COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 of the Judiciary Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland on February 12, 2016.

Members present:

Hon. Alan M. Wilner, Chair

Hon. Yvette M. Bryant
James E. Carbine, Esq.
Hon. John P. Davey
Mary Anne Day, Esq.
Christopher R. Dunn, Esq.
Hon. Angela M. Eaves
Hon. JoAnn M. Ellinghaus-Jones
Alvin I. Frederick, Esq.
Ms. Pamela Q. Harris
Bruce L. Marcus, Esq.
Donna Ellen McBride, Esq.
Hon. Danielle M. Mosley
Hon. Douglas R. M. Nazarian
Sen. H. Wayne Norman
Hon. Paula A. Price
Dennis J. Weaver, Clerk
Robert Zarbin, Esq.
Thurman W. Zollicoffer, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
David R. Durfee, Jr., Esq., Assistant Reporter
Sherie B. Libber, Esq., Assistant Reporter
P. Gregory Hilton, Esq., Clerk, Court of Special Appeals

The Chair convened the meeting and welcomed everyone. He said that the following sets of minutes had been sent to the Committee for approval: October, 2014; November, 2014; January, 2015; February, 2015; April, 2015; and September, 2015. Mr. Frederick moved to approve these sets of minutes, the motion was seconded, and it passed unanimously.

The Chair said that Agenda Item 3 would be considered first,

so that Mr. Hilton could get back to the Court of Special Appeals, where he is the Clerk.

Agenda Item 3. Consideration of a proposed amendment to Rule 8-412 (Record - Time for Transmitting)

Judge Nazarian presented Rule 8-412, (Record - Time for Transmitting) for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 8 - APPELLATE REVIEW IN THE COURT OF APPEALS AND COURT OF SPECIAL APPEALS

CHAPTER 400 - PRELIMINARY PROCEDURES

AMEND Rule 8-412 to add a reference to Rule 8-204, as follows:

Rule 8-412. RECORD - TIME FOR TRANSMITTING

(a) To the Court of Special Appeals

Unless a different time is fixed by Rule 8-204 or by an order entered pursuant to section (d) of this Rule, the clerk of the lower court shall transmit the record to the Court of Special Appeals within the applicable time specified in this section:

(1) in a civil action proceeding under Rule 8-207 (a), thirty days after the first notice of appeal is filed;

(2) in all other civil actions subject to Rule 8-205 (a), sixty days after the date of an order entered pursuant to Rule 8-206 (c); or

(3) in all other actions, sixty days after the date the first notice of appeal is filed.

Cross reference: Rule 8-207 (a).

(b) To the Court of Appeals

Unless a different time is fixed by order entered pursuant to section (d) of this Rule, the clerk of the court having possession of the record shall transmit it to the Court of Appeals within 15 days after entry of a writ of certiorari directed to the Court of Special Appeals, or within sixty days after entry of a writ of certiorari directed to a lower court other than the Court of Special Appeals.

(c) When Record is Transmitted; Notice

For purposes of this Rule the record is transmitted when it is (1) delivered to the Clerk of the appellate court; (2) sent by certified mail by the clerk of the lower court, addressed to the Clerk of the appellate court; or (3) transmitted to the Clerk of the appellate court in accordance with Rule 20-402. Upon receipt and docketing of the record by the Clerk of the appellate court, the Clerk shall send a notice to the parties stating (1) the date the record was received and docketed and (2) the date by which an appellant other than a cross-appellant shall file a brief conforming with Rule 8-503. Unless otherwise ordered by the appellate court, the date by which the appellant's brief must be filed shall be no earlier than 40 days after the date the Clerk sends the notice.

(d) Shortening or Extending the Time

On motion or on its own initiative, the appellate court having jurisdiction of the appeal may shorten or extend the time for transmittal of the record. If the motion is filed after the prescribed time for transmitting the record has expired, the Court will not extend the time unless the Court finds that the failure to transmit the record was caused by the act or omission of a judge, a clerk of court, the court reporter, or the appellee.

Source: This Rule is derived from former Rules 1025 and 825.

Rule 8-412 was accompanied by the following Reporter's note.

The time for transmitting the record pertaining to an application for leave to appeal is fixed by provisions contained in Rule 8-204, which differ from the provisions of Rule 8-412. Because of the differences, a reference to Rule 8-204 is proposed to be added to the first line of Rule 8-412 (a).

Judge Nazarian said that Mr. Hilton would explain the change to Rule 8-412 (a). Mr. Hilton explained that Rule 8-412 requires that the record shall be transmitted by the clerk of the lower court to the Court of Special Appeals within 30 days after the first notice of appeal is filed for expedited appeals under Rule 8-207 (a) and within 60 days after the date of an order entered pursuant to Rule 8-206 (c) or after the date the first notice of appeal is filed in any other action. It does not take into account that Rule 8-204, Application for Leave to Appeal to Court of Special Appeals, requires the record to be sent up in 30 days. An addition of a cross reference to Rule 8-204 is proposed for Rule 8-412, so that the clerks in the circuit court know to send the record up at the appropriate time for applications for leave to appeal.

By consensus, the Committee approved Rule 8-412 as presented.

Agenda Item 1. Reconsideration of proposed new Rules 2-422.1 (Inspection of Property - Of Nonparty or by Foreign Party - Without Deposition) and 2-510.1 (Foreign Subpoenas in Conjunction with a Deposition) and Conforming amendments to:

Rule 2-422 (Discovery of Documents, Electronically Stored Information, and Property - From Party) and Rule 2-510 (Subpoenas - Court Proceedings and Depositions)

Mr. Carbine presented proposed new Rules 2-422.1, Inspection of Property - Of Nonparty or by Foreign Party - Without Deposition; and 2-510.1, Foreign Subpoenas in Conjunction with a Deposition; as well as conforming amendments to Rules 2-422, Discovery of Documents, Electronically Stored Information, and Property - From Party; and 2-510, Subpoenas - Court Proceedings and Depositions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 400 - DISCOVERY

ADD new Rule 2-422.1, as follows:

Rule 2-422.1. INSPECTION OF PROPERTY - OF NONPARTY OR BY FOREIGN PARTY – WITHOUT DEPOSITION

(a) Applicability; Use of Subpoena

This Rule applies to the issuance of a subpoena to obtain entry upon and inspection of designated land or property owned by or in the possession or control of (1) a nonparty to an action pending in this State or (2) a person to whom a foreign subpoena is directed pursuant to Courts Article, §9-401 et seq. A subpoena issued under this Rule may be used only for that purpose. This Rule does not apply to the issuance of a subpoena in conjunction with a deposition.

Committee note: Under subsection (a)(2), a person to whom a foreign subpoena is directed

could be a party or a non-party to the foreign action. A party to an action pending in this State who seeks entry upon land of another party must proceed in accordance with Rule 2-422.

Cross reference: For a subpoena issued in conjunction with a deposition, see Rule 2-510 and Rule 2-510.1.

(b) Definitions

(1) Statutory Definitions

The definitions stated in Code, Courts Article, §9-401 apply in this Rule to the extent relevant.

(2) Additional Definitions

In this Rule, the following additional definitions apply:

(A) Domestic Subpoena

"Domestic Subpoena" means a subpoena issued by a circuit court of this State in an action pending in this State.

(B) Inspection

"Inspection" includes inspecting, measuring, surveying, photographing, testing, and sampling within the scope of Rule 2-402 (a).

(C) Nonparty

"Nonparty" means any person, other than a party, who is in possession or control of land or property and, if different, the record owner of the land or property.

(D) Foreign Party

"Foreign Party" means the party on whose behalf a foreign subpoena is issued.

(E) Foreign Attorney

"Foreign Attorney" means an attorney licensed to practice law in a

foreign jurisdiction, but not in the state of Maryland.

(c) Issuance

(1) Domestic Subpoena

Upon the request of a person entitled to the issuance of a subpoena under this Rule for discovery in an action pending in this State, the clerk shall issue a completed subpoena, or provide a blank form of subpoena which shall be filled in and returned to the clerk to be signed and sealed before service. On the request of an attorney or other officer of the court entitled to the issuance of a subpoena under this Rule, the clerk shall issue a subpoena signed and sealed but otherwise in blank, which shall be filled in before service.

(2) Foreign Subpoena

(A) Request for Issuance

A party to an action pending in a foreign jurisdiction may request issuance of a subpoena by a court of this State based on a foreign subpoena issued in that action by submitting a request to the clerk of the circuit court for the county in which discovery is sought to be conducted. The request shall be accompanied by the foreign subpoena and a written undertaking in a form approved by the State Court Administrator, signed by the Foreign Party and the party's Foreign Attorney, if any, by which the party and the party's Foreign Attorney submit to the jurisdiction of the circuit court for the purpose of adjudicating discovery disputes, motions to quash, enforcement of the subpoena, and discovery sanctions. A Foreign Party and the party's Foreign Attorney, if any, who files a request or undertaking pursuant to this section does not, by so doing, submit to the jurisdiction of a court of this State for any other purpose.

Committee note: This section does not affect the jurisdiction of a court over a party or attorney who is otherwise subject to the court's jurisdiction.

(B) Issuance

If the request, the contents of the subpoena, and any attachments to the subpoena are in compliance with this Rule, the clerk promptly shall issue a subpoena for service upon the person to whom the foreign subpoena is directed. The subpoena shall:

(i) incorporate the terms used in the foreign subpoena;

(ii) comply with the requirements of section (d) of this Rule; and

(iii) contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(d) Form

(1) Except as otherwise provided by the court for good cause, every subpoena shall be on a uniform form approved by the State Court Administrator and shall:

(A) contain the caption of the action, including the civil action number for the Maryland court issuing the subpoena;

(B) contain the name and address of the person to whom it is directed;

(C) contain the name of the person at whose request it is issued;

(D) describe with reasonable particularity the land or property to be entered and any actions to be performed;

(E) state the nature of the controversy and the relevancy of the entrance and proposed acts;

(F) specify a reasonable time and manner of entering and performing the proposed acts;

(G) describe the good faith attempts

made by the party to reach agreement and with the person to whom the subpoena is directed concerning the entry and proposed acts;

(H) contain the date of issuance;

(I) be served at least 45 days before the date of the requested entry; and

(J) contain a statement that the subpoena may be served within 60 days after its issuance and may not be served thereafter.

(2) A subpoena issued pursuant to this Rule shall be accompanied by:

(A) a written undertaking that the requesting party will pay for all damages arising out of the entry and performance of the proposed acts; and

(B) a notice informing the person to whom the subpoena is directed that:

(i) the person has the right to object to the entry and proposed acts by filing an objection with the court and serving a copy of it on the requesting party;

(ii) any objection must be filed and served within **30** days after the person is served with the subpoena; and

(iii) the objection must include or be accompanied by a certificate of service, stating the date on which the person mailed a copy of the objection to the requesting party.

Cross reference: See Rules 1-321 and 1-323.

(e) Service

A subpoena shall be served by delivering a copy to the person named or to an agent authorized by appointment or by law to receive service for the person named or as permitted by Rule 2-121 (a)(3). Service of a subpoena upon a party represented by an attorney may be made by service upon the attorney under Rule 1-321 (a). A subpoena

may be served by a sheriff of any county or by any person who is not a party and who is not less than 18 years of age. If a subpoena is to permit entry upon leased land or property, the subpoena shall be served on any record owner of the land or property and any occupant or person in possession or control of the land or property. Before the subpoena is served, the party on whose behalf the subpoena is issued shall serve a copy of it on each other party in the manner provided by Rule 1-321 and file with the court a certificate of service attesting to the fact of service on the other parties. A person may not serve or attempt to serve a subpoena more than 60 days after its issuance.

Cross reference: See Code, Courts Article, §6-410, concerning service upon certain persons other than the custodian of public records named in the subpoena if the custodian is not known and cannot be ascertained after a reasonable effort. As to additional requirements for certain subpoenas, see Code, Health-General Article, §4-306 (b)(6) and Code, Financial Institutions Article, §1-304.

(f) Objection to Subpoena to Permit Entry Upon Designated Land or Property; Procedure to Compel Entry

(1) Objection

A person served with a subpoena to permit entry upon designated land or property, or any other person who claims an interest in the land or property, may object to the entry by filing an objection within 30 days after service of the subpoena and serving the objection on the requesting party. After an objection is filed, entry upon the designated land or property is not permitted unless the court grants a motion to compel entry filed in accordance with subsection (f)(2) of this Rule.

(2) Procedure to Compel Entry

(A) Motion to Compel

If the requested discovery is

refused or within 15 days after an objection is served, the requesting party may file a motion to compel entry. The requesting party shall (i) attach to the motion a copy of the subpoena and any objection, (ii) serve a copy of the motion in the manner provided by Rule 1-321 on all other parties and the person who filed the objection, and (iii) if the requesting party is seeking entry upon leased land or property, serve a copy of the motion on any record owner of the land or property and any occupant or person in possession or control of the land or property. A hearing may be requested by including the headline "Request for Hearing" in the motion.

(B) Response

A response may be filed within 15 days after service. A hearing may be requested by including the headline "Request for Hearing" in the response.

(C) Hearing

If a hearing is not timely requested, the court may rule on the motion without a hearing. If a nonparty requests a hearing, the court shall hold a hearing. If a party requests a hearing, the court may determine whether a hearing will be held.

(D) Order

An order granting the motion shall specify the time, place, and manner of entry upon the land or property and the acts that may be performed. The order also may include any other provision that the court deems appropriate, including provisions relating to the privacy of the person who filed the objection, protection of the interests of the parties and any nonparty, and the filing of a bond to secure the obligation of the moving party to pay for damages arising out of the entry and acts performed.

Cross reference: See Maryland Uniform Interstate Depositions and Discovery Act, Code, Courts Article, §§9-401 et seq.

Source: This Rule is new.

Rule 2-422.1 was accompanied by the following Reporter's note.

> In Chapter 41 of the 2008 session, the General Assembly enacted the Maryland Uniform Interstate Depositions and Discovery Act (the "Uniform Act"), which is codified in Code, Courts Article, §§9-401 - 407. The purpose of the Uniform Act, which has been codified in twenty-eight jurisdictions, is to create a fair and easy-to-follow procedure, requiring minimal judicial oversight and intervention. The Uniform Act is patterned after Rule 45 of the Federal Rules of Civil Procedure. *See* Report of the Drafting Committee on the Uniform Interstate Deposition and Discovery Act, §3. Accordingly, Section 9-401 (f)(3) of the Uniform Act provides that a subpoena issued under the Uniform Act may require a person to "[p]ermit inspection of premises under control of a person."
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> Section 9-401 (f)(3), however, is inconsistent with Rule 2-422. In *Webb v. Joyce*, 108 Md. App. 512 (1996), the Court of Special Appeals determined that Rule 2-422 did not permit a party to inspect the property of a nonparty. The Court distinguished Rule 2-422 from what is permitted under the federal rules of civil procedure, which had been specifically amended to permit the use of subpoenas to inspect the property of nonparty's.
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> After the *Webb* decision, the Rules Committee proposed a new Rule 2-422.1. *See* One Hundred Forty-Seventh Report of the Rules Committee. The Rule expressly would have authorized circuit courts to issue subpoenas to command the inspection of premises of non-parties. However, by Rules Order dated June 6, 2000, the Court of Appeals rejected proposed new Rule 2-422.1.
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> The Discovery Subcommittee now proposes a revised version of Rule 2-422.1, for two reasons that have occurred since 2000.
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> First, the passage of the Uniform Act enables a foreign party to obtain a subpoena requiring a person, including a non-party, to

permit inspection of premises under the control of the person.

Second, the Subcommittee believes that Maryland litigants should receive the same consideration. Post-*Webb* case authority from the Court of Special Appeals has highlighted for Maryland practitioners that there is an indirect means to obtain discovery of the property of nonparties. In *Stokes v. 835 N. Washington Stree, LLC*, 141 Md. App. 214 (2001), the Court of Special Appeals declared the "circuit courts have the power to order inspection of a non-party's property on a case-by-case basis through the equitable bill of discovery." *Id.* At 223. The Court acknowledged its earlier decision in *Webb v. Joyce*, but held that, "Because the Maryland Rules do not preclude circuit courts from exercising their inherent equitable powers, we are persuaded that the circuit court has jurisdiction to permit appellants entry into appellee's property through an equitable bill of discovery." *Id.* at 222. In *Johnson v. Franklin*, 223 Md. App. 273 (2015), the Court of Special Appeals adhered to its holding in *Stokes*. The Subcommittee proposes that Rule 2-422.1 be adopted to create a Rule whereby parties may directly obtain discovery of the property of nonparties, rather than having to obtain an equitable bill of discovery.

Section (a) of proposed new Rule 2-422.1 provides that the Rule applies to the issuance of a subpoena to obtain entry upon and inspection of designated land or property owned by or in the possession or control of (1) a nonparty to an action pending in this State or (2) a person to whom a foreign subpoena is directed pursuant to Courts Article, §9-401 et seq. A subpoena issued under this Rule may be used only for that purpose.

Subsection (b)(1) adopts the definitions from the Uniform Act to the extent relevant, and subsection (b)(2) contains additional definitions of "domestic subpoena," "inspection," and "nonparty."

Subsections (c)(1) and (c)(2) deal with

the issuance of domestic subpoenas and foreign subpoenas, respectively.

Subsection (d)(1) contains a detailed list of the elements of a subpoena. Subsection (d)(2) states that certain information must accompany a subpoena, including a written undertaking that the requesting party will pay for all damages arising from the entry and proposed acts and a notice containing the receiving person's right to object.

Section (e) contains provisions pertaining to service of the subpoena.

Section (f) contains provisions pertaining to an objection to a subpoena under the Rule and to a procedure to compel entry.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 500 - TRIAL

ADD new Rule 2-510.1, as follows:

Rule 2-510.1. FOREIGN SUBPOENAS IN CONJUNCTION WITH A DEPOSITION

(a) Applicability

This Rule applies only to a subpoena issued under the Maryland Uniform Interstate Depositions and Discovery Act requiring a person to attend and give testimony at a deposition and, if applicable, produce at the deposition and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person.

Cross reference: See Code, Courts Article,

Title 9, Subtitle 4, Maryland Uniform Interstate Depositions and Discovery Act. For the issuance of a subpoena based on a foreign subpoena that does not require a person to attend a deposition, see Rule 2-422.1.

(b) Definitions

(1) Statutory Definitions

The definitions stated in Code, Courts Article, §9-401 apply in this Rule, to the extent relevant.

(2) Inspection

In this Rule, "Inspection" includes inspecting, measuring, surveying, photographing, testing, and sampling to the extent permitted by Rule 2-402 (a).

(3) Foreign Party

In this Rule, "Foreign Party" means the party on whose behalf a foreign subpoena is issued.

(4) Foreign Attorney

In this Rule, "Foreign Attorney" means an attorney licensed to practice law in a foreign jurisdiction, but not in the state of Maryland.

(c) Request for Issuance

A party to an action pending in a foreign jurisdiction may request issuance of a subpoena by a court of this State based on a foreign subpoena issued in that action by submitting a request to the clerk of the circuit court for the county in which discovery is sought to be conducted. The request shall be accompanied by the foreign subpoena and a written undertaking in a form approved by the State Court Administrator, signed by the Foreign Party and the party's Foreign Attorney, if any, by which the party **and** the party's Foreign Attorney submit to the jurisdiction of the circuit court for the purpose of adjudicating discovery disputes,

motions to quash, enforcement of the subpoena, and discovery sanctions. A Foreign Party and the party's Foreign Attorney, if any, who files a request or undertaking pursuant to this section does not, by so doing, submit to the jurisdiction of a court of this State for any other purpose.

Committee note: Section (c) of this Rule does not affect the jurisdiction of a court over a party or attorney who is otherwise subject to the court's jurisdiction.

(d) Issuance

If the request, the contents of the subpoena, and any attachments to the subpoena are in compliance with this Rule, the clerk promptly shall issue a subpoena for service upon the person to whom the foreign subpoena is directed. The subpoena shall:

(1) incorporate the terms used in the foreign subpoena;

(2) comply with the requirements of section (e) of this Rule; and

(3) contain or be accompanied by the names, addresses, and telephone numbers of all attorneys of record in the proceeding to which the subpoena relates and of any party not represented by an attorney.

(e) Form

Except as otherwise permitted by the court for good cause, every subpoena shall be on a uniform form approved by the State Court Administrator. The form shall contain: (1) the caption of the action, including the civil action number for the Maryland court issuing the subpoena, (2) the name and address of the person to whom it is directed, (3) the name of the person at whose request it is issued, (4) the date, time, and place where attendance is required, (5) a description of any documents, electronically stored information, or tangible things to be produced and if testing or sampling is to occur, a description of the proposed testing or sampling procedure, (6) when required by

Rule 2-412 (d), a notice to designate the person to testify, (7) the date of issuance, and (8) a statement that the subpoena may be served within 60 days after its issuance and may not be served thereafter. A subpoena may specify the form in which electronically stored information is to be produced.

Committee note: A subpoena may be used to compel attendance at a deposition that will be held more than 60 days after the date of issuance, provided that the subpoena is served within the 60-day period. The failure to serve a subpoena within the 60-day period does not preclude the re-issuance of a new subpoena.

(f) Service

A subpoena shall be served by delivering a copy to the person named or to an agent authorized by appointment or by law to receive service for the person named or as permitted by Rule 2-121 (a)(3). A subpoena may be served by a sheriff of any county or by any person who is not a party and who is not less than 18 years of age. A person may not serve or attempt to serve a subpoena more than 60 days after its issuance.

Cross reference: See Code, Courts Article, §6-410, concerning service upon certain persons other than the custodian of public records named in the subpoena if the custodian is not known and cannot be ascertained after a reasonable effort. As to additional requirements for certain subpoenas, see Code, Health-General Article, §4-306 (b)(6) and Code, Financial Institutions Article, §1-304.

(g) Objection to Subpoena for Deposition

A person served with a subpoena to attend a deposition may seek a protective order pursuant to Rule 2-403. If the subpoena also commands the production of documents, electronically stored information, or tangible things at the deposition, the person served or a person named or depicted in an item specified in the subpoena may seek a protective order pursuant to Rule 2-403 or

may file, within ten days after service of the subpoena, an objection to production of any or all of the designated materials. The objection shall be in writing and shall state the reasons for the objection. If an objection is filed, the party serving the subpoena is not entitled to production of the materials except pursuant to an order of the court from which the subpoena was issued. At any time before or within 15 days after completion of the deposition and upon notice to the deponent, the party serving the subpoena may move for an order to compel the production.

A claim that information is privileged or subject to protection as work product materials shall be supported by a description of each item that is sufficient to enable the demanding party to evaluate the claim.

(h) Duties Relating to the Production of Documents, Electronically Stored Evidence, and Tangible Things

(1) Generally

A person responding to a subpoena to produce documents, electronically stored information, or tangible things at a court proceeding or deposition shall:

(A) produce the documents or information as they are kept in the usual course of business or shall organize and label the documents or information to correspond with the categories in the subpoena; and

(B) produce electronically stored information in the form specified in the subpoena or, if a form is not specified, in the form in which the person ordinarily maintains it or in a form that is reasonably usable.

(2) Electronically Stored Information

A person responding to a subpoena to produce electronically stored information at a court proceeding or deposition need not produce the same electronically stored

information in more than one form and may decline to produce the information on the ground that the sources are not reasonably accessible because of undue burden or cost. A person who declines to produce information on this ground shall identify the sources alleged to be not reasonably accessible and state the reasons why production from each identified source would cause undue burden or cost. The statement of reasons shall provide enough detail to enable the demanding party to evaluate the burdens and costs of complying with the subpoena and the likelihood of finding responsive information in the identified sources. Any motion relating to electronically stored information withheld on the ground that it is not reasonably accessible shall be decided in the manner set forth in Rule 2-402 (b).

(i) Protection of Persons Subject to Subpoenas

A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or cost on a person subject to the subpoena.

Cross reference: For the availability of sanctions for violations of this section, see Rules 1-201 (a) and 1-341.

(j) Permissive, and Non-permissive Use

(1) A subpoena may be used to compel a witness to attend, give testimony, and produce and permit inspection, copying, testing, or sampling of designated documents, electronically stored information, or tangible things at a deposition to the extent permitted by Rule 2-402 (a).

(2) A subpoena issued under this Rule may not be used for any other purpose. If the court, on motion of a party or on its own initiative, after affording the alleged violator an opportunity for a hearing, finds that a person has used or attempted to use a subpoena or a copy or reproduction of a subpoena form for a purpose other than one allowed under this Rule, the court may impose

an appropriate sanction, including an award of a reasonable attorney's fee and costs, the exclusion of evidence obtained as a result of the violation, and reimbursement of any person inconvenienced for time and expenses incurred.

(k) Attachment

A witness served with a subpoena under this Rule is liable to body attachment and fine for failure to obey the subpoena without sufficient excuse. The writ of attachment may be executed by the sheriff or peace officer of any county and shall be returned to the court issuing it. The witness attached shall be taken immediately before the court if then in session. If the court is not in session, the witness shall be taken before a judicial officer of the District Court for a determination of appropriate conditions of release to ensure the witness' appearance at the next session of the court that issued the attachment.

(l) Information Produced that is Subject to a Claim of Privilege or Work Product Protection

Within a reasonable time after information is produced in response to a subpoena that is subject to a claim of privilege or of protection as work product material, the person who produced the information shall notify each party who received the information of the claim and the basis for it. Promptly after being notified, each receiving party shall return, sequester, or destroy the specified information and any copies and may not use or disclose the information until the claim is resolved. A receiving party who wishes to determine the validity of a claim of privilege shall promptly file a motion under seal requesting that the court determine the validity of the claim. A receiving party who disclosed the information before being notified shall take reasonable steps to retrieve it. The person who produced the information shall preserve it until the claim is resolved.

Source: This Rule is new.

Rule 2-510.1 was accompanied by the following Reporter's note.

> New Rule 2-510.1, Foreign Subpoenas in Conjunction with a Deposition, is proposed to effectuate and flesh out the Maryland Uniform Interstate Depositions and Discovery Act (the "Uniform Act"), codified in Code, Courts Article, §§9-401 - 407.
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> Section (a) sets forth the applicability of the Rule.
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> Subsection (b)(1) adopts the definitions of the Uniform Act, to the extent applicable, and subsection (b)(2) defines the term "inspection" as used in the Rule.
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> Section (c) establishes requirements for a party in an action pending in a foreign jurisdiction when requesting issuance of a subpoena and states that a "party or attorney who files a request or undertaking pursuant to [that] does not, by so doing, submit to the jurisdiction of a court of this State for any other purpose.
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> Section (d) provides that the clerk shall issue a subpoena if the request, the contents of the subpoena, and any attachments are in compliance with the Rule.
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> Section (e) provides that every subpoena shall be on a uniform form approved by the State Court Administrator, and what the form shall contain.
>
> Section (f) provides the manner in which a subpoena shall be served.
>
> Section (g) discusses how a person served with a subpoena may move for a protective order or file an objection and how the party serving a subpoena may move for an order to compel production.
>
> Section (h) states the duties of a person responding to a subpoena with respect to the production of documents, electronically stored evidence, and tangible thins.

Section (i) provides that the party responsible for issuance of the subpoena "shall take reasonable steps to avoid imposing undue burden or cost on a person subject to the subpoena."

Section (j) states to purposes for which a subpoena under this Rule may be used and may not be used.

Section (k) states that a person served with a subpoena is liable to body attachment and fine for failure to obey the subpoena without sufficient cause.

Section (l) discusses what should be done when information subject to a claim of privilege or work product has been produced.

The Discovery Subcommittee believes that proposed Rule 2-510.1 is consistent with a core purpose of the Uniform Act -- to establish a "simple and efficient ... clerical procedure under which a trial state subpoena can be used to issue a discovery state subpoena." See Prefatory Note, The Drafting Committee on Uniform Interstate Depositions and Discovery Act. The Subcommittee believes that Rule 2-510.1 also is consistent with another cardinal goal of the Uniform Act -- to be "fair to deponents ... [by] provid[ing] that motions brought to enforce, quash, or modify a subpoena, or for protective orders, shall be brought in the discovery state and will be governed by the discovery state's laws."

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-422 to change the title of the Rule, to add clarifying language to

section (a), and to add a cross reference following section (a), as follows:

Rule 2-422. DISCOVERY OF DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND PROPERTY – FROM PARTY

(a) Scope

Any party to an action pending in this State may serve one or more requests to any other party (1) as to items that are in the possession, custody, or control of the party upon whom the request is served, to produce and permit the party making the request, or someone acting on the party's behalf, to inspect, copy, test or sample designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form) or to inspect and copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 2-402 (a); or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection, measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property, within the scope of Rule 2-402 (a).

Cross reference: For inspection of property of a nonparty in an action pending in this State and for discovery under the Maryland Uniform Interstate Depositions and Discovery Act that is not in conjunction with a deposition, see Rule 2-422.1.

(b) Request

A request shall set forth the items to be inspected, either by individual item or by category; describe each item and category

with reasonable particularity; and specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form in which electronically stored information is to be produced.

(c) Response

The party to whom a request is directed shall serve a written response within 30 days after service of the request or within 15 days after the date on which that party's initial pleading or motion is required, whichever is later. The response shall state, with respect to each item or category, that (1) inspection and related activities will be permitted as requested, (2) the request is refused, or (3) the request for production in a particular form is refused. The grounds for each refusal shall be fully stated. If the refusal relates to part of an item or category, the part shall be specified. If a refusal relates to the form in which electronically stored information is requested to be produced (or if no form was specified in the request) the responding party shall state the form in which it would produce the information.

Cross reference: See Rule 2-402 (b)(1) for a list of factors used by the court to determine the reasonableness of discovery requests and (b)(2) concerning the assessment of the costs of discovery.

(d) Production

(1) A party who produces documents or electronically stored information for inspection shall (A) produce the documents or information as they are kept in the usual course of business or organize and label them to correspond with the categories in the request, and (B) produce electronically stored information in the form specified in the request or, if the request does not specify a form, in the form in which it is ordinarily maintained or in a form that is reasonably usable.

(2) A party need not produce the same electronically stored information in more than one form.

Committee note: Onsite inspection of electronically stored information should be the exception, not the rule, because litigation usually relates to the informational content of the data held on a computer system, not to the operation of the system itself. In most cases, there is no justification for direct inspection of an opposing party's computer system. See *In re Ford Motor Co.*, 345 F.3d 1315 (11th Cir. 2003) (vacating order allowing plaintiff direct access to defendant's databases). To justify onsite inspection of a computer system and the programs used, a party should demonstrate a substantial need to discover the information and the lack of a reasonable alternative. The inspection procedure should be documented by agreement or in a court order and should be narrowly restricted to protect confidential information and system integrity and to avoid giving the discovering party access to data unrelated to the litigation. The data subject to inspection should be dealt with in a way that preserves the producing party's rights, as, for example, through the use of neutral court-appointed consultants. See, generally, The Sedona Conference, The Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production (2d ed. 2007), Comment 6. c.

Source: This Rule is derived from former Rule 419 and the 1980 and 2006 versions of Fed. R. Civ. P. 34.

Rule 2-422 was accompanied by the following Reporter's note.

Rule 2-422 is proposed to be amended to clarify that the discovery permitted under this Rule is from a party and that the party who requests the discovery is a party in an action pending in this State. As stated in the cross reference, Rule 2-422.1 governs inspection of property of a nonparty in an action pending in this State and discovery under the Uniform Interstate Depositions and

Discovery Act that is not in conjunction with a deposition.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-510 to change the title of the Rule, to add clarifying language to subsection (a)(3), to add a Committee note following section (b), and to add a cross reference, as follows:

Rule 2-510. SUBPOENAS – COURT PROCEEDINGS AND DEPOSITIONS

(a) Required, Permissive, and Non-permissive Use

(1) A subpoena is required:

(A) to compel the person to whom it is directed to attend, give testimony, and produce designated documents, electronically stored information, or tangible things at a court proceeding, including proceedings before a master, auditor, or examiner; and

(B) to compel a nonparty to attend, give testimony, and produce and permit inspection, copying, testing, or sampling of designated documents, electronically stored information, or tangible things at a deposition.

(2) A subpoena may be used to compel a party over whom the court has acquired jurisdiction to attend, give testimony, and produce and permit inspection, copying, testing, or sampling of designated documents, electronically stored information, or tangible things at a deposition.

(3) ~~A~~ Except as otherwise permitted by law, a subpoena may not be used for any other purpose. If the court, on motion of a party or on its own initiative, after affording the alleged violator an opportunity for a hearing, finds that a person has used or attempted to use a subpoena or a copy or reproduction of a subpoena form for a purpose other than one allowed under this Rule, the court may impose an appropriate sanction, including an award of a reasonable attorney's fee and costs, the exclusion of evidence obtained as a result of the violation, and reimbursement of any person inconvenienced for time and expenses incurred.

(b) Issuance

A subpoena shall be issued by the clerk of the court in which an action is pending in the following manner:

(1) On the request of any person entitled to the issuance of a subpoena, the clerk shall (A) issue a completed subpoena, or (B) provide to the person a blank form of subpoena, which the person shall fill in and return to the clerk to be signed and sealed by the clerk before service.

(2) On the request of a member in good standing of the Maryland Bar entitled to the issuance of a subpoena, the clerk shall issue a subpoena signed and sealed by the clerk, which the attorney shall fill in before service.

(3) An attorney of record in a pending action who is a registered user under Rule 20-101 may obtain from the clerk through MDEC, for use in that action, an electronic version of a blank form of subpoena containing the clerk’s signature and the seal of the court, which the attorney may download, print, and fill in before service.

(4) Except as provided in subsections (b)(2) and (b)(3) of this Rule, a person other than the clerk may not copy and fill in any blank form of subpoena for the purpose of serving the subpoena. A violation of this section shall constitute a violation of

subsection (a)(3) of this Rule.

Committee note: Rule 2-510 pertains only to subpoenas to be used to compel attendance at a court proceeding or deposition in a pending civil action in a Maryland circuit court.

Cross reference: For subpoenas under the Maryland Uniform Interstate Depositions and Discovery Act requiring attendance at a deposition in this State, see Rule 2-510.1. For discovery of documents, electronically stored information, and property from a party to an action pending in this State, other than in conjunction with a deposition, see Rule 2-422. For inspection of property of a nonparty in an action pending in this State and for discovery under the Maryland Uniform Interstate Depositions and Discovery Act that is not in conjunction with a deposition, see Rule 2-422.1.

(c) Form

Except as otherwise permitted by the court for good cause, every subpoena shall be on a uniform form approved by the State Court Administrator. The form shall contain: (1) the caption of the action, (2) the name and address of the person to whom it is directed, (3) the name of the person at whose request it is issued, (4) the date, time, and place where attendance is required, (5) a description of any documents, electronically stored information, or tangible things to be produced and if testing or sampling is to occur, a description of the proposed testing or sampling procedure, (6) when required by Rule 2-412 (d), a notice to designate the person to testify, (7) the date of issuance, and (8) a statement that the subpoena may be served within 60 days after its issuance and may not be served thereafter. A subpoena may specify the form in which electronically stored information is to be produced.

Committee note: A subpoena may be used to compel attendance at a court proceeding or deposition that will be held more than 60 days after the date of issuance, provided that the subpoena is served within the 60-day period. The failure to serve a subpoena

within the 60-day period does not preclude the reissuance of a new subpoena.

(d) Service

A subpoena shall be served by delivering a copy to the person named or to an agent authorized by appointment or by law to receive service for the person named or as permitted by Rule 2-121 (a)(3). Service of a subpoena upon a party represented by an attorney may be made by service upon the attorney under Rule 1-321 (a). A subpoena may be served by a sheriff of any county or by any person who is not a party and who is not less than 18 years of age. Unless impracticable, a party shall make a good faith effort to cause a trial or hearing subpoena to be served at least five days before the trial or hearing. A person may not serve or attempt to serve a subpoena more than 60 days after its issuance. A violation of this provision shall constitute a violation of subsection (a)(3) of this Rule.

Cross reference: See Code, Courts Article, §6-410, concerning service upon certain persons other than the custodian of public records named in the subpoena if the custodian is not known and cannot be ascertained after a reasonable effort. As to additional requirements for certain subpoenas, see Code, Health-General Article, §4-306 (b)(6) and Code, Financial Institutions Article, §1-304.

(e) Objection to Subpoena for Court Proceedings

On motion of a person served with a subpoena to attend a court proceeding (including a proceeding before a master, auditor, or examiner) or a person named or depicted in an item specified in the subpoena filed promptly and, whenever practicable, at or before the time specified in the subpoena for compliance, the court may enter an order that justice requires to protect the person from annoyance, embarrassment, oppression, or undue burden or cost, including one or more of the following:

(1) that the subpoena be quashed or modified;

(2) that the subpoena be complied with only at some designated time or place other than that stated in the subpoena;

(3) that documents, electronically stored information, or tangible things designated in the subpoena be produced only upon the advancement by the party serving the subpoena of the reasonable costs of producing them; or

(4) that documents, electronically stored information, or tangible things designated in the subpoena be delivered to the court at or before the proceeding or before the time when they are to be offered in evidence, subject to further order of court to permit inspection of them.

A motion filed under this section based on a claim that information is privileged or subject to protection as work product materials shall be supported by a description of the nature of each item that is sufficient to enable the demanding party to evaluate the claim.

(f) Objection to Subpoena for Deposition

A person served with a subpoena to attend a deposition may seek a protective order pursuant to Rule 2-403. If the subpoena also commands the production of documents, electronically stored information, or tangible things at the deposition, the person served or a person named or depicted in an item specified in the subpoena may seek a protective order pursuant to Rule 2-403 or may file, within ten days after service of the subpoena, an objection to production of any or all of the designated materials. The objection shall be in writing and shall state the reasons for the objection. If an objection is filed, the party serving the subpoena is not entitled to production of the materials except pursuant to an order of the court from which the subpoena was issued. At any time before or within 15 days after completion of the deposition and upon notice to the deponent, the party serving the subpoena may move for an order to compel the

production.

A claim that information is privileged or subject to protection as work product materials shall be supported by a description of each item that is sufficient to enable the demanding party to evaluate the claim.

(g) Duties Relating to the Production of Documents, Electronically Stored Evidence, and Tangible Things

(1) Generally

A person responding to a subpoena to produce documents, electronically stored information, or tangible things at a court proceeding or deposition shall:

(A) produce the documents or information as they are kept in the usual course of business or shall organize and label the documents or information to correspond with the categories in the subpoena; and

(B) produce electronically stored information in the form specified in the subpoena or, if a form is not specified, in the form in which the person ordinarily maintains it or in a form that is reasonably usable.

(2) Electronically Stored Information

A person responding to a subpoena to produce electronically stored information at a court proceeding or deposition need not produce the same electronically stored information in more than one form and may decline to produce the information on the ground that the sources are not reasonably accessible because of undue burden or cost. A person who declines to produce information on this ground shall identify the sources alleged to be not reasonably accessible and state the reasons why production from each identified source would cause undue burden or cost. The statement of reasons shall provide enough detail to enable the demanding party to evaluate the burdens and costs of complying with the subpoena and the

likelihood of finding responsive information in the identified sources. Any motion relating to electronically stored information withheld on the ground that it is not reasonably accessible shall be decided in the manner set forth in Rule 2-402 (b).

(h) Protection of Persons Subject to Subpoenas

A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or cost on a person subject to the subpoena.

Cross reference: For the availability of sanctions for violations of this section, see Rules 1-201 (a) and 1-341.

(i) Records Produced by Custodians

(1) Generally

A custodian of records served with a subpoena to produce records at trial may comply by delivering the records to the clerk of the court that issued the subpoena at or before the time specified for production. The custodian may produce exact copies of the records designated unless the subpoena specifies that the original records be produced. The records shall be delivered in a sealed envelope labeled with the caption of the action, the date specified for production, and the name and address of the person at whose request the subpoena was issued. The records shall be accompanied by a certificate of the custodian that they are the complete records requested for the period designated in the subpoena and that the records are maintained in the regular course of business. The certification shall be prima facie evidence of the authenticity of the records.

Cross reference: Code, Health-General Article, §4-306 (b)(6); Code, Financial Institutions Article, §1-304.

(2) During Trial

Upon commencement of the trial, the clerk shall release the records only to the courtroom clerk assigned to the trial. The courtroom clerk shall return the records to the clerk promptly upon completion of trial or at an earlier time if there is no longer a need for them. Upon final disposition of the action the clerk shall return the original records to the custodian but need not return copies.

(3) Presence of Custodian

When the actual presence of the custodian of records is required, the subpoena shall state with specificity the reason for the presence of the custodian.

Cross reference: Code, Courts Article, §10-104 includes an alternative method of authenticating medical records in certain cases transferred from the District Court upon a demand for a jury trial.

(j) Attachment

A witness served with a subpoena under this Rule is liable to body attachment and fine for failure to obey the subpoena without sufficient excuse. The writ of attachment may be executed by the sheriff or peace officer of any county and shall be returned to the court issuing it. The witness attached shall be taken immediately before the court if then in session. If the court is not in session, the witness shall be taken before a judicial officer of the District Court for a determination of appropriate conditions of release to ensure the witness' appearance at the next session of the court that issued the attachment.

(k) Information Produced that is Subject to a Claim of Privilege or Work Product Protection

Within a reasonable time after information is produced in response to a subpoena that is subject to a claim of privilege or of protection as work product material, the person who produced the information shall notify each party who

received the information of the claim and the basis for it. Promptly after being notified, each receiving party shall return, sequester, or destroy the specified information and any copies and may not use or disclose the information until the claim is resolved. A receiving party who wishes to determine the validity of a claim of privilege shall promptly file a motion under seal requesting that the court determine the validity of the claim. A receiving party who disclosed the information before being notified shall take reasonable steps to retrieve it. The person who produced the information shall preserve it until the claim is resolved.

Cross reference: For issuing and enforcing legislative subpoenas, see Code, State Government Article, §§2-1802 and 2-1803.

Source: This Rule is derived as follows:
Section (a) is new but the first and second sentences are derived in part from the 2006 version of Fed. R. Civ. P. 45 (a)(1)(C); the second sentence also is derived in part from former Rule 407 a.
Section (b) is new.
Section (c) is derived from former Rules 114 a and b, 115 a and 405 a 2 (b), and from the 2006 version of Fed. R. Civ. P. 45 (a)(1)(D).
Section (d) is derived from former Rules 104 a and b and 116 b. Section (e) is derived from former Rule 115 b and the 2006 version of Fed. R. Civ. P. 45 (d)(2)(A).
Section (f) is derived from the 1980 version of Fed. R. Civ. P. 45 (d)(1), and the 2006 version of Fed. R. Civ. P. 45 (d)(2)(A). Section (g) is new and is derived from the 2006 version of Fed. R. Civ. P. 45 (d)(1).
Section (h) is derived from the 1991 version of Fed. R. Civ. P. 45 (c)(1).
Section (i) is new.
Section (j) is derived from former Rules 114 d and 742 e.
Section (k) is new and is derived from the 2006 version of Fed. R. Civ. P. 45 (d)(2)(B).

Rule 2-510 was accompanied by the following Reporter's note.

Amendments to Rule 2-510 are proposed to

> distinguish the issuance and use of a subpoena under Rule 2-510 –- i.e., only to compel attendance at a court proceeding or deposition in a pending civil action in a Maryland circuit court -– from the issuance and use of subpoenas under proposed new Rules 2-510.1 (Foreign Subpoenas in Conjunction with a Deposition) and 2-422.1 (Inspection of Property - Of Nonparty or by Foreign Party - without Deposition) and from certain discovery in a pending circuit court action that can be obtained without the issuance of a subpoena (Rule 2-422, Discovery of Documents, Electronically Stored Information, and Property - from Party).

Mr. Carbine said that he would start with proposed new Rule 2-510.1. Last fall, the Discovery Subcommittee had presented to the Rules Committee proposed new Rules 2-422.1 and 2-510.1, both of which pertain to the Maryland Uniform Interstate Depositions and Discovery Act ("the Uniform Act"), which is codified in Code, Courts Article, §§9-401-407. The original draft of the Rules had provided that attorneys and parties who were out-of-state would sign an undertaking agreeing to be subject to the jurisdiction of the circuit court in which the subpoena was being served for purposes of sanctions, discovery disputes, etc. The question arose at the full Committee meeting as to whether this may be too aggressive given the text of the statute. Since that time, the Rules have been changed minimally.

Mr. Carbine noted that Mr. Durfee, an Assistant Reporter, had done a memorandum based on nationwide research on this topic. Mr. Durfee had built a very strong legislative history, which showed that Rules 2-422.1 and 2-510.1 can require the

undertaking. Many other states have this, but Maryland would be the first one to have a written undertaking. Other states have rules that provide that when a foreign subpoena is served in another state, the proceeding would be governed by the ethical, discovery, and other rules in that other state.

Mr. Carbine remarked that the Commissioners on Uniform State Laws made a comment on the section in the Uniform Act that is a basis for Code, Courts Article, §9-405, which is the "subject to" provision in the Uniform Act in Maryland. The comment is as follows: "Evidentiary issues that may arise, such as objections based on grounds such as relevance or privilege, are best decided in the discovery state under the laws of the discovery state (including its conflict of laws principles)... If a party makes or responds to an application to enforce, quash, or modify a subpoena in the discovery state, the lawyer making or responding to the application must comply with the discovery state's rules governing lawyers appearing in its courts." Mr. Carbine noted that with that background, the Subcommittee is bringing back proposed Rules 2-422.1 and 2-510.1. He said that he would explain the minor changes to the Rules from the last time the Rules were presented.

Mr. Carbine commented that section (a) of Rule 2-510.1 addresses applicability. He pointed out that section (b) incorporates the statutory definitions of the terms "foreign jurisdiction," "foreign subpoena," "person," "state," and "subpoena." The first time Rule 2-510.1 was presented, the

definition of the word “inspection” was included, and it is still in the Rule. The two new definitions are of the terms “Foreign Party” and “Foreign Attorney.”

Mr. Carbine said that regarding section (c), he wants to make clear that the requirement of a written undertaking does not apply to a Maryland attorney. Section (c) is the key section of Rule 2-510.1. Most of the rest of the Rule tracks Rule 2-510. Section (c) states: “[t]he request shall be accompanied by the foreign subpoena and a written undertaking in a form approved by the State Court Administrator, signed by the Foreign Party and the party’s Foreign Attorney, if any, by which the party and the party’s Foreign Attorney submit to the jurisdiction of the circuit court...”. The last sentence of section (c) complies with the statute by stating that filing a request or undertaking does not submit the Foreign Party or Foreign Attorney to the jurisdiction of a court of Maryland for any other purpose.

Mr. Carbine commented that section (d), Issuance, is similar to section (b) of Rule 2-510. Section (e) of Rule 2-510.1 has additional language for the contents of the form that reads: “(1) the caption of the action, including the civil action number for the Maryland court issuing the subpoena.” It is important to make sure that the circuit courts actually issue their own case number for these subpoenas, which some of the courts had not been doing. When Mr. Carbine had asked the late Derrick Lowe, Esq., who had been the Clerk for Cecil County and a member of the Rules Committee, about this, he had said that the circuit courts were

issuing the case numbers.

Mr. Carbine drew the Committee's attention to section (f) of Rule 2-510.1, Service. He explained that this tracked the language of section (d) of Rule 2-510. He said that the Chair had made three comments. The first one addressed subsection (j)(2) of Rule 2-510.1 regarding the language: "...the court may impose an appropriate sanction, including an award of a reasonable attorney's fee and costs, the exclusion of evidence obtained as a result of the violation, and reimbursement of any person inconvenienced for time and expenses incurred." This language was taken verbatim from subsection (a)(3) of Rule 2-510. However, the Chair pointed out that last fall, the Committee had suggested taking out the language "the exclusion of evidence obtained as a result of the violation." Mr. Carbine said that the reason that this language is different from that in Rule 2-510 is that in that Rule, the language is a tool for the trial judge, so that if someone is in court with an invalid subpoena, the trial judge can prevent the evidence from coming in.

The Chair explained that he had had a question relating to the language: "the exclusion of evidence obtained as a result of a violation." This is not a problem in a Maryland case. However, is the Maryland court able to exclude evidence in a Texas case? Mr. Carbine said that this is why the Subcommittee had taken the language out of Rule 2-510.1 (j)(2). He expressed the view that it is different at trial than it would be in a deposition. The Reporter pointed out that the language should

have been taken out, but was inadvertently left in. It will be deleted.

Mr. Carbine told the Committee that the Chair had asked to discuss the following issue: which state's law applies when a privilege is asserted? It is fairly uniform for the attorney-client privilege, but there are other statutory privileges. Not all states have the same privileges. There will be conflict-of-law issues. Mr. Carbine said that he had given this some thought. The text of Code, Courts Article, §9-405 makes clear that if there is a motion for a protective order, the motion is governed by Maryland law. The Maryland Discovery Rules apply by statute. There is a fairly strong case that Maryland law would apply, particularly to a Maryland resident who is a defendant. The question is whether a statement to this effect needs to be put into Rule 2-510.1. Mr. Carbine expressed the opinion that this is not necessary. The view of the Commissioners on Uniform State Laws is that this should be governed by the conflict-of-law rules in Maryland.

The Chair commented that the fourth sentence in section (g) of Rule 2-510.1 reads: "If an objection is filed, the party serving the subpoena is not entitled to production of the materials except pursuant to an order of the court from which the subpoena was issued." In these cases, two courts are issuing a subpoena, a court from another state and the Maryland court. Which court is going to decide whether the objection is valid? This is a conflict-of-law issue.

Mr. Carbine noted that Code, Courts Article, §9-405 provides that an application to the court for a protective order or to enforce, quash, or modify a subpoena shall comply with the rules and statutes of Maryland. The attorney signs the undertaking that he or she is subject to the jurisdiction of the Maryland courts to resolve discovery disputes. The Chair asked whether the fourth sentence of section (g) of Rule 2-510.1 should read: "If an objection is filed ... pursuant to an order of the Maryland court..." instead of "... pursuant to an order of the court from which the subpoena was issued." Mr. Carbine agreed that the word "Maryland" should be put in front of the word "court" in the fourth sentence of section (g) of Rule 2-510.1. By consensus, the Committee agreed to make this change.

Mr. Carbine remarked that the Reporter had referred to Rule 2-510 (k) as a "clawback" provision. This applies to the inadvertent production of privileged material in discovery. The "clawback" provision was put into Rule 2-510.1 (l) verbatim. Mr. Carbine said that the Chair had raised a question. If someone produces privileged material, and he or she sends the notice that section (k) of Rule 2-510 requires, the party who received the privileged material must take one of three actions concerning the material. The person must destroy it, sequester it, or return it. The Chair noted that the next sentence provides a fourth option, which is that the receiving party may file a motion requesting the court to determine the validity of the claim. Mr. Carbine commented that the person probably would not choose the

destruction option.

The Chair asked whether someone has to return the material pending disposition of a dispute or keep it until the court decides whether someone else should get the material. An attorney could contact the recipient and say that the material is privileged, and it has to be returned, but the recipient does not think that it is privileged and intends to file a motion stating that he or she is entitled to it. Mr. Carbine said that his thinking is that if the material was held in the first place, the discovering party would not have it at all and would file a motion for production. Nine times out of ten, the judge would want to see it, and the producing party is the one that files it under seal. The "clawback" Rule puts the parties in that same position as if they had not gotten the material in the first place. The Chair added that the party does not have to return the privileged material until a judge so orders.

Mr. Frederick said that the facts in *Elkton Care Center Associates Limited Partnership T/A Medpointe v. Quality Care Management, Inc.* 145 Md. App. 532 (2002) were that in response to a request for documents in a suit for wrongful termination of an agreement to manage a nursing home, the plaintiff's attorney found a letter in a box of documents from the defendant's attorney stating that the defendant had not properly terminated the contract with the plaintiff. The plaintiff's attorney made copious notes. He marked the letter and asked for copies of various documents, including the letter.

Mr. Frederick noted that two weeks later the plaintiff's attorney had an envelope with those documents. At the trial, when the president of the defendant company was on the stand, the plaintiff's attorney asked him if it was not a fact that his attorney had told him that the termination was improper. The defense attorney objected. The Court of Special Appeals held that the privilege had been waived. The letter was very valuable, and the attorney had told the defendant to send the letter back to the plaintiff. Why did the defendant not put the letter in an envelope, file it under seal with the court, and state that the plaintiff was not entitled to the document because of attorney-client privilege? Or, the letter could have been put into an envelope and saved for the trial court to decide. Any other answer would have gotten someone into a great deal of trouble.

Mr. Frederick expressed the view that the "clawback" provision was a good addition to Rule 2-510.1. It means that if the material is accidentally turned over, the right to make the argument for returning it is preserved. However, the other choices of actions may not be the best practice, and if this is sent to the Court of Appeals, it suggests that the Committee is in agreement with the other choices. Mr. Frederick stated that he is not in favor of the other choices.

Mr. Zarbin expressed his agreement with Mr. Frederick. Mr. Zarbin said that he had been in a case where co-defendants were sending discovery to one another, and one accidentally sent non-

discoverable material that consisted of communications between the attorney and the client. The other co-defendant would not send it back. Mr. Zarbin told him that he had to send the material back to the court under seal. He refused to do it, so the judge, the Honorable J. Frederick Motz of the U.S. District Court for the District of Maryland, got involved, and he insisted that all of the material go to him. He put it under seal. Mr. Zarbin had suggested that the judge tell the other attorney that the material could not be photocopied. The other attorney asked why he could not photocopy the material. In cases like this, the court is the gatekeeper.

Mr. Frederick remarked that it is the option of the person receiving the material to determine what to do with it, but the material should be preserved. The client needs to be told that the attorney received the material and that there is case law about how to proceed. There is a good argument that receiving the material was the result of an accidental disclosure, but it is up to the client as to what to do. The attorney can file something, but it may not be clear whether the attorney is allowed to do this. The client has to make an informed decision. Mr. Zarbin agreed, noting that the Attorney Grievance Commission initiate proceedings against the attorney, and the court may have a problem with this. The Chair said that he had raised the question, but he did not know the answer to it.

Mr. Carbine said that he had experienced the inadvertent production of privileged material in his practice. The Chair

responded that if the receiving attorney agrees that the material is privileged, it is easy, because there is no contest. The Chair's question pertained to the situation where the attorney receives the material by accident, and the sender asks for the material back, noting that it was privileged, and it should not have been sent. The person sending it feels that the person receiving the material is not entitled to it. However, the recipient feels that he or she is entitled to it and would like a judge to make the determination. What happens until the judge decides this? Does the recipient send it back? The recipient should not destroy the material.

Mr. Carbine noted that destruction is an option under Rule 2-510 (k). Mr. Zarbin remarked that the problem with this is when the attorney does not think the material is privileged, and the attorney sends it back, then the attorney loses the case, and the client is irate. The client then hires competent counsel who tells the initial attorney that he did not handle the case properly. It should have been sent to the court, and the court should have ruled on it, because the second attorney felt that the material was privileged.

Mr. Frederick inquired as to why sequestering the material and allowing it to be resolved in an appropriate way would not be the answer. A motion for appropriate relief could be filed. The attorney can tell the client that although the material is privileged, it has to be preserved. The attorney can send a letter to confirm this, then leave the material in a file

preserved, informing the other side that it has been preserved.

Mr. Carbine commented that it is a strange phenomenon for a rule to supplant an attorney's judgment. If Rule 2-510 provided that someone could only sequester the material and not be able to return it, it might be too limiting. The Chair responded that this only becomes relevant if the recipient of the material thinks that he or she is entitled to it. If someone files a motion stating that he or she is entitled to the material, this is when the question arises as to what to do with the material until the judge decides. Mr. Carbine answered that the material would be sequestered. The Chair added that the material should not be destroyed. Mr. Carbine noted that this is the attorney's decision.

Ms. Day asked whether it is a problem when the client feels that he or she is entitled to the material. Even if counsel does not think the client is entitled to it, when the client feels entitled, then the attorney is at odds with the client. Mr. Zarbin added that this is when the client asks for a copy of the material, and the attorney responds that he or she has to send it to the court. The client then demands a copy of it, anyway. If the attorney is covered by a rule stating that the attorney is required to send the material to the court, there is no conflict between the attorney and the client.

Mr. Marcus said that the problem is when the client tells the attorney that the client feels that he or she is entitled to the material, not because he or she should have it substantively,

but because there is always going to be an argument of waiver. The issue of waiver exists whether or not the document is privileged. If there is a waiver, this is a matter that is going to have to be determined by the judge. If an attorney has received material from other counsel, and the attorney who receives it is not supposed to use it in some instances, the client can always say that this constitutes a waiver. This argument exists in every circumstance. If it is accepted that waiver is one of the potential arguments that could be made by a client at any point in time, it forces the decision to default to the idea that the material has to be preserved, because attorneys will be worried that the client will be the new plaintiff, and the attorney will become the new defendant.

Mr. Marcus remarked that there have been times when the material went out, and he told the client that they would not use the material. It was an obvious error to send the material to the other side. He and his colleagues recognize very clearly that the attorneys for the other side are competent counsel, and there is no way that they would have released something that is clearly a privileged document. He would prefer that the Rule not provide that the attorney cannot extend that courtesy or make the decision, so that another attorney does not have to be in the uncomfortable position of waiting until a judge tries to sort out whether there was a waiver or some sort of improper disclosure. There may be a practice point that states that if an issue arises, preservation and sequestration are the way to handle it.

Mr. Frederick agreed with Mr. Marcus. Mr. Frederick said that he was not in favor of the choices of action being in the Rule. He had a perfect example of when the privileged material should go back to the other side, and it is an occurrence that happens frequently. Someone introduces a file, and it inadvertently has a communication in it between the attorney and a different client in a different file, because a piece of paper had been put in the wrong place. When this happens, the paper should immediately be sent back. Each attorney has a duty to be courteous to his or her fellow attorney. Mr. Frederick liked the idea that if there is an issue on the "clawbacks," either party may bring it to the attention of the appropriate judicial authority for appropriate resolution as opposed to laying out the specific options in the Rule.

Ms. McBride remarked that in a recent case, she had gotten a letter from an attorney to his client that explained his theory of the case. The letter was addressed to the client and to a third party, who was involved in the case but not actually part of it. She had taken the person's deposition, assuming that it was a waiver situation. Mr. Frederick referred to the case of *State v. Newman*, 384 Md. 285 (2004), noting that the Chair's dissent was relevant to Ms. McBride's comments.

Ms. McBride added that during the case she had referred to, she had pulled out the letter, and the opposing attorney said that it was privileged. Her response was that it was not privileged, because the other attorney had waived the privilege.

The other attorney backed down, and that was the end of the matter. She suggested that in the second sentence of section (l) of Rule 2-510.1 after the word "notified," language could be added that would read: "and if the parties are unable to reach agreement otherwise." This would encourage the parties to make the correct decision and avoid the requirements to return, sequester, or destroy the information and copies. This removes the issue from the court and makes the parties do what they should have done in the first place.

Mr. Carbine expressed the view that this would not solve the problem. The Committee should not be writing rules addressing best practice. The Rule is appropriate as drafted. It has options in it. There can be an agreement between the parties without putting a reference to it in the Rule, because they can discuss the options. Ms. McBride pointed out that the second sentence of section (l) of Rule 2-510.1 begins as follows: "[p]romptly after being notified, each receiving party shall return, sequester, or destroy the specified information ...". In the case she had just referred to, she simply told opposing counsel that there was a waiver. There are instances where she might have returned the document. The two attorneys could have had a discussion about the material.

The Chair commented that the second sentence of section (l) could be left as it appears in the meeting materials, but the following language could be added to it: "unless the receiving party believes that he or she is entitled to the document for any

reason, in which event, a motion is filed with the court to determine the validity of the claim, and the document is preserved until the claim is resolved." The Chair referred to the fourth sentence of section (l), which applies to the situation of when the attorney had already provided the material in dispute to his or her client. Then, the attorney has to get it back from the client.

Mr. Frederick suggested deleting the second sentence of section (l) of Rule 2-510.1. The word "receiving" could be taken out of the third sentence, and the last sentence of section (l) could be stricken. The Chair asked about waiver, and Mr. Frederick responded that the language he proposed would address waiver. The Chair suggested that after the phrase "validity of the claim," the second time it appeared in the third sentence, the following language could be added: "and shall preserve the disputed items until the claim is resolved." Mr. Frederick suggested that the new language could be: "and shall preserve without introducing the item until the claim is resolved." Mr. Carbine added that a copy of the document has to be filed with the court under seal. The Chair remarked that Rule 2-510.1 could provide "... shall preserve or send to the court under seal." Mr. Zarbin remarked that if there is a contest, the original should be sent to the court.

Mr. Frederick commented that before there was a Rule addressing this, and the concept was being taught to attorneys in risk management programs, the attorneys were instructed that the

disputed material should be put into an envelope and sealed. It should then be placed in the attorney's safe, and the attorney should tell the other side that the attorney has it and feels that he or she is entitled to it. Mr. Frederick said that when he is handling a case, he tells the other side that he is going to use the material, but he will wait 30 days, leaving it untouched, so that the other attorney can file a motion if he or she wishes to. This puts the onus and the expense on the other side.

The Chair remarked that the material would be put into an envelope and sent to the clerk. What is the clerk supposed to do with it? Mr. Frederick responded that the attorney has to file a motion under the Rules for filing something under seal. Judge Nazarian asked what would happen then if the attorney wins. Mr. Frederick answered that at that point, the attorney would ask the court to give him or her an order releasing the document from under seal, and the clerk would deliver it to the attorney. Judge Nazarian said that the resulting document would not be in the circuit court file at the end.

Mr. Frederick noted that the clerk makes a copy of the document and keeps it. In Montgomery County, when a motion to seal a document is filed, the clerk immediately seals the document attached to the motion. Judge Nazarian inquired whether the document would have vanished from the file if someone sends the original in and gets the original back. Mr. Frederick reiterated that the clerk keeps a copy.

The Chair commented that in this situation, if a party feels that he or she is entitled to a document for whatever reason, the sender has to file a motion, and the recipient sends the document to the clerk. Mr. Frederick added that the recipient can take any action that he or she is told to take. Absent an order, the recipient communicates that in 31 days, he or she will use the document.

The Chair inquired how the Committee wished to handle this. He noted that the language did not have to be drafted, but the concept should be decided. Mr. Frederick moved that Rule 2-510.1 be amended the way he had described generally with the additions suggested by the Chair. This would be to strike the second sentence in Rule 2-510.1 (l) that begins: "Promptly after being notified" up to the word "resolved," then deleting the word "receiving" in the subsequent sentence and adding the language "and shall appropriately preserve the item pending a ruling" at the end of that sentence. The motion was seconded.

Mr. Carbine said that he likes the Rule as it was written. He remarked that the Committee had not heard the scenario he was about to describe. In a hypothetical case, the court rules that the document is privileged. Before the attorney received notice of the ruling, the attorney gave the document to his or her client. The client gives the document to the local newspaper.

The Chair pointed out that the next sentence that read: "A receiving party who discloses the information before being notified shall take reasonable steps to retrieve it" seems to

address the problem. Mr. Carbine observed that this sentence had been proposed to be deleted in Mr. Frederick's motion. The Chair clarified that it had not been proposed for deletion.

The Chair called for a vote on Mr. Frederick's motion, and it carried on a majority vote. The Chair stated that the final wording of section (l) could be drafted by the Style Subcommittee. Judge Nazarian inquired if a parallel change should be made to Rule 2-510. The Chair said that it is the same issue, and section (k) should be changed accordingly. Mr. Frederick moved to make the same change Rule 2-510 (k) as will be made to Rule 2-510.1 (l). The motion was seconded, and it passed unanimously.

Judge Bryant asked why the word "and" was bolded in the second sentence of section (c) of Rule 2-510.1. Mr. Carbine responded that the word "and" should not have been bolded. The Discovery Subcommittee thought about whether the word "and" should be changed to "or" or "and/or," but there had been no consensus to make a change.

Mr. Carbine explained that there are conforming amendments to Rule 2-510, because of proposed new Rule 4-222.1, which provides for another use for a subpoena. Rule 2-510 had to be changed to accommodate this.

Mr. Carbine noted that a legislative change would be needed because of Rule 2-510.1, since the statute (Code, Courts Article, §§9-403 and 9-404) refers to Rule 2-510. The Rule number is going to be "Rule 2-510.1". Will the legislature make this

change? The Reporter replied that this change could be included in a routine corrective bill. The Chair said that it will not happen in the 2016 session, because the deadline for bills had already passed. The Reporter added that it will take some time before Rule 2-510.1 could be adopted by the Court of Appeals.

Mr. Carbine commented that he would summarize the history of the proposed Rules changes. In 2000, the Committee had approved a rule similar to proposed new Rule 2-422.1 for nonparties in Maryland cases. That Rule was rejected by the Court of Appeals. Case law exists as to procedures for inspecting the property of a person who is not a party to a case. One case is *Stokes v. 835 N. Washington Street, LLC*, 141 Md. App. 214 (2001). Then in 2008, the General Assembly enacted the Uniform Act. Later, the Discovery Subcommittee was given the assignment of updating the Rules. The Subcommittee reviewed the earlier draft, modernized it, and adapted it for the foreign subpoenas as well as for those in the State.

Mr. Carbine observed that section (a) of Rule 2-422.1 differentiates between a subpoena in an action in this State and a foreign subpoena. Section (b) defines the terms "domestic subpoena," "nonparty," "Foreign Party," and "Foreign Attorney." Section (c) sets out how domestic subpoenas and foreign subpoenas are issued. The language in subsection (c)(1) is almost verbatim the language of subsections (b)(1) and (2) of Rule 2-510. The language of subsection (c)(2) tracks the language of section (c) of proposed Rule 2-510.1.

The Chair referred to the definition of the term "nonparty" in subsection (b)(2)(C) of proposed Rule 2-422.1. He asked about the language in the definition that reads: "land or property." This language also appears in Rule 2-422.1 in sections (a), (d), (e), and (f). It suggests that land is not property. Rule 2-422, the current Rule, uses the language "land or other property." Should the word "other" be added before the word "property" in Rule 2-422.1? Mr. Carbine replied affirmatively. The Chair said that the word "other" would be added wherever the phrase "land or property" appears in Rule 2-422.1. By consensus, the Committee agreed with this change.

Mr. Carbine told the Committee that the form referred to in section (d) of proposed Rule 2-422.1 is more involved than the regular subpoena form, because there are many actions that must be taken to protect the landowner. A landowner who is not a party must be advised of his or her rights. Subsection (d)(2)(A) of Rule 2-422.1 provides for a written undertaking that the requesting party will pay for all damages arising out of the entry and performance of the proposed acts.

The Chair asked whether the written undertaking to pay damages subjects the requesting party to the jurisdiction of the Maryland court in an action for damages. Mr. Carbine inquired whether it would be a discovery sanction. The Chair responded that if someone goes onto the land of another and causes damage, in order to have gotten the subpoena to obtain entry onto the land, the person had to make the written undertaking that he or

she would pay for any damages. Where would that action for damages be brought other than in a Maryland court?

Mr. Frederick noted that subsection (f)(2)(D) of Rule 2-422.1 had a provision for the filing of a bond to secure the obligation of the moving party to pay for damages arising out of the entry and acts performed. The Chair said that it would depend on the amount of the bond and the damages. Mr. Frederick commented that a nonparty can hire an attorney and establish the amount of the damages. The Chair remarked that it is likely that someone will raise this issue.

Mr. Carbine told the Committee that the legislature had stated that the party is not subject to the jurisdiction of the court, with the exceptions that had been put into the Rule. The legislation cannot be overridden. Mr. Frederick said that if the party causes damages, the only argument could be that it was not wrongful, because he or she had a subpoena that allowed it. Mr. Carbine agreed with Mr. Frederick. Code, Courts Article, §9-402 states that by filing a request for issuance of the subpoena, a person does not submit to the jurisdiction of the court. If the party knocks someone's house down while testing it for lead, this is separate from what the subpoena allowed.

The Chair commented that Ms. Harris had raised a style question. It pertained to section (d) of proposed Rule 2-422.1. Subsection (d)(1) requires that the subpoena be on a uniform form approved by the State Court Administrator. It mandates the list of items that have to be on the form. Ms. Harris particularly

referred to subsections (d)(1)(D), (E), (F),(G), (H), and (I), because these items were not on the form she uses as the State Court Administrator, and there is no room on the form for them. There is no problem with requiring the items in subsections (d)(1)(A), (B), and (C) to be on the form, since they already are. Then the following language can be added to section (d), "and shall be accompanied by," referring to what is in subsections (d)(1) (D), (E),(F), (G), (H), and (I). By consensus, the Committee agreed to this change.

Mr. Weaver said that from the clerk's perspective, subsection (c)(2)(B) of proposed Rule 2-422.1 puts the clerk in the position of determining whether the documents are in compliance with the Rule. It would be better for the clerk if this provision were worded, "Upon the filing of the request, the foreign subpoena and any attachments to it and the undertaking in the form approved by the State Court Administrator, the clerk shall issue...". These subpoenas are infrequent, and the clerk would have to read the entire Rule to know that he or she has to determine whether the person filing is in compliance with the Rule. Also, for clarity in subsection (c)(2)(B), the word "foreign" should be put before the word "subpoena" in the first sentence of subsection (c)(2)(B) the first time and the second time the word appears. This differentiates the foreign subpoena from the Maryland subpoena.

Mr. Carbine remarked that someone in another state cannot be told by someone in Maryland how to word a subpoena. Mr. Weaver

said that the other state's forms should be subject to the forms in Maryland. Mr. Carbine noted that Maryland cannot dictate what the foreign subpoena says. Mr. Weaver asked which subpoena Rule 2-422.1 referred to. Mr. Carbine answered that it is a subpoena that is to be issued out of a Maryland circuit court, but it has not yet been issued. Mr. Weaver said that he thought that it meant that the clerk is getting a request to issue a subpoena, and the language "the contents of the subpoena" meant the foreign subpoena.

Mr. Carbine explained that subsection (c)(2)(A) of Rule 2-422.1 referred to the foreign subpoena, and in subsection (c)(2)(B), the clerk issues a Maryland subpoena. The Maryland subpoena is going to incorporate the terms of the foreign subpoena, and it must comply with the requirements of section (d), which is the "laundry list."

The Chair asked Mr. Weaver whether he wanted to delete the language at the beginning of subsection (c)(2)(B) of Rule 2-422.1 that reads, "[i]f the request, the contents of the subpoena, and any attachments to the subpoena are in compliance with this Rule...". Subsection (c)(2)(B) would begin: "[t]he clerk promptly shall issue a subpoena...". The Chair inquired whether the compliance issue would be covered appropriately in subsection (f)(1), which addresses objections. Anyone who would like to object to the subpoena on the grounds that it is not in compliance with the Rule can do so; the clerk would not be making that decision.

Mr. Weaver pointed out that the same language that he had just referred to in Rule 2-422.1 (c)(2)(B) is in section (d) of Rule 2-510.1. Mr. Carbine said that Rule 2-510.1 has a different laundry list. The list in Rule 2-510.1 (e) is the same list found in current Rule 2-510 (c), which applies to subpoenas used to compel attendance at a court proceeding or deposition in a pending civil action in a Maryland circuit court. Mr. Weaver observed that there is nothing in Rule 2-510 that requires the clerk to determine whether a request is in compliance with the Rule. Section (d) of Rule 2-510.1 should also be changed to eliminate the beginning language that is the same as the beginning language in subsection (c)(2)(B) of Rule 2-422.1. By consensus, the Committee agreed to delete the introductory clause from Rules 2-422.1 (c)(2)(B) and 2-510.1 (d).

Mr. Carbine told the Committee that the discussion had been centered on the "laundry list" of what the subpoena should contain. Then, there is a notice that a person has the right to object. Proposed Rule 2-422.1 (d)(2)(B)(ii) provides that any objection must be filed and served within 30 days after the person is served with the subpoena. The objection must include or be accompanied by a certificate of service. Section (e), the provision for service of the subpoena, has standard language in it.

Mr. Carbine noted that a new requirement that the subpoena must be served within 60 days after its issuance has been added to section (e). As to the objection procedure, a change was made

from the 2000 version of Rule 2-422.1. That version provided that if "entry" is refused, the requesting party may file a motion to compel entry, but the Committee changed subsection (f)(2)(A) of Rule 2-422.1 to provide that if the "requested discovery" is refused, the requesting party may file a motion to compel entry, because the landowner could allow entry but not allow the testing. Then, Rule 2-422.1 provides the mechanics of how the entry on land is resolved. All of this is new.

Judge Ellinghaus-Jones pointed out a typographical error in the Reporter's note to Rule 2-422.1. The last word of the second paragraph was "nonparty's," and it should have been "nonparties." Judge Mosley pointed out another typographical error in the sixth paragraph of the Reporter's note. The case cited should read *"Stokes v. 835 N. Washington Street, LLC*." The letter "t" had been inadvertently left off the word "street." The Chair pointed out that in subsection (a)(1)(A) of Rule 2-510, the word "master" appears. This should be changed to the word "magistrate" to conform to the same change that took place in other Rules. By consensus, the Committee agreed to make these changes.

By consensus, the Committee approved new Rule 2-422.1 as amended and new Rule 2-510.1 as amended, subject to redrafting the wording of section (l). The Committee also approved Rule 2-422 as presented and Rule 2-510 as amended, subject to redrafting the wording of section (k).

Agenda Item 2. Consideration of a Report from the Discovery Subcommittee concerning recent amendments to the Federal Rules of Civil Procedure

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Mr. Carbine explained that on December 1, 2015, the Federal Rules of Civil Procedure were amended. An important amendment was that language had been taken out of subsection (b)(1) of Fed. R. Civ. Pro. 26, Duty to Disclose; General Provisions Governing Discovery, which had read, "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." After the current language which reads, "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense," the following language was added: "and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." The amendments also changed the timing and sequence of discovery and added more stringent response requirements.

Mr. Carbine said that the Discovery Subcommittee had looked at the Maryland Rules to see whether any parallel changes should be made. Their view was that there will be many discovery disputes as to what is "proportional to the needs of the case." Fed. R. Civ. Pro. 26 now provides that something is discoverable

even if it is not admissible, but other language has been taken out that clarified the meaning of this. It is not admissible, but it is discoverable, and all of the commentators say this is designed to cover hearsay. The Subcommittee feels that before considering any changes in Maryland, it would be useful to wait several years. At that point, the Subcommittee can look at the hundreds of federal rules decisions that will be generated by the amendments to the federal rules. The Subcommittee's view is "if it ain't broke, don't fix it." The Rules in Maryland have proportionality provisions in them. There is an obligation not to place an undue burden on the responding party. The Maryland Rules have sanctions for the destruction of electronic evidence. They address how to respond to a request for production of documents. The Subcommittee thought that this decision of how to proceed in light of the changes to the federal rules should be a decision of the full Committee.

By consensus, the Committee agreed with Mr. Carbine to defer any parallel action on the Maryland Rules.

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