled trial, may order a party and the party's attorney to participate in one non-fee-for-service mediation or one non-fee-for-service settlement conference.
Committee note: Under this Rule, an order of referral to ADR may be entered regardless of whether a party is represented by an attorney.

(b) Referral Prohibited

The court may not enter an order of referral to ADR in a protective order action under Code, Family Law Article, Title 4, Subtitle 5, Domestic Violence.

Committee note: Mediation is not precluded in a peace order proceeding under Code, Courts Article, Title 3, Subtitle 15, but the court should be especially careful in its determination as to whether mediation is appropriate where the parties are in an intimate relationship and there has been the equivalent of domestic violence.

(c) Objection by Party

(1) Notice of Right to Object

If an order of referral is entered or contemplated by the court on the day of a scheduled trial, the court shall inform the parties that they have a right to object to the referral at that time. If a written order of referral is entered and served on

the parties prior to the date of the scheduled trial, the order shall inform the parties that they have a right to object to a referral and state a reasonable time and method by which the objection may be made.

(2) Consideration of Objection

(A) If a party objects to a referral, the court shall give the party a reasonable opportunity to explain the basis of the objection and give fair and prompt consideration to it.

(B) If the basis of the objection is that the parties previously had engaged in an ADR process in good faith which did not succeed and the court finds that to be true, the court may offer them the opportunity to participate in a new court-referred mediation or settlement conference, but it may not require them to do so.

Source: This Rule is new.

Rule 17-302 was accompanied by the following Reporter's note.

Rule 17-302 outlines the general procedures and requirements regarding ADR proceedings in the District Court.

Section (a) provides the District Court with the authority to order a party and the party's attorney to participate in one non-fee-for-service mediation or one non-fee-for-service settlement conference.

Section (b) prohibits an order of referral to ADR in a protective order action.

Section (c) provides that the parties may object to a referral to ADR, and that the court shall give the objecting party a reasonable opportunity to explain the objection. If a party objects because the parties have previously engaged in an ADR process in good faith, the court may not

require the parties to engage in a new court-referred mediation or settlement conference.

Mr. Klein noted that section (a) of Rule 17-302 addresses the authority of the court to order ADR. He remarked that Rule 17-305 emphasizes that ADR in the District Court is always non-fee-for-service. Mr. Rosenthal inquired if it would be possible to add to the Committee note language that would provide that while the court may order only one ADR session, it may offer more than one. This suggestion came from an earlier statement by Judge Pierson. What could happen is that a judge determines that a case ought to go to pretrial mediation. The case may not settle, or the parties make progress but do not reach an agreement. The next day when the trial is scheduled, the parties may come into court, and the judge may be able to offer the parties another chance to mediate. The judge would not order it, but offer it. Mr. Klein said that he had no problem adding this to the Committee note. Mr. Rosenthal added that it would let judges know that there is still the possibility of ADR, even though the parties have already tried it once.

The Chair asked if there could be an implicit coercive factor in that the parties have been ordered to one ADR session; then they come back for trial, and the judge asks them if they would like to have another ADR session. This may be coercion particularly for a *pro se* litigant who feels like he or she should do this because the judge really wants it. Mr. Rosenthal

responded that it could be possible that a party would feel coerced. It would depend on how the judge phrases the offer. The experience of Mr. Rosenthal and his colleagues is that judges tend not to phrase the offer as the Chair had just done. However, once the parties get into the ADR session, all of their practitioners understand that one of their roles is that after the practitioner goes through the explanation of what the process is, and the party does not want to try the ADR, the practitioner tells the party that he or she is free to go back into the courtroom. At this point, the practitioner will have met his or her obligation set up by the judge, and the parties can still get their trial. Their practitioners never report back to the judge the identity of the party who did not want to participate in the ADR.

Mr. Brault questioned who determines whether it is a mediation or settlement conference. Mr. Rosenthal answered that unless it is ordered pretrial, if it happens the day of trial, it is determined by which of their practitioners is there that day. Judge Wilson asked if the word “one” should be changed to the word “a” in section (a) to be consistent with the circuit court Rule. She did not have a preference for one or the other. The Chair replied that there is something to be said for consistency, but on the other hand, the circuit court settlement conferences are not usually going to be the day of trial. In the District Court, most of the time they will be. Judge Wilson remarked that many times the ADR is held on the day of trial.

The Reporter pointed out that section (a) provides for the ADR in the disjunctive, so the word "a" might not work. In this Rule, it is one mediation or one settlement conference. Mr. Klein expressed his concern that it should not be more than one mediation or settlement conference.

Mr. Johnson inquired if, because of the way the District Court operates, it is contemplated that the mediation would be on the day that the case is scheduled for trial. Judge Wilson replied that it can be on that day. Mr. Johnson asked if it would ever be before the day that it is scheduled for trial. Judge Wilson answered that it can be before the day of trial. Mr. Rosenthal added that this could work a variety of ways. First, someone could request mediation. Second, the judge may be familiar with the case, which may be coming back for another reason, and the judge may decide that he or she would like the parties to try mediation before the trial date comes up.

Mr. Rosenthal said that his office would be responsible for scheduling that mediation. Either the judge looks the case over and decides that the case should go to mediation, or a party requests mediation. In some instances, they send out letters. They screen cases where a defendant has filed a notice of intention to defend. If it is far enough away from the trial date, they may send the defendant information about the option of mediation, but at that point, it is up to the parties. If the parties are represented, the choice goes to the attorneys.

Judge Norton said that in his court, the parties are called

ahead of time. The court sends out notices offering pretrial ADR which few people avail themselves of. Most people wait until the day of the trial. Mr. Rosenthal remarked that the success generally depends on the letters and materials that go out, how they are phrased, and what envelopes the information comes in.

Mr. Klein said that he was not sure whether the Committee note should be changed by adding language to the effect that the court can offer additional ADR. He did not have a strong feeling one way or the other about this, as long as the offer would not be made in a coercive manner. The Chair commented that it would not necessarily be used in a coercive manner. Mr. Klein expressed the view that the Rule should stay silent on this.

Mr. Rosenthal explained that one of the reasons they were pleased with the language about judges being able to order ADR is that without that language, the way the ADR programs in the District Court are working now, some judges around the State do not believe that they can refer a case to ADR. They believe that they always have to ask if anyone wants to try the case as opposed to making a determination that a certain case is appropriate for ADR. By having this language in the Committee note, Mr. Rosenthal expressed the view that it would be telling judges that it is appropriate to make that determination. If the Rule remains silent, the concern is that there may be some judges who feel that if the ADR happened once, it cannot happen again.

The Chair recollected that the Subcommittee had considered at one point the proposition that the court could order two ADR

sessions. Ultimately, the Subcommittee rejected this. The discussion centered on the fact that the ADR session took place and did not result in an agreement, so the case should be tried. He expressed the concern that the suggested language would sneak in the back door what the Subcommittee had rejected.

The Reporter told Mr. Rosenthal that his comment was a kind of back door. She pointed out subsection (c)(2)(B). If the parties are objecting to an order to go to ADR, the court can offer them the opportunity, but it cannot be required. Mr. Rosenthal noted that the difference with that provision was the fact that the parties might not been so ordered the first time, and they had tried the ADR on their own the first time. He would like for the same opportunity be available to people who were ordered to a pre-trial mediation. They should be able to come in the day of trial and have the opportunity for a settlement conference if a settlement conference chair is in court that day or a mediation if a mediator is in court that day.

Mr. Rosenthal said that another instance where the language added would be helpful was if people have their first conversation in mediation, and they do not reach an agreement. They come to the courthouse that day, and they know that a judge is going to hear that case that day. This is their one last chance to try and resolve the case. There will not be a postponement nor anything else. They will either try ADR one more time, or the judge will hear the case, and even if ADR was tried, and it does not work, the judge will still be there to

hear the case. This is the way that their program is designed.

Judge Wilson commented that a part of the concern about coerciveness is in the manner in which the judge makes that offer. There is a litany that the judges use to invite people at this stage, since formalized rules are not in place, that hopefully can encourage people to try ADR. The Chair suggested the addition of the following language: "Upon request of the parties, the court can offer...". The Reporter asked where this language would be placed. Mr. Rosenthal said that he interpreted this as that one of the actions his office would take is to educate the public about what opportunities exist for them. The Chair noted that if the parties want to take advantage of the second ADR opportunity, the court can do it.

Mr. Johnson observed that another way to address this would be that when the parties come in for their first ADR session, which is not successful, they could be told that if they think another session might be successful, they can ask the trial judge on the day of trial for another session. The court could allow another session, but more than one should not be mandated. If the parties request one more, then the court will accommodate them. Mr. Rosenthal expressed his agreement with this approach.

Mr. Klein noted that the structural question was whether this should be added to a Committee note. Is it on request of the parties or of a party? The Chair responded that this could go into a Committee note. Section (a) provides that the court can order one session, and the note could state that this does

not preclude the court from offering another ADR session on the request of the parties. Mr. Klein asked if this has to be on the request of the parties or of a party. The Chair answered that his view was that it should be on request of both parties. Mr. Rosenthal added that for purposes of voluntariness, his view was that both parties should agree. The Chair said that the language would be that section (a) does not preclude another session. Mr. Rosenthal thanked the Chair for his suggestion. Mr. Klein stated that the Subcommittee accepted the proposal of the Chair.

Mr. Klein drew the Committee's attention to section (b). He pointed out that this makes clear that the District Court cannot order ADR in a protective order action in a domestic violence (d.v.) case. Judge Norton commented that one of the scenarios he frequently sees is that a domestic violence order will be in place; the parties may come in for a replevin action and ask for a division of property. Typically, replevin is an area that is fruitful for mediation. It may not necessarily be a good idea for that mediation with a d.v. order in place even though that would not be the case excluded by section (b). Could the Rule state that even if the litigation concerns some other aspect of the case if the court is aware of an existing d.v. order, it would exclude that other piece of litigation from mediation? Mr. Rosenthal said that if there is another action, but between the parties there is a protective order in place, that case should not be mediated. Judge Wilson noted that the fact that a protective order is in place may not be known until

the parties are in the middle of the mediation.

Mr. Klein inquired if there was a motion to change the Rule. The Subcommittee had approved of the current wording. Judge Norton observed that the wording did not answer the problem of litigation involving parties in which there is a d.v. order. The Chair pointed out that the judge may not know this. If the judge is told about the d.v. order, the judge would probably not order the mediation. Judge Norton remarked that the Rule is there because judges cannot necessarily be trusted. If they are not trusted in one scenario, why are they trusted in the other? If this Rule is necessary, why not cover the other scenario?

The Chair commented that there has been a debate about whether mediation is ever appropriate in a case with a history of domestic violence. The decision had been not to do mediation in such a case. Other states permit it. Judge Norton suggested that the language "or to parties who are subject to a current protective order in a related action" could be added to the Rule. The Chair cautioned that the judge has to know about it. Judge Wilson expressed the opinion that a corollary relating to peace orders would need to be included, because a peace order could involve intimate partners where domestic violence has occurred in the relationship, but they do not fall within the parameters of a protective order. That replevin action might be between unmarried individuals subject to a peace order where there has been a threat of violence.

Judge Pierson expressed his agreement with Judge Norton.

Mr. Klein inquired what the change would be. Judge Norton answered that some language would be added as follows: "...or make any referral to parties in another non-ADR case in which both parties are currently under an existing domestic violence order." The Chair suggested the language, "or in any other case in which the parties are under a domestic violence order." The motion was seconded. The motion carried with one opposed.

The Reporter said that she was not sure what the language was. Judge Norton responded that it was: "and in any other non-domestic violence cases between the parties who are currently subject to a domestic violence or a protection order." Mr. Rosenthal cautioned that the wording has to be precise, because there could be a protective order that would not be classified as a domestic violence case. Those cases could go to mediation.

The Reporter asked for an example of this. Judge Wilson answered that an example would be a case with a peace order. If two neighbors were fighting over who cuts the hedge between their houses, that would not necessarily fall within the category of a domestic violence case, and a peace order case can be ordered to mediation. One of the grounds for relief in a peace order case is mediation. If the case involves a boyfriend and girlfriend who do not have children together, have not lived together, but are intimate partners, and there is a threat of violence, that is not the type of matter that should be ordered to mediation, even if the parties come in on a replevin action.

Mr. Klein said that he did not want to take this matter back

to the Subcommittee, so he asked the Reporter, Judge Norton, and Judge Wilson to work on the language of the Committee note, so that everyone is in agreement as to how it should read. The Reporter asked Judge Wilson to suggest language for the main part of the Rule as well as for the Committee note.

Mr. Carbine cautioned that when the language is drafted, it is important to take into consideration a situation such as a major multi-car crash where a married couple with a domestic violence restraining order against one of them is in one of the cars. The language of the Rule could take away the right to mediation for the case concerning the accident. The Chair noted that this type of case is not likely to arise in District Court. Mr. Carbine acknowledged that his example may not have been appropriate, but the language of the Rule has to be clearly thought out. The Chair remarked that the idea is that people with a history of domestic violence should not be in the same room negotiating. Judge Norton responded that the judges of the District Court are willing to deal with this problem.

Mr. Klein drew the Committee's attention to section (c). The Committee had no comments about this section.

By consensus, the Committee approved Rule 17-302 as amended.

Mr. Klein presented Rule 17-303, Designation of Mediators and Settlement Conference Chairs, for the Committee's consideration.

Rule 17-303. DESIGNATION OF MEDIATORS AND SETTLEMENT CONFERENCE CHAIRS

(a) Limited to Qualified Individuals

(1) Court-Designated Mediator

A mediator designated by the court or pursuant to court order shall possess the qualifications prescribed in Rule 17-304 (a).

(2) Court-Designated Settlement Conference Chair

A settlement conference chair designated by the court or pursuant to court order shall possess the qualifications prescribed in Rule 17-304 (b).

(b) Designation Procedure

(1) Court Order

In its order, the court may designate an individual to conduct the ADR or direct the ADR Office, on behalf of the court, to select a qualified individual.

(2) Duty of ADR Office

If the court directs the ADR Office to select the individual, the ADR Office may either select the individual directly or arrange for an ADR organization to do so. An individual selected by the ADR Office or by the ADR organization shall be deemed to be a court-designated mediator or settlement conference chair.

(3) Discretion in Designation or Selection

Neither the court nor the ADR Office is required to choose at random or in any particular order from among the qualified

individuals. Although they should endeavor to use the services of as many qualified individuals as practicable, the court or ADR Office may consider whether, in light of the issues and circumstances presented by the action or the parties, special training, background, experience, expertise, or temperament may be helpful and may designate an individual possessing those special qualifications.

(4) ADR Practitioner Selected by Agreement of Parties

If the parties agree on the record to participate in ADR but inform the court of their desire to select an individual of their own choosing to conduct the ADR, the court may (A) grant the request and postpone further proceedings for a reasonable time, or (B) deny any request for postponement and proceed with a scheduled trial.

Source: This Rule is new.

Rule 17-303 was accompanied by the following Reporter's note.

Rule 17-303 outlines the procedures for designating mediators and settlement conference chairs.

Section (a) provides that the individual shall have the qualifications prescribed in Rule 17-304.

Section (b) outlines the designation procedure, and provides that the court may designate an individual to conduct the ADR, or may direct the ADR office to select a qualified individual.

Subsection (b)(3) provides that neither the court nor the ADR Office is required to choose at random or in any particular order from the list of qualified individuals.

Subsection (b)(4) provides that an ADR practitioner may be selected by agreement of

the parties.

Mr. Klein explained that section (a) of Rule 17-303 makes it clear that only qualified individuals may be designated as mediators and settlement conference chairs, and they must have the qualifications prescribed in Rule 17-304. It is the same for both. He noted that subsection (b)(2) provides that if the ADR Office is directed by the court to select someone, the Office would either select the individual directly or arrange for an ADR organization to do so. Subsection (b)(3) makes it clear that neither the court nor the ADR Office is required to randomly choose or choose in any particular order from among the list of qualified individuals. This provision is the same as in the circuit court. Subsection (b)(4) provides that although the court cannot force a particular ADR provider on a party, the court has the option of allowing a party or parties to select the ADR provider and give the parties some time to do so, or the court may state that even though the party or parties did not like the court's choice of ADR provider, the court is not willing to wait for the parties to pick a different provider, and the parties will go to trial.

There being no comments on Rule 17-303, the Committee approved Rule 17-303 as presented.

Mr. Klein presented Rule 17-304, Qualifications and Selection of Mediators and Settlement Conference Chairs, for the Committee's consideration.

Rule 17-304. QUALIFICATIONS AND SELECTION OF MEDIATORS AND SETTLEMENT CONFERENCE CHAIRS

(a) Qualifications of Court-Designated Mediators

To be designated by the court as a mediator, an individual shall:

(1) unless waived by the parties, be at least 21 years old;

(2) have completed at least 40 hours of basic mediation training in a program meeting the requirements of (A) Rule 17-104 or (B) for individuals trained prior to [effective date of the Rule], former Rule 17-106;

(3) be familiar with the Rules in Title 17 of the Maryland Rules;

(4) submit a completed application in the form required by the ADR Office;

(5) attend an orientation session provided by the ADR Office;

(6) unless waived by the ADR Office, observe, on separate dates, at least two District Court mediation sessions and participate in a debriefing with the mediator after each mediation;

(7) unless waived by the ADR Office, mediate on separate dates, at least two District Court cases while being reviewed by an experienced mediator or other individual designated by the ADR Office and participate in a debriefing with the observer after each mediation;

(8) agree to volunteer at least six days in each calendar year as a court-designated mediator in the District Court day-of-trial mediation program;

(9) abide by any mediation standards adopted by the Court of Appeals;

(10) submit to periodic monitoring by the ADR Office;

(11) in each calendar year complete four hours of continuing mediation-related education in one or more of the topics set forth in Rule 17-104; and

(12) comply with the procedures and requirements posted on the ADR Office's website relating to diligence and quality assurance.

(b) Qualifications of Court-Designated Settlement Conference Chair

To be designated by the court as a settlement conference chair, an individual shall be:

(1) a judge of the District Court;

(2) a retired judge approved for recall for temporary service under Maryland Constitution, Article IV, §3A; or

(3) an individual who, unless the parties agree otherwise, shall:

(A) abide by any applicable standards adopted by the Court of Appeals;

(B) submit to periodic monitoring of court-ordered ADR by a qualified person designated by the ADR Office;

(C) be a member in good standing of the Maryland Bar and have at least three years experience in the active practice of law;

(D) unless waived by the court, have completed a training program that consists of

at least six hours and has been approved by the ADR Office; and

(E) comply with the procedures and requirements posted on the ADR Office's website relating to diligence and quality assurance.

(c) Procedure for Approval

(1) Filing Application

A person seeking designation to mediate or conduct settlement conferences in the District Court shall submit to the ADR Office a completed application substantially in the form required by that Office. The application shall be accompanied by documentation demonstrating that the applicant has met the applicable qualifications required by this Rule.
Committee note: Application forms are available from the ADR Office and on the Maryland Judiciary's website, www.mdcourts.gov/district/forms/general/adr001.pdf.

(2) Action on Application

After any investigation that the ADR Office deems appropriate, the ADR Office shall notify the applicant of the approval or disapproval of the application and the reasons for a disapproval.

(3) Court-Approved ADR Practitioner and Organization Lists

The ADR Office shall maintain a list:

(A) of mediators who meet the qualifications of section (a) of this Rule;

(B) of settlement conference chairs who meet the qualifications set forth in subsection (b)(3) of this Rule; and

(C) of ADR organizations approved by the ADR Office.

(4) Public Access to Lists

The ADR Office shall provide to the Administrative Clerk of each District a copy of each list for that District maintained pursuant to subsection (c)(3) of this Rule. The clerk shall make a copy of these items available to the public at each District Court location. Copies of the application forms will be made available by the ADR Office upon request.

(5) Removal from List

After notice and a reasonable opportunity to respond, the ADR Office may remove a person as a mediator or settlement conference chair for failure to maintain the applicable qualifications of this Rule or for other good cause.

Source: This Rule is new.

Rule 17-304 was accompanied by the following Reporter's note.

Rule 17-304 outlines the qualifications and selection of mediators and settlement conference chairs.

Section (a) outlines the required qualifications for a court-designated mediator.

Subsection (a)(2) requires that a court-designated mediator complete at least 40 hours of basic mediation training in a program that meets the requirements of new Rule 17-104. Individuals trained prior to the effective date of new Rule 17-104, must instead meet the requirements of current Rule 17-106.

Section (b) outlines the required qualifications for a court-designated settlement conference chair. The individual may be a judge, a retired judge, or an individual who meets certain requirements, unless these requirements are waived by the

> parties. The requirements include being a Maryland attorney with at least 3 years of experience and complying with the other requirements listed in subsection (b)(3).
>
> Section (c) outlines the procedures for the approval of prospective ADR practitioners, the maintenance of court-approved ADR provider lists, and the removal of individuals from the lists.

Mr. Klein told the Committee that section (a) of Rule 17-304 addresses mediators. It is somewhat similar to the circuit court Rules. There is no requirement that the mediator have a bachelor's degree. Subsection (b)(2) requires that the mediator must have completed at least 40 hours of basic mediation training as any mediator in any State court, and the same grandfather clause as was in the circuit court Rule is in subsection (b)(2) for people who had the training prior to the effective date of the Rule. Section (b) addresses the qualifications of a court-designated settlement chair. Judge Kaplan inquired why the word "temporary" is in subsection (b)(2). It could be deleted. Mr. Klein asked if the word was unnecessary. The Chair noted that the service of a judge approved for recall is always temporary as the approval of a judge to serve is an annual one. Judge Kaplan agreed, and he added that there is no need to use the word "temporary." The Reporter commented that this may be the constitutional language. Mr. Klein responded that the word would still be unnecessary. By consensus, the Committee approved of Judge Kaplan's suggestion to delete the word "temporary."

Mr. Klein said that section (c) is similar to the circuit

court procedures for approval. The application form has to be submitted, there has to be supporting documentation, and this provision specifies what the ADR Office must do with the application. They either approve or disapprove the applicant. Lists of persons who meet the qualifications are to be maintained and available to the public. Subsection (b)(5) provides that the ADR Office may remove a person as a mediator or settlement conference chair for failure to maintain the applicable qualifications or for other good cause.

By consensus, the Committee approved Rule 17-304 as amended.

Mr. Klein presented Rule 17-305, No Fee for Court-ordered ADR, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 300 – PROCEEDINGS IN THE DISTRICT COURT

Rule 17-305. NO FEE FOR COURT-ORDERED ADR

> District Court litigants and their attorneys shall not be required to pay a fee or additional court costs for participating in a mediation or settlement conference before a court-designated ADR practitioner in the District Court.
>
> Source: This Rule is new.

Rule 17-305 was accompanied by the following Reporter's note.

> Rule 17-305 provides that District Court litigants and their attorneys shall not be required to pay a fee for court-ordered ADR. In contrast, in circuit court, litigants may be required to pay a fee for court-ordered ADR under certain circumstances.

Mr. Klein told the Committee that Rule 17-305 makes clear that parties and their attorneys shall not be required to pay a fee or additional court costs for participating in a mediation or settlement conference. The fee for ADR cannot be disguised in the form of a cost.

Mr. Brault inquired if the judge who is going to try the case would be the one who orders mediation. Judge Wilson answered that the judge may or may not be the one who orders mediation. Mr. Brault asked if this would reflect at all on the question of bias, the willingness or unwillingness of a party to mediate. Judge Wilson questioned if Mr. Brault was referring to the trial judge's ability to hear the case if that judge has asked the parties to mediate and they refuse to do so. Mr. Brault explained that his thought was that the judge asked for the parties to mediate, and they objected, or the judge wanted the case mediated, and the parties did not settle. Judge Norton added that the judge would not know who is refusing and why. In a single-judge county, a case cannot easily be given to another judge. Judge Wilson noted that to the extent that there is an open-court invitation, the parties would tell the judge in open court that they do not want to mediate and that they want the judge to hear the case. Mr. Brault commented that he was not

sure that this would be what the parties would say. Judge Wilson said that usually the parties tell her that they tried to mediate, but it did not work out.

Mr. Rosenthal noted that the way it happens currently may be different than the way it happened five to eight years ago. It used to be that sometimes judges would ask from the bench what happened with the mediation. Judges no longer do this. If one of the parties tries to start a sentence with the words "in the mediation," the judges will respond that it does not matter what happened in the mediation.

Mr. Brault inquired if there is any language in the Rules that addresses this situation. Mr. Rosenthal replied that the confidentiality segment of the Rules addresses it, because it explains what can and cannot be told to the judge. It is covered in the Rules. Judge Wilson commented that to the extent that a judge asks in open court if the parties would like to go to mediation, and the parties answer negatively, the judge then knows or does not know who is willing to participate. That could be a possible scenario. She did not think that this would create a bias that would get in the way of the judge presiding over the case.

The Reporter asked about the drafting of the Committee note after section (b) of Rule 17-302. That same language about referral being prohibited when there is the equivalent of domestic violence is in Rule 17-201 (b), the circuit court Rule. She inquired whether the Committee wanted the language to be

drafted to go into the circuit court Rule as well, or whether the circuit rule should remain the way it is now. The language in section (b) of Rule 17-201 is the exact same language that Judge Wilson, Judge Norton, and Mr. Rosenthal will be amending pertaining to the Committee note after section (b) of Rule 17-302.

Judge Norton remarked that a party who does not want to mediate can immediately file a d.v. petition. The Chair explained that in circuit court, there is a difference. The circuit court cannot order fee-for-service mediation, so if one party refuses to go to mediation, this would not be like the District Court. It is the same language in both Rules, but it may not be needed in Rule 17-201. The circuit court cannot order it. Judge Pierson expressed the opinion that the language in both Rules should be the same. The practice in the family law docket in Baltimore City is to screen all cases even though they may be d.v. cases for any prior filings between the parties for the reason that had been suggested earlier -- it is not a good idea for those people to be sitting in the same room. He could not imagine that automobile accidents involve parties with d.v. actions. The Reporter pointed out that there may be other examples.

Mr. Klein asked how the Committee wanted to handle this as far as changing Rule 17-201. Judge Kaplan responded that the note in the circuit court Rule should not be changed. The Reporter said that then the two Rules would read differently.

Judge Pierson inquired why the two Rules would not be the same. Judge Kaplan replied that he had no strong objection to the two Rules being the same, but it is unnecessary.

The Chair commented that he had thought that a person cannot be ordered to mediation in the circuit court, but on reflection, he noted that a person can be so ordered. The court can order the person to go to mediation, but if the party objects, the order has to be withdrawn. If the party does not object within 30 days, the mediation will go forward. Since it can be ordered in the circuit court, perhaps the language in both Rules ought to be the same. The parties can always agree to mediate. In the auto accident case that was referred to earlier, the parties may have some common interests. Mr. Carbine explained that his point was that it seemed that everyone was thinking about the scenario of husband vs. wife, but husband and wife could have aligned interests in a variety of disputes involving other people, and those disputes are involved with the domestic violence case. Judge Pierson expressed the opinion that the husband and wife could be on the same side in a foreclosure mediation, but he was not certain they should be in the same room mediating.

The Chair commented that if the husband and wife's interests are aligned, and they recognize this, they would not be in a position negotiating against themselves. The power imbalance that would apply if they were head-to-head is not necessarily present. There may be a safety factor. Ms. Wohl remarked that it is not as much of a power imbalance as an intimidation issue.

Mr. Leahy moved that the language of the Committee note be the same for Rules 17-201 (b) and 17-302 (b). The motion was seconded, and it passed with two opposed.

By consensus, the Committee approved Rule 17-305 as amended.

Mr. Klein said that all of the Rules in Title 17 had been considered. There were some other Rules related to ADR. He told the Committee that they should look at the marked version of those Rules.

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

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

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

DELETE current Rule 9-205 and ADD new Rule 9-205, as follows:

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

[showing changes from current Rule 9-205 (a):]

(a) Scope of Rule

This Rule applies to any case under this Chapter in which the custody of or visitation with a minor child is an issue, including:

(1) an initial action to determine custody or visitation;

(2) an action to modify an existing order or judgment as to custody or visitation; and

(3) a petition for contempt by reason of non-compliance with an order or judgment governing custody or visitation.

[showing changes from current Rule 9-205 (b):]

(b) Duty of Court

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

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

(B) ~~a properly qualified mediator~~ a mediator possessing the qualifications set forth in section (c) of this Rule is available to mediate the dispute.

(2) If a party or a child represents to the court in good faith that there is a genuine issue of ~~physical or sexual~~ abuse, as defined in Code, Family Law Article, §4-501, of the party or child, and that, as a result, mediation would be inappropriate, the court shall not order mediation.

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

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

[showing changes from current Rule 17-104

(b)(1) and (2):]

(c) Qualifications of Court-designated Mediator

To be ~~designated~~ eligible for designation as a mediator by the court ~~as a mediator with respect to issues concerning child access, the person must~~, an individual shall:

(1) have the basic qualifications ~~prescribed in section (a) of this Rule~~ set forth in Rule 17-205 (a);

(2) have completed at least 20 hours of training in a family mediation training program ~~meeting the requirements of Rule 17-106~~ that includes:

[showing changes from current Rule 17-106 (b):]

(A) Maryland law relating to separation, divorce, annulment, child custody and visitation, and child and spousal support;

(B) emotional aspects of separation and divorce on adults and children;

(C) introduction to family systems and child development theory; ~~and~~

(D) inter-relationship of custody, visitation, and child support; and

(E) if the training program is given after [effective date of the Rule], strategies to (i) identify and respond to power imbalances, intimidation, and the presence and effects of domestic violence, and (ii) safely terminate a mediation when such action is warranted; and

[showing changes from Rule 17-104 (b)(3):]

(3) have observed or co-mediated at least eight hours of child access mediation sessions conducted by persons approved by the

county administrative judge, in addition to any observations during the training program.

[New:]

(d) Court Designation of Mediator

(1) In an order referring a matter to mediation, the court shall:

(A) designate a mediator from a list of qualified mediators approved by the court;

(B) if the court has a unit of court mediators that provides child access mediation services, direct that unit to select a qualified mediator; or

(C) direct an ADR organization, as defined in Rule 17-102, approved by the court to select a qualified mediator.

(2) If the referral is to a fee-for-service mediation, the order shall specify the hourly rate that the mediator may charge for mediation in the action, which may not exceed the maximum stated in the applicable fee schedule.

(3) A mediator selected pursuant to subsection (d)(1)(B) or (d)(1)(C) of this Rule shall be deemed to be a court-designated mediator.

[showing changes from the last two sentences of current Rule 17-103 (c)(4):]

(4) In ~~making a designation~~ designating a mediator, ~~when there is no agreement by the parties,~~ the court is not required to choose at random or in any particular order ~~from among the qualified persons~~. Although the court should endeavor to use the services of as many qualified ~~persons~~ mediators as possible, the court may consider ~~whether~~, in light of the issues and circumstances presented by the action or the parties, any special training, background, experience, expertise, or temperament ~~may be helpful and may designate a person possessing those~~

~~special qualifications~~ possessed by the available prospective designees.

[New:]

(5) The parties may request to substitute for the court-designated mediator another mediator who has the qualifications set forth in Rule 17-205 (a)(1), (2), (3), and (6) and subsection (c)(2) of this Rule, whether or not the mediator's name is on the court's list, by filing with the court no later than 15 days after service of the order of referral to mediation a Request to Substitute Mediator.

(A) The Request to Substitute Mediator shall be substantially in the following form:

[Caption of Case]

Request to Substitute Mediator and
Selection of Mediator by Stipulation

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

(Name, address, and telephone number of mediator)

and we have made payment arrangements with the mediator. We request that the court substitute this mediator for the mediator designated by the court.

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

I, _____,
(Name of Mediator)

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

(j).

I solemnly declare and affirm under the penalties of perjury that I have the qualifications prescribed by Rule 9-205 (d)(5).

_____
Signature of Mediator

(B) If the Request to Substitute Mediator is timely filed, the court shall enter an order to strike the original designation and substitute the individual selected by the parties to conduct the mediation, unless the court determines after notice and opportunity to be heard that the individual does not have the qualifications prescribed by subsection (d)(5) of this Rule. If no Request to Substitute Mediator is timely filed, the mediator shall be the court-designated mediator.

(C) A mediator selected by stipulation of the parties and substituted by the court pursuant to subsection (d)(5)(B) of this Rule is not subject to the fee schedule provided for in section (j) of this Rule and Rule 17-208 while conducting mediation proceedings pursuant to the stipulation and designation, but shall comply with all other obligations of a court-designated mediator.
Committee note: Nothing in this Rule or the Rules in Title 17 prohibits the parties from selecting any individual, regardless of qualifications, to assist them in the resolution of issues by participating in ADR that is not court-ordered.

(e) Role of Mediator

The role of a mediator designated by the court or agreed upon by the parties is as set forth in Rule 17-103.

[showing changes from current Rule 9-205 (f):]

(f) Confidentiality

Confidentiality of mediation communications under this Rule is governed by Rule ~~17-109~~ 17-105.

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

[showing changes from current Rule 9-205 (c):]

~~(c)~~ (g) Scope of Mediation; Restriction on Fee Increase

(1) The court's initial order may ~~not~~ require the parties to attend a maximum of four hours in not more than two mediation sessions. For good cause ~~shown~~ and upon the recommendation of the mediator, the court may order up to ~~two~~ four additional ~~mediation sessions~~ hours. The parties may~~,~~ ~~agree to further mediation~~ by agreement, extend the mediation beyond the number of hours stated in the initial or any subsequent order.

Committee note: Although the parties, without further order of court, may extend the mediation, an amendment to the time requirements contained in a scheduling order may be made only by order of the court.

Cross reference: See Rule 2-504.

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

(3) During any extension of the mediation pursuant to subsection (f)(1) of this Rule or expansion of the issues that are the subject of the mediation pursuant to subsection (f)(2) of this Rule, the mediator may not increase the mediator's hourly rate for providing services relating to the action.

Cross reference: See Rule 17-208, concerning fee schedules and sanctions for noncompliance with an applicable schedule.

[showing changes from current Rule 9-205 (d):]

~~(d)~~ (h) If Agreement

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

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

Committee note: Mediators often will record points of agreement expressed and adopted by the parties to provide documentation of the results of the mediation. Because a mediator who is not a Maryland lawyer is not authorized to practice law in Maryland, and a mediator who is a Maryland lawyer ordinarily would not be authorized to provide legal advice or services to parties in conflict, a mediator should not be drafting agreements regarding matters in litigation for the parties to sign. If the parties are represented by counsel, the mediator should advise them not to sign the document

embodying the points of agreement until they have consulted their attorneys. If the parties, whether represented or not, choose to sign the document, a statement should be added that the points of agreement as recorded by the mediator constitute the points of agreement expressed and adopted by the parties.

[showing changes from current Rule 9-205 (e):]

~~(e)~~ (i) If No Agreement

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

[New:]

(j) Evaluation Forms

At the conclusion of the mediation, the mediator shall give to the parties any evaluation forms and instructions provided by the court.

[showing changes from current Rule 9-205 (g):]

~~(g)~~ (k) Costs

(1) Fee Schedule

Fee schedules adopted pursuant to Rule 17-208 shall include maximum fees for mediators designated pursuant to this Rule, and a court-designated mediator appointed under this Rule may not charge or accept a fee for a mediation proceeding conducted pursuant to that designation in excess of that allowed by that schedule.

(2) Payment of Compensation

> Payment of the compensation, fees, and costs of a mediator may be compelled by order of court and assessed among the parties as the court may direct. In the order for mediation, the court may waive payment of the compensation, fees, and costs.
> Source: This Rule is derived in part from the 2010 version of former ~~S73A~~ Rule 9-205 and is in part new.

Mr. Klein noted that the first substantive change in Rule 9-205 was in subsection (c)(2)(E). This is new and provides additional requirements for what a training program must include after the effective date of Rule 9-205. This includes strategies to identify and respond to power imbalances, intimidation, and the presence and effects of domestic violence and to safely terminate a mediation when such action is warranted. This is the identical language that had been added to Rule 17-104 (b)(3). A new section (d) had been added concerning court designation of a mediator. A person selected under any of the methods set out in the Rule is deemed to be a court-designated mediator.

Ms. Potter pointed out that in subsection (c)(2)(A), the word "designate" is used, but in subsection (c)(2)(B), the word "select" is used. Is there a difference between these two terms? Mr. Klein replied negatively. He suggested that Rule 17-103 (c)(4) be reviewed to see what language appears in that Rule. The Chair commented that the Style Subcommittee could consider this.

Mr. Klein noted that in Rule 17-202 (c)(1), the language is

that in an order referring an action or matter to ADR, the court may "designate" an ADR practitioner. Subsection (c)(2) concerning ADR organizations, provides that an organization may "select" a practitioner. The Reporter observed that the word "designate" had been used to mean what the court does, and the word "select" means what someone other than the court does. Mr. Klein added that the Rule provides that however someone was chosen, the person is deemed to be "court-designated."

Mr. Klein pointed out that subsection (d)(5) sets out a form similar to the ones in Rule 17-202. If the parties want to choose their own practitioner, they may do so provided that the person meets the qualifications needed for the kind of case, and the parties agree that they have made payment arrangements with that practitioner. The Chair inquired if this is the same procedure as for most cases in the circuit court generally. Mr. Klein answered affirmatively. The Reporter noted the exception that the court can force the parties under Rule 9-205 to go to mediation and pay for it. Mr. Klein pointed out the example of the Committee note in Rule 17-103 that refers to recording points of agreement as opposed to authoring points of agreement, and he said that the word "recording" will have to be changed throughout the ADR Rules. In Rule 9-205, the word "drafting" will have to be changed to the word "authoring." This is in the Committee note after section (h).

Mr. Klein said that section (j) was added and provides that the mediator give out evaluation forms. The parties are being

asked to complete those forms. Subsection (k)(1) is new and it addresses fee schedules.

By consensus, the Committee approved Rule 9-205 as presented, with the changes noted.

Mr. Klein presented Rule 2-504.1, Scheduling Conference, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-504.1 to conform terminology and internal references to the revision of the Rules in Title 17, as follows:

Rule 2-504.1. SCHEDULING CONFERENCE

. . .

(c) Order for Scheduling Conference

An order setting a scheduling conference may require that the parties, at least ten days before the conference:

(1) complete sufficient initial discovery to enable them to participate in the conference meaningfully and in good faith and to make decisions regarding (A) settlement, (B) consideration of available and appropriate forms of alternative dispute resolution, (C) limitation of issues, (D) stipulations, (E) any issues relating to preserving discoverable information, (F) any issues relating to discovery of electronically stored information, including the form in which it is to be produced, (G) any issues relating to claims of privilege or of protection, and (H) other matters that may

be considered at the conference; and

(2) confer in person or by telephone and attempt to reach agreement or narrow the areas of disagreement regarding the matters that may be considered at the conference and determine whether the action or any issues in the action are suitable for referral to ~~an~~ alternative dispute resolution ~~process~~ in accordance with Title 17, Chapter<u>s</u> 100 <u>and 200</u> of these Rules.

Committee note: Examples of matters that may be considered at a scheduling conference when discovery of electronically stored information is expected, include:

(1) its identification and retention;

(2) the form of production, such as PDF, TIFF, or JPEG files, or native form, for example, Microsoft Word, Excel, etc.;

(3) the manner of production, such as CD-ROM;

(4) any production of indices;

(5) any electronic numbering of documents and information;

(6) apportionment of costs for production of electronically stored information not reasonably accessible because of undue burden or cost;

(7) a process by which the parties may assert claims of privilege or of protection after production; and

(8) whether the parties agree to refer discovery disputes to a master or Special Master.

The parties may also need to address any request for metadata, for example, information embedded in an electronic data file that describes how, when, and by whom it was created, received, accessed, or modified or how it is formatted. For a discussion of metadata and factors to consider in

determining the extent to which metadata should be preserved and produced in a particular case, see, The Sedona Conference, The Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production, (2d ed. 2007), Principle 12 and related Comment.

. . .

(e) Scheduling Order

Case management decisions made by the court at or as a result of a scheduling conference shall be included in a scheduling order entered pursuant to Rule 2-504. A court may not order a party or counsel for a party to participate in ~~an~~ alternative dispute resolution ~~process~~ under Rule 2-504 except in accordance with Rule 9-205 or Rule ~~17-103~~ 17-201.

Source: This Rule is new.

Rule 2-504.1 was accompanied by the following Reporter's note.

The amendments to Rule 2-504.1 conform terminology and internal references to the revision of the Rules in Title 17.

Mr. Klein explained that the amendments to Rule 2-504.1 conform internal references and new concepts to the Rules in Title 17.

There being no discussion, by consensus, the Committee approved Rule 2-504.1 as presented.

Mr. Klein presented Rule 14-212, Alternative Dispute Resolution, for the Committee's consideration.

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-212 to conform internal references to the revision of the Rules in Title 17, as follows:

Rule 14-212. ALTERNATIVE DISPUTE RESOLUTION

(a) Applicability

This Rule applies to actions that are ineligible for foreclosure mediation under Code, Real Property Article, §7-105.1.

(b) Referral to Alternative Dispute Resolution

In an action in which a motion to stay the sale and dismiss the action has been filed, and was not denied pursuant to Rule 14-211 (b)(1), the court at any time before a sale of the property subject to the lien may refer a matter to mediation or another appropriate form of alternative dispute resolution, subject to the provisions of Rule ~~17-103~~ 17-201, and may require that individuals with authority to settle the matter be present or readily available for consultation.

Cross reference: For qualifications of a mediator other than one selected by agreement of the parties, see Rule ~~17-104 (f)~~ 17-205 (e).

Source: This Rule is new.

Rule 14-212 was accompanied by the following Reporter's note.

Amendments to Rule 14-212 conform internal references to the revision of the Rules in Title 17.

Mr. Klein noted that Rule 14-212 also conformed internal references to the revised Title 17 Rules. It pertains to ADR foreclosure. There being no discussion, the Committee approved Rule 14-212 as presented.

Delegate Vallario referred to the memorandum in the meeting materials from the Honorable Karen Abrams, of the Circuit Court for St. Mary's County, about how the fees for ADR are set by the administrative judge. The Chair noted that this refers to the master's fee. Delegate Vallario inquired how one would figure out what a reasonable rate is. The Chair responded that there is some language in the Rules providing for that. Mr. Carbine observed that the rate is in the order for mediation.

Delegate Vallario questioned how the maximum fee is set. Mr. Klein said that this is in Rule 17-208, Fee Schedules. What is in the proposed Rule is also in the current Rule. The Rule provides that the county administrative judge shall take into account the availability of qualified persons willing to provide those services and the ability of litigants to pay for them. This is the standard. The Committee note states that the maximum hourly rates in a fee schedule may vary based on the type of ADR proceeding, the complexity of the action, and the qualifications of the ADR practitioner. Ms. Wohl noted that there is a Conference of Circuit Court Judges ADR Committee chaired by Judge Ross, and they have looked at the different courts as to how the fees are set. The proposed new Rules will be discussed by the Conference including issues such as how fees are set. Delegate

Vallario suggested that a recommendation should be made to the administrative judges on this issue.

The Chair thanked Mr. Klein and his Subcommittee for their hard work in what had been a long, tedious process. The Chair stated that the meeting in October would only be a morning meeting.

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