COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 of the Judiciary Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland, on September 16, 2010.

Members present:

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

Albert D. Brault, Esq.
Hon. Ellen L. Hollander
John B. Howard, Esq.
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Robert D. Klein, Esq.
Hon. Thomas J. Love
Zakia Mahasa, Esq.
Timothy F. Maloney, Esq.
Robert R. Michael, Esq.
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Scott G. Patterson, Esq.
Hon. W. Michel Pierson
Debbie L. Potter, Esq.
Kathy P. Smith, Clerk
Sen. Norman R. Stone
Melvin J. Sykes, Esq.
Hon. Julia B. Weatherly

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Ms. Amy Womaski
Jennifer K. Cassel, Esq.
John Hurst, Ph.D.
Paul Berman, Ph.D., Maryland Psychological Association
Margo Kushner, Ph.D.
Hon. Ann N. Sundt
Connie Kratovil-Lavelle, Esq., Executive Director, Family Administration
Hon. Cynthia Callahan
Hon. Deborah S. Eyler
Bradley A. Kukuk, Esq., Maryland Family Law News
Jessica Pitts, Esq., Executive Director, Emergency Preparedness and Court Security

The Chair convened the meeting, welcoming everyone back from

the summer break. He announced the appointment of the Honorable Julia B. Weatherly, a judge of the Circuit Court for Prince George's County, in place of the Honorable Michele D. Hotten, whose service on the Committee ended upon her appointment to the Court of Special Appeals. He welcomed Judge Weatherly who said that it was a pleasure for her to be part of the Committee. The Chair read to the Committee a letter from Judge Hotten.

Before beginning with the agenda for the meeting, the Chair updated the Committee on some of the upcoming projects. One of the main projects is preparing for the statewide electronic filing system now under development. A few months ago, the Honorable Ben Clyburn, Chief Judge of the District Court, made a presentation to the Committee regarding that project. A Request for Proposal (RFP) was issued on September 1, 2010, for contractors to bid on actually developing the system. On September 20, 2010 a pre-bid conference is scheduled with prospective contractors. They are looking to let a contract by January. The estimate is that, within approximately 18 months after the letting of the contract, the system will be ready for testing in Anne Arundel County. The plan is that the system will involve all four levels of court, the District Court, the circuit courts, and the two appellate courts.

The Chair commented that the Committee is in the process of looking at all of the Maryland Rules to get a preliminary sense of which Rules may need to be amended. Material from the federal courts

including the U.S. District Court for Maryland that have embarked on electronic filing and records management, has been collected as well as material from other States. It is not clear whether any of the States have a statewide system yet. Protocols are being developed. The National Center for State Courts has put together a template. The Committee will have to pay special attention to the Rules on access to court records, because when the new system is fully implemented, there will be few, if any, paper records left. Access will be remote. This will be a major project for this coming year.

The Chair told the Committee that the Special Subcommittee on Remote Access that Mr. Howard is chairing is looking at some comprehensive rules on conducting court proceedings by teleconferencing, video-conferencing, or other electronic means.

The Chair noted that the Juvenile Rules are being reviewed again. This process started a very long time ago. A completely different format is now being considered, however. Instead of one set of Rules that would govern all proceedings in the Juvenile Courts, the suggestion is to separate the Rules similar to the way the Code is structured, with different chapters for Child in Need of Assistance (CINA) cases, Termination of Parental Rights (TPR) cases, delinquency cases, and a general category. The Code has something new: the juvenile courts on the Eastern Shore and in Harford and Prince George's Counties now have special statutory jurisdiction in truancy cases. This will have to be reflected in the Juvenile Rules. The

goal is to have a comprehensive set of Rules on each kind of proceeding, which will involve bringing some of the procedural provisions now in the Code into the Juvenile Rules.

The Chair said that all of the Court Administration Rules, which are now in Title 16, may be split into three separate titles, one addressing Court Administration, one pertaining to judges and judicial officers, and one addressing attorneys. This would collect what is now scattered throughout the Rules and various appendices. The title on attorneys, for example, would include the Bar Admission Rules, the Code of Professional Responsibility, Attorneys Trust Account Rules, any Professionalism Rules, Pro Bono Reporting Rules, and Attorney Grievance Rules. The Chair said that the Alternative Dispute Resolution (ADR) Subcommittee chaired by Mr. Klein is looking at more comprehensive ADR Rules in the District Court. The Chair stated that this would be the agenda for the Committee this year.

Agenda Item 1. Reconsideration of proposed new Rule 9-205.2 (Parenting Coordination); Conforming amendments to: Rule 16-204 (Family Division and Support Services) and Rule 17-101 (Applicability)

The first item for consideration today is parenting coordination. The last time that the Committee looked at this, it approved most of the Rule, but a few issues remained unresolved. Before the Committee today is draft Rule 9-205.2 approved earlier with new language shown in bolded type that deals with the unresolved issues, and conforming amendments to Rule 16-204 and 17-101.

The Chair presented Rule 9-205.2 (Parenting Coordination) for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

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

ADD new Rule 9-205.2, as follows:

Rule 9-205.2. PARENTING COORDINATION

(a) Applicability

This Rule applies to parenting coordination in actions under this Chapter in which child custody or child access is an issue.

Committee note: Actions in which parenting coordination may be used include an initial action to determine custody or visitation and an action to modify an existing order or judgment as to custody or visitation.

(b) Definitions

In this Rule, the following definitions apply:

(1) Parenting Coordination

"Parenting coordination" means a process in which the parties work with a parenting coordinator to reduce the effects or potential effects of conflict on the parties' child. Although parenting coordination may draw upon alternative dispute resolution techniques, it is not governed by the Rules in Title 17.

(2) Parenting Coordinator

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

(c) Qualifications of Parenting Coordinator

(1) Age, Education, and Experience

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

(A) be at least 21 years old and hold a bachelor's degree from an accredited college or university;

(B) hold a post-graduate degree in psychology, social work, counseling, negotiation, conflict management, or a related subject area, or from an accredited medical or law school;

(C) have at least three years of related professional experience undertaken after receiving the post-graduate degree; and

(D) if applicable, hold a current license in the individual's area of practice.

(2) Parenting Coordination Training

A parenting coordinator also shall have completed:

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

(B) at least 40 hours of accredited specialty training in topics related to parenting coordination, including conflict coaching, the developmental stages of children, the dynamics of high-conflict families, family violence dynamics, parenting skills, problem-solving techniques, and the stages and effects of divorce.

Committee note: The accredited specialty

training requirement could be met by training offered by recognized national organizations such as the American Bar Association or the Association of Family and Conciliation Courts.

(3) Continuing Education

Every two years a parenting coordinator shall complete a minimum of eight hours of continuing education approved by the Administrative Office of the Courts in the topics listed in subsection (c)(2) of this Rule and recent developments in family law. The Administrative Office shall maintain a list of approved continuing education programs.

(d) Parenting Coordinator Lists

An individual who has the qualifications listed in section (c) of this Rule and seeks appointment as a parenting coordinator shall submit an application to the family support services coordinator of the circuit court for each county in which the individual seeks appointment. The application shall document that the individual meets the qualifications required in section (c). If the family support services coordinator is satisfied that the applicant meets the qualifications, the applicant's name shall be placed on a list of qualified individuals. The family support services coordinator shall maintain the list and, upon request, make the list and the information submitted by each individual on the list available to the court, attorneys, and parties.

(e) Appointment of Parenting Coordinator

In an action in which the court determines that the level of conflict so warrants, the court may appoint a parenting coordinator in accordance with this section.

(1) Pendente Lite and Post-Judgment Parenting Coordinators

(A) After notice and an opportunity for the parties to be heard, the court may appoint

a parenting coordinator pendente lite on motion of a party, on joint request of the parties, or on the court's own initiative.

Committee note: A hearing may be important even when the court acts on joint request, with respect to the duties and powers given to the parenting coordinator.

(B) With the consent of the parties, the court may appoint a post-judgment parenting coordinator upon entry of a judgment granting or modifying custody or visitation.

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

(2) Selection

The court may appoint only an individual who:

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

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

(C) **has entered into a written fee agreement with the parties or agrees to accept a fee not in excess of that allowed in the applicable fee schedule adopted pursuant to subsection (i)(1) of this Rule.** If the parties jointly request appointment of an individual who meets these requirements, the court shall appoint that individual.

Committee note: A written fee agreement may be an agreement to render services *pro bono*.

(3) Contents of Order or Judgment

An order or judgment appointing a parenting coordinator shall include:

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

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

Committee note: The order must be consistent with the relevant provisions of any other existing order, such as a "no contact" requirement that is included in a civil protective order or is a condition of pre-trial release in a criminal case.

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

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

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

(4) Term of Appointment

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

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

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

(5) Notice of Termination of Appointment of Pendente Lite Parenting Coordinator

If the court does not appoint as a post-judgment parenting coordinator an individual who had served as a pendente lite parenting coordinator in the action, the court shall send a notice by first-class mail to each party, any attorney for the child, and the pendente lite parenting coordinator, informing them of the termination of the appointment.

(f) Provision of Services by the Parenting Coordinator

(1) Permitted

As appropriate, a parenting coordinator may:

(A) if there is no operative custody and visitation order, work with the parties to develop an agreed-upon plan for custody and visitation;

(B) if there is an operative custody and visitation order, assist the parties in amicably resolving disputes regarding compliance with the order and in making any joint recommendations to the court for changes to the order;

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

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

(E) suggest resources to assist the parties;

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

(G) in response to a subpoena issued at the request of a party or an attorney for a child of

the parties, or upon action of the court pursuant to Rule 2-514 or 5-614, produce documents and testify in the action as a fact witness;

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

Committee note: Examples of such modifications include one-time or minor changes in the time or place for child transfer and one-time or minor deviations from access schedules to accommodate special events or circumstances.

(I) if concerned that a party or child under this provision is in imminent danger, physically or emotionally, communicate with the court or court personnel to request an immediate hearing.

(2) Not Permitted

A parenting coordinator may not:

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

Committee note: A parenting coordinator may ask the parties and the attorney for the child for the release of confidential information that is not in the case record, but neither the parenting coordinator nor the court may require or coerce the release of such information to the parenting coordinator. **Pursuant to subsection (g)(2) of this Rule, if confidential information that is not part of the case record is released to the parenting coordinator, the information may lose its confidential or privileged status unless further disclosure by the parenting coordinator is prohibited by statute or the terms of the release. Compare subsection (g)(1),**

applicable only to case records.

Query to Rules Committee: The Rules Committee directed that subsections (f)(2)(A), (g)(1), and (g)(2) be reconciled. How should they be reconciled? Should the Rule require specificity in the release as to whether the parenting coordinator may disclose the information to the other party and to the court? If a release is silent as to further disclosure by the parenting coordinator, and there is no statute [such as Code, Health General Article, §4-302 (d)] governing redisclosure, does the information obtained by the parenting coordinator lose its confidential or privileged status?

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

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

(C) testify in the action as an expert witness; or

Cross reference: See Rule 5-702 as to expert witnesses.

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

(g) Access to Case Records; Disclosure

(1) Access to Case Records

Except as otherwise provided in this subsection, the parenting coordinator shall have access to all case records in the action. If a document or any information contained in a case record is not open to public inspection under the Rules in Title 16, Chapter 1000, the court shall determine whether the parenting coordinator may have access to it. The parenting coordinator shall maintain the confidentiality of any such document or information.

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

(2) Disclosure of Information by Parenting Coordinator

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

(h) Removal or Resignation of Parenting Coordinator

(1) Removal

The court shall remove a parenting coordinator:

(A) on motion of a party or an attorney for the child, if the court finds good cause,

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

(C) for a violation of subsection (i)(1) of this Rule.

(2) Resignation

A parenting coordinator may resign at any time by sending by first-class mail to each

party and any attorney for the child a notice that states the effective date of the resignation and contains a statement that the parties may request the appointment of another parenting coordinator. The notice shall be sent at least 15 days before the effective date of the resignation. Promptly after mailing the notice, and at least seven days before the effective date of resignation, the parenting coordinator shall file a copy of it with the court.

(i) Fees

(1) Fee Schedules

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

(2) Designation by Court

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

against either or both parties for the reasonable fees and expenses.

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

Source: This Rule is new.

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

Proposed new Rule 9-205.2 is based upon a request from the Conference of Circuit Judges for a Statewide Rule that authorizes and guides the practice of parenting coordination. Parenting coordination, as described in subsection (b)(1), is "a process in which the parties work with a parenting coordinator to reduce the effects or potential effects of conflict on the parties' child."

Section (a) provides for the applicability of the Rule. In an action under the Rules in Title 9, Chapter 200 in which child custody or child access is an issue, the court may appoint a parenting coordinator in accordance with the Rule. A Committee note cites examples of actions in which parenting coordination may be used.

Section (b) contains definitions of "parenting coordination" and "parenting coordinator," and distinguishes the process of parenting coordination from the processes governed by the Rules in Title 17.

Section (c) sets out the qualifications that a parenting coordinator must have. The requirements are in the areas of age, education, experience, licensing (if applicable), family mediation training, parenting coordination training, and continuing education.

Section (d), in conjunction with a proposed amendment to Rule 16-204 (a)(3), requires the family support services coordinator of the circuit court for each county to maintain a list of individuals who wish to be appointed to provide parenting coordination services in the county and have the qualifications listed in section (c).

Section (e) sets out the process for appointment of a parenting coordinator. The court may appoint a parenting coordinator in accordance with section (e) if the court determines that there exists a level of conflict so warranting the appointment.

Subsection (e)(1)(A) provides that on motion of a party, on joint request of the parties, or on the court's own initiative, after notice and an opportunity for the parties to be heard, the court may appoint a parenting coordinator *pendente lite*. Consent of the parties to the appointment of a *pendente lite* parenting coordinator is not required, but a hearing must be held if either party requests one. When the court enters judgment in the action, subsection (e)(1)(B) allows a post-judgment parenting coordinator to be appointed, but only if the parties consent to the appointment.

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

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

Pursuant to subsection (e)(4), the term of service of a *pendente lite* parenting coordinator ends upon entry of a judgment that resolves all child custody and access issues. The term of service of a post-judgment parenting coordinator is for a specified period, not to exceed two years, unless the parties and the parenting coordinator agree in writing to an extension.

Subsection (e)(5) contains a provision requiring notice to the parties, the parenting coordinator, and any attorney for the child regarding the termination of the appointment of a *pendente lite* parenting coordinator who is not appointed to serve as a post-judgment parenting coordinator.

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

Subsections (f)(1)(G) and (I) and (f)(2)(B) and (C) set out the role of the parenting coordinator vis-a-vis the appointing court. The parenting coordinator is not an investigator or custody evaluator for the court. The parenting coordinator may be subpoenaed by either party, or by the attorney for the child,

to produce documents and testify as a fact witness, or may be called to testify by the court. The parenting coordinator may not testify as an expert witness in the action. If concerned about imminent physical or emotional danger to a party or child, the parenting coordinator may communicate with the court or court personnel to request an immediate hearing.

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

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

Subsection (h)(1) requires the court to remove a parenting coordinator on a finding that

continuation of the appointment is not in the best interest of the child or, for good cause shown, upon motion of a party or the attorney for the child. Subsection (h)(1) also requires the court to remove a parenting coordinator from the action if the parenting coordinator violates the fee provisions of subsection (i)(1) of the Rule.

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

Borrowing language from Rule 17-108, subsection (i)(1) provides for the development and adoption of fee schedules. Unlike Rule 17-108, subsection (i)(1) requires the fee schedules to be developed and adopted by the county administrative judge, rather than the circuit administrative judge. Unless the parties and the parenting coordinator agree otherwise, a court-appointed parenting coordinator may not charge or accept a fee in excess of the amount allowed by the applicable schedule. Violation of the subsection is cause for removal from all lists maintained pursuant to section (d) and the Rules in Title 17.

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

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 200 - THE CALENDAR – ASSIGNMENT AND DISPOSITION OF MOTIONS AND CASES

AMEND Rule 16-204 by adding a new subsection (a)(3)(G) pertaining to parenting coordination services, as follows:

Rule 16-204. FAMILY DIVISION AND SUPPORT SERVICES

(a) Family Division

(1) Established

In each county having more than seven resident judges of the circuit court authorized by law, there shall be a family division in the circuit court.

(2) Actions Assigned

In a court that has a family division, the following categories of actions and matters shall be assigned to that division:

(A) dissolution of marriage, including divorce, annulment, and property distribution;

(B) child custody and visitation, including proceedings governed by the Maryland Uniform Child Custody Jurisdiction Act, Code, Family Law Article, Title 9, Subtitle 2, and the Parental Kidnapping Prevention Act, 28 U.S.C. §1738A;

(C) alimony, spousal support, and child support, including proceedings under the Maryland Uniform Interstate Family Support Act;

(D) establishment and termination of the parent-child relationship, including paternity, adoption, guardianship that

terminates parental rights, and emancipation;

(E) criminal nonsupport and desertion, including proceedings under Code, Family Law Article, Title 10, Subtitle 2 and Code, Family Law Article, Title 13;

(F) name changes;

(G) guardianship of minors and disabled persons under Code, Estates and Trusts Article, Title 13;

(H) involuntary admission to state facilities and emergency evaluations under Code, Health General Article, Title 10, Subtitle 6;

(I) family legal-medical issues, including decisions on the withholding or withdrawal of life-sustaining medical procedures;

(J) actions involving domestic violence under Code, Family Law Article, Title 4, Subtitle 5;

(K) juvenile causes under Code, Courts Article, Title 3, Subtitles 8 and 8A;

(L) matters assigned to the family division by the County Administrative Judge that are related to actions in the family division and appropriate for assignment to the family division; and

(M) civil and criminal contempt arising out of any of the categories of actions and matters set forth in subsection (a)(2)(A) through (a)(2)(L) of this Rule.

Committee note: The jurisdiction of the circuit courts, the District Court, and the Orphan's Court is not affected by this section. For example, the District Court has concurrent jurisdiction with the circuit court over proceedings under Code, Family Law Article, Title 4, Subtitle 5.

(3) Family Support Services

Subject to the availability of funds, the following family support services shall be available through the family division for use when appropriate in a particular action:

(A) mediation in custody and visitation matters;

(B) custody investigations;

(C) trained personnel to respond to emergencies;

(D) mental health evaluations and evaluations for alcohol and drug abuse;

(E) information services, including procedural assistance to pro se litigants;

Committee note: This subsection is not intended to interfere with existing projects that provide assistance to pro se litigants.

(F) information regarding lawyer referral services;

(G) parenting coordination services as permitted by Rule 9-205.2;

~~(G)~~ (H) parenting seminars; and

~~(H)~~ (I) any additional family support services for which funding is provided.

Committee note: Examples of additional family support services that may be provided include general mediation programs, case managers, and family follow-up services.

(4) Responsibilities of the County Administrative Judge

The County Administrative Judge of the Circuit Court for each county having a family division shall:

(A) allocate sufficient available judicial resources to the family division so

that actions are heard expeditiously in accordance with applicable law and the case management plan required by Rule 16-202 b;

Committee note: This Rule neither requires nor prohibits the assignment of one or more judges to hear family division cases on a full-time basis. Rather, it allows each County Administrative Judge the flexibility to determine how that county's judicial assignments are to be made so that actions in the family division are heard expeditiously. Additional matters for county-by-county determination include whether and to what extent masters, special masters, and examiners are used to assist in the resolution of family division cases. Nothing in this Rule affects the authority of a circuit court judge to act on any matter within the jurisdiction of the circuit court.

(B) provide in the case management plan required by Rule 16-202 b criteria for:

(i) requiring parties in an action assigned to the family division to attend a scheduling conference in accordance with Rule 2-504.1 (a) (1) and

(ii) identifying those actions in the family division that are appropriate for assignment to a specific judge who shall be responsible for the entire case unless the County Administrative Judge subsequently decides to reassign it;

Cross reference: For rules concerning the referral of matters to masters as of course, see Rules 2-541 and 9-208.

(C) appoint a family support services coordinator whose responsibilities include:

(i) compiling, maintaining, and providing lists of available public and private family support services,

(ii) coordinating and monitoring referrals in actions assigned to the family division, and

(iii) reporting to the County Administrative Judge concerning the need for additional family support services or the modification of existing services; and

(D) prepare and submit to the Chief Judge of the Court of Appeals, no later than October 15 of each year, a written report that includes a description of family support services needed by the court's family division, a fiscal note that estimates the cost of those services for the following fiscal year, and, whenever practicable, an estimate of the fiscal needs of the Clerk of the Circuit Court for the county pertaining to the family division.

(b) Circuit Courts Without a Family Division

(1) Applicability

This section applies to circuit courts for counties having less than eight resident judges of the circuit court authorized by law.

(2) Family Support Services

Subject to availability of funds, the family support services listed in subsection (a)(3) of this Rule shall be available through the court for use when appropriate in cases in the categories listed in subsection (a)(2) of this Rule.

(3) Family Support Services Coordinator

The County Administrative Judge shall appoint a full-time or part-time family support services coordinator whose responsibilities shall be substantially as set forth in subsection (a)(4)(C) of this Rule.

(4) Report to the Chief Judge of the Court of Appeals

The County Administrative Judge shall prepare and submit to the Chief Judge of the Court of Appeals, no later than October 15 of each year, a written report that includes a

description of the family support services needed by the court, a fiscal note that estimates the cost of those services for the following fiscal year, and, whenever practicable, an estimate of the fiscal needs of the Clerk of the Circuit Court for the county pertaining to family support services.

Source: This Rule is new.

Rule 16-204 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 9-205.2.

MARYLAND RULES OF PROCEDURE

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

AMEND Rule 17-101 (b) to add a reference to parenting coordinators appointed under Rule 9-205.2, as follows:

Rule 17-101. APPLICABILITY

. . .

(b) Rules Governing Qualifications and Selection

The rules governing the qualifications and selection of a person designated to conduct court-ordered alternative dispute resolution proceedings apply only to a person designated by the court in the absence of an agreement by the parties. They do not apply to a master,

> examiner, ~~or~~ auditor, or parenting coordinator appointed under Rules 2-541, 2-542, ~~or~~ 2-543, 9-205.2.
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Rule 17-101 was accompanied by the following Reporter's note.

> New Rule 9-205.2 is a self-contained Rule pertaining to parenting coordination. The second sentence of Rule 9-205.2 (b)(1) reads, "Although parenting coordination may draw upon alternative dispute resolution techniques, it is not governed by the Rules in Title 17."
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> The proposed amendment to Rule 17-101 (b) excludes a parenting coordinator appointed under Rule 9-205.2 from the applicability of the Rules in Title 17 that govern the qualifications and selection fo a person designated by the court to conduct alternative dispute resolution proceedings.

Commencing first with proposed Rule 9-205.2, the Chair asked for comments on section (a), Applicability. There were none. He noted that subsection (b)(1), the definition of "parenting coordination," provides in the second sentence that parenting coordination "is not governed by the Rules in Title 17." In subsection (c)(2)(A), there is a reference to "Rule 17-106 (b)." To avoid any potential inconsistency it might be helpful to add to subsection (b)(1) the following language: "except as otherwise provided in this Rule." Ms. Ogletree commented that the Subcommittee would accept that change. By consensus, the Committee approved the additional language. There were no other comments on section (b).

The Chair drew the Committee's attention to section (c) of Rule 9-205.2. Mr. Klein commented that he had some concerns about consistency with the ADR Rules. Subsection (c)(3) provides that parenting coordinators have to complete at least eight hours of continuing education every two years. This has been suggested to be four hours a year for ADR practitioners. It would be fewer hours but more often. Is the eight-hour requirement feasible for parenting coordinators?

Mr. Patterson inquired whether the subject of the training is so condensed that four hours will cover what needs to be covered and whether the same training would be repeated each year. Dr. Berman responded that he envisioned changing the curriculum as appropriate each year based upon the research and based upon the experience of people taking the ongoing workshops. It would not be one four-hour seminar that is repeated each year. People have already had the 40 hours of training plus the additional 20 hours that the Rule requires. The purpose of the continuing education would be to supplement this and to keep people up on changes in the field.

Mr. Patterson referred to the eight-hour training block being changed to two four-hour blocks. Would someone new to the field who was not present for the first four hours of year one be able to get the necessary training in the four-hour training in year two as opposed to the training being composed of added material for someone who had already taken the first four-hour training? Is the new

arrangement going to prevent people from becoming parenting coordinators and getting the training in a timely fashion? Dr. Berman replied that he did not think that this would be a problem. The idea is that the training would not just be four hours, it would also include materials that would be handed out that would address anything that was covered previously. The next training would include the materials from the previous training and any new materials.

Dr. Kushner told the Committee that she is a social worker who worked at Salisbury University. The training there for parent coordinators is organized into three- and six-hour blocks. The training is never four or eight hours in one day. Mr. Klein noted that a problem already exists, because the training to which Dr. Kushner referred does not match up with the current eight-hour requirement. The Rule should conform to the training actually taking place. The Chair commented that the full Committee had not addressed the suggestion to split the eight-hour training for mediators into two four-hour blocks.

Mr. Klein remarked that Jonathan Rosenthal, who coordinates ADR for the District Court, compiled a list for the ADR Subcommittee of all of the training programs currently available, and it spanned many pages. There are many training programs for ADR and conflict resolution. In addition, the training is not limited to formal programs. Many organizations provide in-house training to mediators

that would be considered appropriate. The Chair's recollection was that mediators would only have to devote a half-day rather than a full-day to training. If the Committee were to adopt this for ADR practitioners, should Rule 9-205.2 be consistent?

Judge Pierson said that without knowing what training is available, it is not a good idea to be unduly prescriptive now. The Chair asked if there was any proposal to change what the Subcommittee had drafted. No one suggested a change.

Ms. Ogletree said that the Subcommittee can look at the eight-hour continuing education requirement after the ADR Rules revision is completed. The Chair said that since the Committee had made its policy decisions on Rule 9-205.2 as to confidenti-ality, fees, and appointments over objection, the Style Subcommittee can redraft the Rule and bring it back to the Committee. Mr. Klein noted that the current draft of the continuing education requirement seems to be taken directly from the ADR Rules. Ms. Ogletree remarked that it was based on the ADR Rules that existed at the time. If those Rules change, Rule 9-205.2 will have to be reconsidered.

The Chair inquired if anyone had a comment on section (d), Parenting Coordinator Lists. He referred to the last sentence of section (d) which reads: "The family support services coordinator shall maintain the list, and, upon request, make the list and the information submitted by each individual on the list available to the court, attorneys, and parties." The question is if this would be a

public court record to which anyone could have access. Ms. Ogletree responded that in her county, the list is public.

Judge Weatherly remarked that, although Prince George's County does not have parenting coordinators, it does have a list of mediators and of attorneys who have been approved to be "best interest" attorneys, and the list is available. Regularly, attorneys and parties ask to look at the list. The Chair pointed out that it may not be desirable to have a rule purport to limit access to the list to the court, attorneys, and parties, because this would suggest that no one else can get it.

The Reporter questioned whether any quasi-confidential information is on the information submitted to get on the list. Ms. Ogletree answered that the list simply names the people. The Chair noted that section (d) states that the list and the information submitted by each individual on the list is available to the court, attorneys, and parties. Ms. Ogletree acknowledged that access to the information submitted may be limited, but the list of names is available to anyone. The Reporter suggested that the Rule could provide that the list is available to anyone, but the information is available to the court, the attorneys, and the parties. Ms. Ogletree responded that this is what was intended.

The Vice Chair inquired as to what is confidential about the information that is submitted. Ms. Ogletree answered that it addresses the education, qualifications, and references of the

person. The Vice Chair expressed the opinion that if the public is entitled to know who is on the list, the public is entitled to know what the qualifications of those individuals are. Judge Eyler remarked that people who are looking for a parenting coordinator might want to have available the information about that person, so it should be available to the public. The Chair commented that he could see that the media would be interested in what kind of people the court is putting on the list. He asked the Committee how they wanted to address this issue. Mr. Sykes moved to make all of the information public. The motion was seconded, and it carried unanimously. The Vice Chair inquired as to how section (d) would be changed. Should it read "...upon request, make the list and the information submitted by each individual on the list available to the court, attorneys, parties, and upon request, the public?" The Reporter suggested that it read "...on the list available to the public." The Chair said that a request is not necessarily needed, particularly if the information ends up being online. By consensus, the Committee approved the change to section (d) suggested by the Reporter.

The Chair drew the Committee's attention to section (e) of Rule 9-205.2. Subsection (e)(1) has an unresolved issue. The court can appoint a pendente lite coordinator on its own initiative and presumably even over the objection of the parties. The parties must consent to the appointment of a post-judgment coordinator. The Committee addressed this the last time it discussed this Rule. The

extended effect of this is with respect to the issue of fees, which is an unresolved issue. The proposal that appears in the bolded language in subsection (e)(2)(C) permits the parties to agree to pay a fee in excess of the fee schedule. The fee schedule is addressed in section (i) of the Rule. This tends to follow the rule pertaining to fees for court-appointed mediators. The court has a fee schedule that can differ from county to county. It is a maximum fee schedule. Currently, mediators may not exceed the fee schedule. For post-judgment parenting coordination, it may not make a difference, because the parties can opt out. Consent is required for the appointment itself, so if one party refuses to pay the stated fee, that party can refuse the coordinator. For pendente lite coordination, the court can make the appointment on its own initiative, and the parties would have to agree to the fee although they would not have to agree to the appointment. Could there be some implicit coercion to do that? In pendente lite proceedings, everything is open, and the court has nearly total discretion in the ultimate custody decision. The Chair stated that he was not expressing an opinion, but merely raising the issue.

The Chair noted that there are two separate issues that coalesce. One is whether the court should be able to appoint a parenting coordinator on it own initiative even over the objection of a party. The second issue is whether the court should be able to award a fee, even by agreement, that exceeds the fee schedule, if the court is able

to do so.

Judge Sundt remarked that, in Montgomery County, there are a number of forensic parenting coordinators. The court does not set their fees. They enter into an agreement with the parties. It is a little difficult at that point for the court to set a fee schedule. On the other hand, the court generally does not impose parenting coordinators on people who object to them. The Rule applies to two separate situations. One is temporary where the parenting coordination will end, and it is set up to try to help the court make a final decision at the final custody hearing. The parenting coordinator can be invaluable, partly for the coordinator's observations as to how the parties are or are not parenting the children. Sometimes the parties actually come to a consensus when they know that they are being observed/helped by a parenting coordinator. After the judgment is entered, the scenario is entirely different. If the parties want to continue with a parenting coordinator, they have to consent. The court no longer supervises the parenting coordination.

Judge Sundt expressed a concern as to pendente lite parent coordination. Even if a party objects to it, the appointment by the court is discretionary. Very often, someone has told the court that he or she objects to the appointment of a certain parenting coordinator, and the party refuses to pay for the coordinator's services. It is obvious that this arrangement will not work and would

be a waste of time and money. However, if the question is asked as to whether a parenting coordinator would help, everyone may agree that it would. In their minds, the parenting coordinator would become their advocate. Some of the people are very naive about this. Everyone then agrees, and then when they find out how much it will cost, they refuse to pay. Sometimes the court circumvents this by deciding that the fee will be allocated at the end. The Rule seems to provide that the fee will be "x." The Chair's question is whether the Rule can impose a parenting coordinator on an objecting party as well as require the party to pay the cost of the coordinator. The Chair clarified that it is not only a matter of bearing the cost, but bearing the cost in excess of what the court has adopted as a maximum fee schedule.

Judge Sundt thanked the Chair for his clarification. It is possible that one of the parties might suggest Dr. Berman as the coordinator. Can the court tell him that if he were to accept the position of being the coordinator, he would be paid $150 per hour? This seems to be what the Rule provides. Judge Sundt said that she could not speak for the people in the health care field. Sometimes the concern is that it is known that the mother is paying $500 an hour for her attorney, and the father is also paying his attorney the same amount. The professional who is being asked to be the parenting coordinator is being informed that he or she will be hired at $150 an hour. Of course, not all Montgomery County attorneys are paid

$500 an hour.

The Chair added that the maximum fee is not necessarily $150 an hour. Concern does exist as to parity among professionals. The hope is that most of the parenting coordinators will not be attorneys. Most of them have expertise in the health care area. People with backgrounds in mediation are sought out. Judge Sundt asked if everyone agreed that the parties could consent to a higher fee, if the parties do not want the chosen parenting coordinator and request someone like Dr. Berman, but he will not take the case at $150 an hour. The Chair stated that his question was not whether the maximum fee schedule can be exceeded by agreement, but whether, in pendente lite proceedings, the court can impose the parenting coordination over objection of the parties and exceed the maximum fee schedule. This is not an issue in post-judgment parenting coordination, because the parties would have to consent to the parenting coordination. The Vice Chair remarked that she did not understand this, because the court can override the objections expressed by the parties, if the court feels that the case needs parenting coordination even for a short period of time. The parties can agree to a fee of $160 even though the fee schedule provides for a fee of $150. The parties have already objected to the parenting coordination and should be able to reject the coordinator's fee of $160.

Judge Eyler pointed out that this involves the very narrow situation of pendente lite parenting coordination for only a specific

period of time. The parties did not initially agree to having a parenting coordinator, and the court is imposing this on the parties. However, the way the Rule is written, the parties can agree to go above the fee schedule. Should this be allowed? The drafters felt that this should be allowed, because the coordinators are highly trained professionals, and there is a very high-level education requirement imposed on them. It did not seem right to the drafters that if professionals are charging fees higher than the fee schedule, and the parties agree to a higher fee, the parenting coordinator should not be allowed to charge the higher fee. The question is if the parties had not agreed to the pendente lite parenting coordinator who is being imposed on them, is it truly an agreement when they agree to pay the higher fee, or is it some kind of coercion? She expressed the view that it is not a kind of coercion. These are not people who are easily coerced.

Judge Weatherly cautioned the Committee that in Prince George's County, 80% of the cases have at least one *pro se* party. The *pro se* litigants will not know anyone on the list. If the judge orders parenting coordination for pendente lite proceedings, Judge Weatherly said that she could not understand how anyone would be able to choose someone from the list. For post-judgment parenting coordination, people will be a little more educated, because they have already worked with someone, or they have learned about the process. How would the lists have any differences in fee structure? If there

is any difference, it would be how to handle low-income families who cannot afford the fees listed in the schedule.

The Chair asked what the result would be if the court wants to appoint someone who is on the list, but that person will not take the case due to the fee schedule. The Vice Chair inquired as to why the potential parenting coordinator would apply, and the Chair replied that he or she is not applying at all; the judge is appointing the person who is on the list. Ms. Ogletree added that someone on the list has already agreed to take this type of case. The Chair said that the situation is that the chosen parenting coordinator wants to charge more than the fee schedule, and the Rule permits this. The Vice Chair noted that the parties have to agree. Ms. Ogletree commented that if a parenting coordinator does not agree to be paid under the fee schedule, then he or she would be taken off of the list of available coordinators. The Chair noted that it is a contradiction if the parties have to agree to the fee, but not to the appointment.

The Vice Chair observed that she can see how the Rule can be interpreted this way. However, she was not envisioning that someone would apply to be on the list and be placed on the list, knowing that the maximum fee is $250 an hour, but then in a certain case, refuse to accept the $250. Ms. Ogletree responded that in that situation, the court would choose someone else. Judge Sundt said that this would be one of the last times the parenting coordinator would be appointed,

because the person should agree to the stated fee schedule. The Chair suggested that the language of subsection (e)(2)(C) should be changed.

The Vice Chair said that the Rule should provide that the parties can agree to pay more if they are picking someone who is not on the list. Someone on the list agrees to charge the amount in the fee schedule. The Chair explained that it is a court appointment. Judge Callahan remarked that afterwards, the court is not appointing anyone. The court cannot order the parenting coordinator, but the parties have agreed to use one. The coordinator can charge his or her regular rate. The coordinator is not bound to the $250 because of being on the list, however he or she may be bound to it for the pendente lite period but not post-judgment, because there is no authority to appoint a post-judgment parenting coordinator.

The Vice Chair pointed out that the Rule provides that a coordinator can be appointed with the consent of the parties. What is the point of this -- can the parties agree to anything? The Chair commented that the parties can say that they would like to have a specific pendente lite parenting coordinator, such as Dr. Berman, and they agree to pay him $50 more than what is on the fee schedule. This is a private arrangement. The problem is when the judge tells the parties that they will be getting a parenting coordinator, and the judge appoints Dr. Berman to be the coordinator. However, the parties will have to pay him more than what the fee schedule provides

for. The Rule allows this. Ms. Ogletree observed that this is not what was envisioned when the Rule was written. Judge Callahan agreed, noting that either the parenting coordinator on the list agrees to take what the court has stated is the fee, or the parenting coordinator does not get on the list.

The Vice Chair said that what subsection (i)(1) should provide is that an individual designated by the court cannot charge a fee that is greater than what is on the schedule. Ms. Ogletree added that the parties can agree otherwise. The Vice Chair noted that post-judgment the parties may agree to a different amount for a parenting coordinator by consent. Ms. Ogletree pointed out that the parties can agree to a different parenting coordinator even pendente lite.

The Chair explained that the problem is with the language of subsection (e)(2)(C). Section (e) provides that the court may appoint a parenting coordinator in accordance with this section. Subsection (e)(2) states: "[t]he court may appoint only an individual who: ... (C) has entered into a written agreement with the parties or agrees to accept a fee not in excess of that allowed in the applicable fee schedule adopted pursuant to subsection (i)(1) of this Rule." This is the language that needs to be changed. Ms. Ogletree noted that the Subcommittee's understanding was that anyone who is on the court list will agree to take an appointment for the fee set by the court. However, if the parties know someone else who is qualified, and the parties are willing to pay more because they want

that particular person, they should be permitted to choose that person, and the court would then appoint him or her.

The Chair pointed out that the solution to the problem would be to strike the words "or agrees" from subsection (e)(2)(C). Judge Eyler said that the drafters did not think that the parties could only pay more only for a parenting coordinator who is not on the list. The parties can agree to pay more for a parenting coordinator who is on the list. This can be done for both pendente lite and post-judgment parent coordinators when the parties agree. Ms. Ogletree expressed her agreement with Judge Eyler. The Chair commented that for a post-judgment parenting coordination, the court cannot appoint a coordinator without the consent of the parties. Judge Eyler noted that in a pendente lite situation, the court can make the appointment without the consent of the parties but cannot impose a fee that is more than the one in the fee schedule.

The Chair asked the Committee whether the court should be able to appoint a parenting coordinator over the objection of a party and whether the fee can exceed the fee schedule. Judge Sundt suggested that subsection (e)(2) could provide that the court may also appoint an individual who meets the qualifications or who may be jointly requested by the parties. The Chair said that this can be drafted as long as there is a consensus as to the policy. Appointing a parenting coordinator over the objection of the parties and exceeding the fee schedule is a problem.

Judge Eyler asked the Chair if his view was that the parties can agree on a pendente lite coordinator who is paid more than the fee schedule. The Chair replied that this would not be a court appointment. If it is a court appointment, the court is limited to appointing parenting coordinators who are on the list. Judge Eyler pointed out that section (i) provides an exception, allowing the parties to agree to pay more than what is on the fee schedule. Ms. Ogletree commented that if the parties cannot agree on the coordinator, the court will appoint one. The parties should be able to agree to use a parenting coordinator who is asking more than the fee schedule allows. The Chair clarified that the judge must appoint someone who is on the list. Master Mahasa remarked that someone who is on the list should have agreed to be paid according to the fee schedule. The Chair said that the parties can privately pay someone who is not on the list.

The Vice Chair remarked that when the parties agree to a post-judgment parenting coordinator, the amount the coordinator had agreed to should be able to be increased. As long as the court is not involved, the parties should be able to do what they like. The Chair commented that a post-judgment parenting coordinator cannot be appointed unless the parties consent, but this is not the case for a pendente lite parenting coordinator. Judge Sundt noted that there is a distinction between a court-appointed order and a consent order of the parties. If the court appoints a coordinator, there is

an assumption that the parties do not agree. Subsection (e)(1) provides that the court may appoint a parenting coordinator on joint request of the parties. The parties can bring to the judge a consent order stating that the parties have agreed on a parenting coordinator and on a fee. This is not the court appointing the coordinator. Judge Callahan commented that in a pendente lite proceeding, the court can appoint a parenting coordinator without the consent of the parties from the list, and the coordinator is paid according to the fee schedule. The parties can consent to using someone else as in the post-judgment situation, but it is by consent of the court.

The Chair asked the Committee for its recommendation. The Reporter remarked that if the court appoints Dr. Smith who ordinarily charges $300 an hour, and the appointment is without the consent of the parties, Dr. Smith has to charge $150 an hour if that is the rate in the fee schedule. If the parties procure an independent parenting coordinator, that person can charge $300. Ms. Ogletree commented that the issue is not whether the court signs a paper, it is whether the court selects the parenting coordinator. The consent order would state that the court approves the coordinator, not that the court appoints the coordinator. Judge Sundt said that there are two distinct orders, one where the court appoints the coordinator, with a ceiling as to the fees, and one where the parties choose their own parenting coordinator, with no ceiling as to the fees. The Chair noted that the fee schedule for Rule 9-205.2, as well as for Rule

17-108, Fee Schedules, the parallel Rule for Alternative Dispute Resolution, is handled by the circuit court for each county. It is not done statewide.

The Vice Chair reiterated that a pendente lite parenting coordinator may be appointed on motion of a party, on joint request of the parties, or on the court's own initiative after notice and an opportunity for the parties to be heard. A post-judgment coordinator may be appointed any time with the consent of the parties. The Chair stated that before the Rule can be redrafted, the policy must be determined. The Vice Chair remarked that the parties can do whatever they choose by consent. Judge Eyler added that this is true whether or not the parenting coordinator is on the list. Ms. Ogletree noted that if there is no agreement by the parties to a parenting coordinator, and one is chosen by the court from the list, the fee will be based on the fee schedule. Master Mahasa observed that this would cover the scenario where the parties do not agree to the court's choice of a pendente lite coordinator. They can select one who is on the list or one who is not on the list. Ms. Ogletree noted that if the coordinator is not on the list, the parties have to consent. Master Mahasa added that if that happens, the court will approve the appointment.

Judge Pierson commented that the court can appoint someone who is not on the list. Judge Callahan said that there would have to be a consent order. The Chair noted that it is important to distinguish

between the court approving the parties' agreement to a parenting coordinator and the court appointing a parenting coordinator from the list. Judge Pierson said that subsection (e)(2) does not provide this. The Chair responded that it will be changed. The Vice Chair remarked that subsection (e)(1)(A) gives the parties an opportunity to be heard before the pendente lite parenting coordinator is appointed. A Committee note states that if the parties agree, the hearing is to determine the duties and powers of the coordinator. Why is the Committee note necessary when the term "parenting coordinator" is already defined? Judge Callahan responded that at the hearing, the parties decide if the parenting coordinator is to do everything. This is not what the parenting coordinator should decide. Before the court signs the order, the court can look at it and talk to the parties. The Vice Chair observed that a hearing is held if the parties do not consent. Why would the court define the powers and duties of the parenting coordinator other than to reduce the effects of conflict on the child? Judge Callahan pointed out that the court could order something that is not what the parties want.

The Vice Chair said that the Committee note provides that each time there is a hearing, the court determines the duties and powers of the coordinator. The Chair commented that later on in the post-judgment situation, if the parties agree, adjustments can be made in the custody or visitation order. In the pendente lite situation, the court can order custody and visitation. The issue is

the extent to which the parenting coordinator can adjust this. In the post-judgment situation, the change can be made only if the parties agree. Master Mahasa noted that this is provided for in subsection (f)(1)(H) of Rule 9-205.2. The Chair remarked that in the pendente lite part of the case, there may not be a judgment, but there may be a custody order. If the custody order provides that the father has the child from Friday to Sunday, and the father wants a little more time, but the mother does not agree, the parenting coordinator can allow it or not. The purpose of the hearing is to go over who is to be the parenting coordinator pendente lite. There may not be an agreement as to what the coordinator is supposed to do. It is not to assign the coordinator's duties.

Master Mahasa inquired why the Committee note is necessary. Judge Norton pointed out that the appointment may be made at the scheduling conference. At the pendente lite hearing, there may be a motion to modify custody or a motion for contempt. The Chair said that at the last meeting, the Committee decided that the pendente lite coordinator is appointed at the scheduling conference or at the hearing. A master may appoint the coordinator with a judge signing off on the appointment and not actually seeing the parties. Judge Eyler remarked that notice and a hearing is required in the pendente lite situation if the parties do not consent. There had been some discussion that the Rule should not create the impression that no hearing is necessary, so the Committee note was added. A period could

be added after the word "request," and the rest of the sentence could be deleted.

The Vice Chair noted that subsection (e)(1)(A) of Rule 9-205.2 requires a hearing even if it is on joint request of the parties. Master Mahasa asked again why the Committee note is necessary, since a hearing will be held anyway. The Reporter commented that the word "opportunity" implies that there may not be a hearing if no one wants it. The Vice Chair commented that the word "opportunity" means that the parties have the ability to request a hearing.

The Reporter said that the Rule requires a hearing if at least one party wants one. The Committee note allows the court to hold a hearing even if the parties do not want one. The Vice Chair observed that the Rule states that a hearing may be helpful. Master Mahasa remarked that the court can set a hearing even if the parties do not want one. The Chair suggested that the Committee note is not necessary. The Vice Chair said that the Committee note has value in letting the parties know that a hearing could be beneficial even if the parties agree. The court can review the duties of the parenting coordinator and provide helpful information.

Judge Callahan noted that there will be a hearing if the parenting coordinator is unwilling or unable to do what is provided for in the consent order. It would be appropriate to have a hearing if there is any concern about the duties and powers of the coordinator. The Committee note is more like a comment rather than an instruction.

The Chair pointed out that the hearing was added for high-conflict cases when the Rule was first drafted. In those situations, it is useful to have a hearing in every case to agree on what the parenting coordinator can do. Otherwise, the parties could complain to the court that they did not know what they were going to have to do.

The Vice Chair asked the meaning of the language "an opportunity for the parties to be heard." Does it mean that if one party files a motion for the appointment of a parenting coordinator, the other party has to request a hearing in order to get one? She expressed the view that a hearing for non-consent cases is mandatory. The Chair responded that the Rule started out that way. Initially, it provided for the ability of the court to make an appointment of a parenting coordinator over the objection and without the consent of the parties. There is a right to be heard before the judge does this. The question then arose about expanding this even if the parties do consent. The Vice Chair suggested that subsection (e)(1)(A) begin with the language "[a]fter notice and a hearing, the court...". Judge Weatherly suggested that subsection (e)(1)(A) provide for "an opportunity for the parties to be heard." The Vice Chair commented that the word "opportunity" can imply that someone needs to ask for a hearing. The Chair said that in a pendente lite situation, the parties may be able to get together and agree privately.

Dr. Berman commented that it is always helpful to have a hearing, particularly in pendente lite cases. The parties do not necessarily

agree with the judge. They know that if the court appoints the coordinator, the parties will be required to work with the person appointed. The Vice Chair said that the beginning of subsection (e)(1)(A) should be changed to "[a]fter notice and a hearing, the court may appoint...". The Reporter asked if the Committee note is to be deleted. By consensus, the Committee agreed to change the beginning language of subsection (e)(1)(A) as the Vice Chair suggested and to take out the Committee note.

The Chair asked whether the words "e-mail address" should be added to the list of the parenting coordinator's information in subsection (e)(3)(A). The Vice Chair pointed out that Rule 1-311, Signing of Pleadings and Other Papers, already has the requirement of an e-mail address. If the words "e-mail address" are added to subsection (e)(3)(A) of Rule 9-205.2, they would have to be added to many other Rules.

The Chair noted that subsection (e)(4)(A) refers to "the service of an individual," while subsection (e)(5) refers to "the termination of the appointment." He suggested that in subsection (e)(4)(A) and (B), the language should be changed from "the service of an individual appointed as..." to "the appointment of a...". Ms. Ogletree responded that the Subcommittee accepted this change. By consensus, the Committee approved the language suggested by the Chair.

The Chair commented that subsection (f)(1)(B) provides that if there is an operative custody and visitation order, the parenting

coordinator may assist the parties in amicably resolving disputes regarding compliance with the order. The Chair asked if it would be a good idea to add to subsection (f)(1)(B) the language "the interpretation of and," so that it would read as follows: "if there is an operative custody and visitation order, assist the parties in amicably resolving disputes regarding the interpretation of and compliance with the order...". This would be helpful if a dispute arises as to what the language of the order means. By consensus, the Committee approved the additional language to subsection (f)(1)(B).

The Chair noted that Rule 9-205.2 uses the language "assist the parties..." in many places. He asked if in subsection (f)(1)(D), the guidelines are going to be developed by the parenting coordinator or if the coordinator is going to assist the parties in developing them. Ms. Ogletree replied that the coordinator will be assisting the parties. The Chair suggested that subsection (f)(1)(D) read as follows: "assist the parties in developing guidelines for appropriate communication between them." By consensus, the Committee approved that change to subsection (f)(1)(D).

The Chair drew the Committee's attention to subsection (g)(2) of Rule 9-205.2. He said that the issue of confidentiality of communications had been reserved for later discussion. He pointed out that unlike in mediation, communications disclosed to a parenting coordinator are not confidential and may be disclosed in other proceedings. He had discussed with Judge Eyler the meaning of

subsection (g)(2). A communication that is non-confidential clearly can be disclosed to the court. What about a parenting coordinator calling The Washington Post and explaining what went on in a high-profile case? Master Mahasa pointed out that subsection (f)(2)(A) states that a parenting coordinator may not "require from the parties or the attorney for the child release of any confidential information that is not included in the case record." She suggested that language be added to that provision that would read as follows: "The parties may voluntarily provide the release of confidential information to the parenting coordinator. Further disclosure of such information shall be determined by statute or the terms of the relief." She also suggested that the following language be added to subsection (g)(2) after "(g)(1)" and before the word "of:" "and (f)(2)(A)." This would mean that if the statute does not cover confidentiality, the agreement will. She proposed that the Committee note after subsection (f)(2)(A) be deleted.

The Reporter remarked that the parenting coordinator may find out certain information that the parties do not want to be disclosed further, but the court may want this information. The Chair said that what is intended is that the parenting coordinator can testify in court about any communication made during the parenting coordination sessions, because the communications are neither confidential nor privileged. In what other venue could the parenting coordinator disclose these communications? Dr. Berman responded that the

parenting coordinator is bound by the ethics of the profession as to disclosure of communications. He suggested that the words "are not confidential" should be deleted from subsection (g)(2). This way the parenting coordinator would not have to worry if the communication is or is not confidential. Judge Eyler agreed with this suggestion. She also suggested changing the language so that it does not refer to "any judicial, administrative, or other proceeding," but to the proceeding in that particular case.

Judge Eyler noted that what is envisioned by this provision is that the parties cannot be forced to turn over confidential records, such as medical or mental health records. If the parties agree to turn the records over, the parenting coordinator can use the records. It should be clear to the parents that what is in the records is not protected from one parent to another. Both will know what has been said about the records. Unlike in mediation, the parenting coordinator can testify in court about the records, but not for the purpose of proceedings involving other people. Code, Health General Article, §4-306 prohibits re-disclosure of medical records generally. Dr. Berman commented that re-disclosure is prevented only if it specifically states that the information in these particular records may not be re-disclosed.

The Chair pointed that two issues are being raised. One is the access to what is in the court file even if the file is sealed. The other is communications made by the parties to the parenting

coordinator. The Rule now provides that communications are not confidential, although they are confidential in mediation. Should the parenting coordinator be able to recite the communications from the parenting coordination to the court if the communications are relevant? The Rule provides no brake on any other disclosure of communications. Judge Eyler commented that the intention was that the records would not be available in an auto tort case, for example. The Chair said that this would include oral communications, also. Judge Callahan added that this would apply to child welfare cases.

The Chair noted that Title 9 of the Rules pertains to divorce and child custody. He observed that the Rule cannot supersede the statutes providing for a duty to disclose child abuse, Code, Family Law Article, §§5-704 and 5-705. Judge Callahan remarked that the intention of subsection (g)(2) is to assist the court, but there is an unintended consequence of disclosure to others. The Chair suggested that the Rule could provide that records and communications can be disclosed to the parenting coordinator in the proceeding in which the parenting coordinator was appointed, but otherwise the law governs the confidentiality. By consensus, the Committee agreed with this.

Judge Eyler observed that under subsection (g)(1), the parenting coordinator has to take action to maintain the confidentiality of information in case records. In a case in which the records are sealed, the parenting coordinator should keep the records as

confidential as possible. The non-disclosure statute provides that the records may not be disclosed unless authorized by a person in interest. One of the exceptions to this is a case of suspected child abuse or neglect. The presumption is that the records cannot be re-disclosed except in certain situations.

The Reporter inquired if Rule 9-205.2 should require that the release mandate that the record be allowed to be disclosed to the judge. The Chair noted that the Rule could provide for that. The Reporter said that subsection (f)(2)(A) provides that the parenting coordinator may not require from the parties or the attorney for the child release of any confidential information that is not included in the case record. Subsection (g)(2)(A) allows the record to be re-disclosed to the judge. Is this in violation of the statute? Master Mahasa remarked that the parties have to agree on the release of the confidential information. They may not want the judge to hear it. The Chair noted that under *Hooks v. Nagle*, 296 Md. 123 (1983), there cannot be a release of confidential information by a child unless the child has counsel.

Judge Callahan said that under subsection (g)(2), the parenting coordinator can disclose anything in any judicial, administrative, or other proceeding. She asked if this covers documents provided by the release. The Chair commented that this provision is very broad. His understanding was that the communications would not be able to be disclosed in any judicial, administrative, or other proceeding,

but they could be disclosed in this proceeding. Judge Callahan remarked that if the parenting coordinator obtains documents from a health care provider by a release, this is covered by this Rule as far as it pertains to this proceeding. Judge Eyler had said that the statute provides that records cannot be re-released unless one of the exceptions is met. Judge Eyler reiterated that the parenting coordinator may disclose information only in the proceeding in which the coordinator was appointed.

Judge Callahan noted that Rule 9-205.2 covers the situation where the parenting coordinator obtains documents from a health care provider by release. The Vice Chair pointed out that to strictly conform to the language of the statute, the Rule needs to provide that consent must be given, and it must be given to a re-release to the judge and others. The Chair observed that it would be helpful to look at the statute. He asked if it refers to "pursuant to a court order or court rules." Judge Eyler replied that she thought that there could be such a reference. Judge Eyler added that the person in interest can agree to the release of the medical records. A parent may obtain the medical records of his or her child, but they cannot be used in the case. The Vice Chair inquired if Rule 9-205.2 overrides the statute. Judge Callahan asked if the disclosure to the parenting coordinator in this proceeding operates as a consent. The Vice Chair said that the Rule allows re-release of the information to the judge. Judge Eyler observed that this is based on the party

agreeing to it. The Reporter commented that if the Rule requires that any release must permit a re-release to the court, there would not be a problem. The person does not have to sign the release. The Chair questioned if the statute precludes the court from getting the information.

The Chair stated that currently in any civil case, under the statute, a hospital record can be subpoenaed to court. Judge Eyler noted that this is covered by the Health Insurance Portability and Accountability Act, PL 104-191. It protects disclosures outside of the case. The Chair pointed out that the case records may need to be sealed once they come to court. Master Mahasa remarked that physicians usually will not give out medical records without a release. Judge Eyler commented that when she was in practice, she would send out subpoenas for medical records and for mental health records, and as long as the correct statutory procedure was followed, the records would be produced.

The Chair noted that once the physician gets a release, he or she can turn over the records to the parenting coordinator. The question is what the parenting coordinator can do with them. Judge Eyler said that this is covered by the Rule, and the release should state what the Rule provides. Master Mahasa observed that the Rule provides that the coordinator is not governed by confidentiality. The Chair said that this can be changed. He asked the Committee for a policy on this. If the parenting coordinator gets the records after

a release is signed, he or she should be able to use the records in that case, but not in any other. Judge Eyler added that the records can be shown to the other parent, and the Committee agreed.

Master Mahasa pointed out that subsection (h)(1)(C) of Rule 9-205.2 provides that a parenting coordinator can be removed for a violation of subsection (i)(1) of the Rule, which addresses fee schedules. She asked why any violation would not cause a parenting coordinator to be removed from the list. The Vice Chair noted that subsection (h)(1)(A) provides that the court shall remove a parenting coordinator on motion of a party or of an attorney if the court finds good cause, and this would cover any situation. Master Mahasa asked why subsection (h)(1)(C) is necessary. The Vice Chair reiterated that subsection (h)(1)(A) would cover any violation, and she agreed that subsection (h)(1)(C) is not necessary. By consensus, the Committee approved of Master Mahasa's suggestion to delete subsection (h)(1)(C).

Master Mahasa asked if the Committee note at the end of subsection (i)(2) is necessary. The Reporter explained that the note was added to encourage parenting coordination as a *pro bono* activity. The Vice Chair remarked that if an attorney were acting as a parenting coordinator for free, it would certainly occur to him or her to report it as a *pro bono* activity. The Chair pointed out that it may be a problem to state this in this Rule but not elsewhere. The Reporter noted that from the *pro bono* perspective, the message is that one does

not have to be an attorney to be a parenting coordinator, but if the coordinator is an attorney who is providing the parenting coordinator *pro bono*, the amount of time spent may be reported on the *pro bono* form. However, in the other places in the Rules, the person must be an attorney to perform the task listed as eligible for *pro bono* hours. The Vice Chair pointed out that the *pro bono* hours that attorneys are required to report are the hours spent providing legal services. Acting as a parenting coordinator is not providing legal services. The Chair suggested that the *pro bono* reporting rules could be reviewed from the point of view of how *pro bono* service is defined to see if acting as a parenting coordinator does or does not fit.

Agenda Item 4. Consideration of Rules changes pertaining to Habeas Corpus and Catastrophic Health Emergencies: Amendments to: Rule 15-306 (Service of Writ; Appearance by Individual Affidavit), Rule 15-309 (Hearing), and Rule 15-1103 (Initiation of Proceeding to Contest Isolation or Quarantine)

The Chair presented Rules 15-306, Service of Writ; Appearance by Individual Affidavit, 15-309, Hearing, and 15-1103, Initiation of Proceeding to Contest Isolation of Quarantine, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 - OTHER SPECIAL PROCEEDINGS

CHAPTER 300 - HABEAS CORPUS

AMEND Rule 15-306 to permit production of the individual by certain electronic means under certain circumstances, as follows:

Rule 15-306. SERVICE OF WRIT; APPEARANCE BY INDIVIDUAL; AFFIDAVIT

(a) Service

Except as provided in section (c) of this Rule, a writ of habeas corpus and a copy of the petition shall be served by delivering them to the person to whom the writ is directed or by mailing them by first class mail, postage prepaid, as ordered by the court.

Cross reference: See Rules 2-121 and 3-121.

(b) Production of Individual

At the time stated in the writ, which, unless the court orders otherwise, shall not be later than three days after service of the writ, the person to whom the writ is directed shall cause the individual confined or restrained to be taken before the judge designated in the writ. If the petition is by or behalf of an individual confined or restrained pursuant to an isolation or quarantine directive or order issued under any federal, State, or local public health law, production of the individual may be by means of a telephonic conference call, live closed circuit television, live internet or satellite video conference transmission, or other available means of communication that reasonably permits the individual to participate in the proceedings.

Cross reference: For proceedings brought pursuant to Code, Health-General Article, §18-906 and Code, Public Safety Article, §14-3A-05, see the Rules in Title 15, Chapter 1100.

(c) Immediate Appearance

Subject to section (b) of this Rule, ~~If~~ if the judge finds probable cause to believe that the person having custody of the individual by or on whose behalf the petition was filed is about to remove the individual or would evade or

disobey the writ, the judge shall include in the writ an order directing the person immediately to appear, together with the individual confined or restrained, before the judge designated in the writ. The sheriff to whom the writ is delivered shall serve the writ immediately, together with a copy of the petition, on the person having custody of the individual confined or restrained and shall bring that person, together with the individual confined or restrained, before the judge designated in the writ.

Cross reference: See Code, Courts Article, §2-305 for the penalty on a sheriff for failure to act as provided in section (b) of this Rule; see Code, Correctional Services Article, §9-611 for the penalty on an officer or other person failing to furnish a copy of a warrant of commitment when demanded.

Source: This Rule is derived in part from former Rules Z46 and Z47 and is in part new.

Rule 15-306 was accompanied by the following Reporter's note.

The constitutionally protected right of an individual to seek habeas corpus relief is in addition to the right of the individual who is confined or restrained pursuant to an isolation or quarantine directive or order to seek relief in accordance with the Rules in Title 15, Chapter 1100. See Rule 15-1101 (a).

Using concepts borrowed from the Rules in Title 15, Chapter 1100, amendments to Rules 15-306 and 15-309 are proposed in order to provide a safe and practical approach to the handling of writs of habeas corpus when the confinement is pursuant to an isolation or quarantine directive or order.

MARYLAND RULES OF PROCEDURE

TITLE 15 - OTHER SPECIAL PROCEEDINGS

CHAPTER 300 - HABEAS CORPUS

AMEND Rule 15-309 to add a new section (b) pertaining to the conduct of a hearing at which an individual is unable to appear due to a certain isolation or quarantine directive or order, as follows:

Rule 15-309. HEARING

(a) Generally

Upon the production of the individual confined or restrained, the judge shall conduct a hearing immediately to inquire into the legality and propriety of the individual's confinement or restraint. The individual confined or restrained for whom the writ is issued may offer evidence to prove the lack of legal justification for the confinement or restraint, and evidence may be offered on behalf of the person having custody to refute the claim.

(b) Conduct of Hearing If Isolation or Quarantine

If, pursuant to an isolation or quarantine directive or order issued under any federal, State, or local public health law, one or more of the parties, their counsel, or witnesses are unable to appear personally at the hearing, and the fair and effective adjudication of the proceedings permits, the court may:

(1) admit documentary evidence submitted or proffered by courier, facsimile, or electronic mail;

(2) if feasible, conduct the proceedings by means of a telephonic conference call, live closed circuit television, live internet or satellite video conference transmission, or

other available means of communication that reasonably permits the parties or their authorized representatives to participate in the proceedings; and

(3) decline to require strict application of the rules of evidence other than those relating to the competency of witnesses and lawful privileges.

Source: This Rule is derived as follows:
Section (a) is derived from former Rules Z46 b and Z48.
Section (b) is derived from Rule 15-1104 (d).

Rule 15-309 was accompanied by the following Reporter's note.

New section (b), proposed to be added to Rule 15-309, uses language borrowed from Rule 15-1104 (d), with the addition of the phrase, "pursuant to an isolation or quarantine directive or order issued under any federal, State, or local public health law," and the omission of the phrase "accept pleadings and," which is contained in Rule 15-1104 (d)(1), and the word "fully," which is contained in Rule 15-1104 (d)(2).

MARYLAND RULES OF PROCEDURE

TITLE 15 - OTHER SPECIAL PROCEEDINGS

CHAPTER 1100 - CATASTROPHIC HEALTH EMERGENCY

AMEND Rule 15-1103 to require that the petition be filed in a circuit court and not with the Clerk of the Court of Appeals and to specify

certain actions to be taken by the County Administrative Judge or the judge's designee and by the clerk, as follows:

Rule 15-1103. INITIATION OF PROCEEDING TO CONTEST ISOLATION OR QUARANTINE

(a) Petition for Relief

An individual or group of individuals required to go to or remain in a place of isolation or quarantine by a directive of the Secretary issued pursuant to Code, Health-General Article, §18-906 or Code, Public Safety Article, §14-3A-05, may contest the isolation or quarantine by filing a petition for relief ~~with the Clerk of the Court of Appeals~~ in the circuit court for the county in which the isolation or quarantine is occurring or, if that court is not available, in any other circuit court.

Committee note: Motions to seal or limit inspection of a case record are governed by Rule 16-1009. The right of a party to proceed anonymously is discussed in *Doe v. Shady Grove Hosp.*, 89 Md. App. 351, 360-66 (1991).

(b) Order Assigning Judge and Setting Hearing

The ~~Chief Judge of the Court of Appeals~~ County Administrative Judge or that judge's designee shall enter an order (1) assigning the matter to a judge ~~of any circuit court to hear the action~~ and (2) setting the date, time, and location of a hearing on the petition or directing ~~that~~ the clerk ~~of the circuit court to which the action has been assigned~~ to promptly set the hearing and notify the parties. The ~~Clerk~~ clerk ~~of the Court of Appeals~~ shall provide a copy of the order to all parties, the State Court Administrator, and the Chief Judge of the Court of Appeals.

Cross reference: See Code, Health-General Article, §18-906 (b), Code, Public Safety

Article, §14-3A-05 (c), and Rule 15-1104 (c) concerning the time within which a hearing is to be conducted.

(c) Notice

No later than the day after the petition was filed, the ~~Clerk of the Court of Appeals~~ clerk shall provide a copy of the petition and a notice of the date that it was filed to the Secretary or other official designated by the Secretary and to counsel to the Department of Health and Mental Hygiene.

(d) Answer to Petition

The Secretary or other official designated by the Secretary may file an answer to the petition. If an answer is not filed, the allegations of the petition shall be deemed denied.

Source: This Rule is new.

Rule 15-1103 was accompanied by the following Reporter's note.

Because a catastrophic health emergency in Annapolis may make the filing of a petition with the Clerk of the Court of Appeals impossible, Rule 15-1103 is proposed to be amended to require that a petition for relief contesting an isolation or quarantine be filed in the circuit court for the county in which the isolation or quarantine is occurring or, if that court is not available, in any other circuit court. To apprise the Chief Judge of the Court of Appeals and the State Court Administrator of filings throughout the State, an amendment to section (b) requires the clerk to provide each of them with a copy of the order entered by the County Administrative Judge or designee of that Judge.

The Chair explained that Rule 15-306 (b) provides that the person

to whom the writ of habeas corpus is directed shall cause the individual confined or restrained to be taken before the judge designated in the writ. However, under the Public Emergency and Catastrophic Health Emergency laws, either the Governor or the Secretary of Health and Mental Hygiene can issue quarantine and isolation orders that can quarantine or isolate people. The laws permit a petition for habeas corpus to be filed to challenge the quarantine or isolation and require that a hearing be held within three days. If the quarantine is because of a health issue and the person involved is contagious, the judge will not want that person to come to court. There is also the issue of who will transport the person to court and back.

The Chair said that one of the issues that the Remote Access Subcommittee, which is chaired by Mr. Howard, is going to discuss is using teleconferencing, video, or some similar technology to address this issue. The amendment to section (b) of Rule 15-306 would allow this kind of technology and avoid the requirement that the State bring the person physically into court. It might be helpful for completeness to add to the new language the following language after the word "law" and before the word "production": "or public emergency law."

The Vice Chair remarked that the "amend" clause at the beginning of the Rule that reads: "Amend Rule 15-306 to permit production of the individual by certain electronic means..." needs to be rewritten.

At the end of the new language in section (b), the language should read "... means of communication that reasonably permit ...".

The Chair introduced Ms. Jessica Pitts, the Executive Director of Emergency Preparedness and Court Security for the Administrative Office of the Courts. Mr. Patterson commented that there are provisions in the Rules that require individuals to come before the court for initial appearances. Currently, some of these individuals are appearing by the use of television monitors. Will the Rules be changed to allow for this? The Chair said that remote bail review proceedings are authorized by Rule 4-231, Presence of Defendant. He was not certain that a rule exists that allows for remote initial appearances.

The Chair remarked that the Remote Access Committee will be looking at this issue very broadly. The reason Rule 15-306 is before the Committee is that it has a specific reference to a "public emergency." He added that Mr. Patterson is correct that the issue appears in other contexts also. Mr. Patterson said that he was not against the change, but he was not sure why it was necessary. The Chair answered that the fact that one rule may be violated does not mean that another one should be violated.

The Reporter noted that Rule 15-306 addresses the constitutional right of habeas corpus. The Chair commented that the catastrophic health law, Code, Public Safety Article, Title 14, Subtitle 3A, or the public emergency law, Code, Public Safety Article, Title 14,

Subtitle 3, gives the Governor the right to disregard any statute or rule of court once he or she declares a public emergency. It is very broad. The quarantine orders give the right of habeas corpus with a hearing in three days. If the quarantine is because the person is contagious, how would this procedure work?

Mr. Patterson remarked that this is a matter of common sense, but the initial appearance also involves constitutional rights, including the rights to know the charges placed against the defendant, to counsel, and to a jury trial. The Chair said that apart from generalities that may come into play in Rule 15-306 as well, there can be curfew violations and violations of quarantine orders that are criminal offenses.

The Reporter commented that the issue of the initial appearance is somewhat convoluted the way it is written. Section (d) of Rule 4-231 provides for video conferencing and states that either the initial appearance or the bail review may be held by video conferencing, but both cannot be held by video conferening in the same case. This is not referred to in Rule 4-213, except for a cross reference, but this is the procedure for protecting the defendant's right to be in court and see a judicial officer -– either a commissioner or a judge.

The Chair asked if there were any other comments on Rule 15-306. By consensus, the Committee approved Rule 15-306 with the amendment to the "amend" clause, the addition of language to section

(b) referring to the "public emergency law," and the removal of the letter "s" from the word "permits" in section (b). The Chair drew the Committee's attention to Rule 15-309, Hearing. Mr. Klein said that he had a comment about subsection (b)(1). He expressed the opinion that the term "electronic mail" is too narrow. He suggested that the wording should be "other electronic means." His reasoning was that, depending on the size of what is to be transmitted, a document that is too big may not be able to be sent by electronic mail. Sometimes a document can be uploaded into cyberspace, and then the recipient can download it. This is not e-mail; it is virtual storage. The change he suggested would accommodate this. By consensus, the Committee approved this change.

By consensus, the Committee approved Rule 15-309 as amended.

The Chair drew the Committee's attention to Rule 15-1103, Initiation of Proceeding to Contest Isolation or Quarantine. The Chair said that when the Catastrophic Health Emergency Rules were first presented to the Court of Appeals, the Court decided that a motion or petition contesting an isolation or quarantine order should be filed in the Court of Appeals. The Chief Judge would then send it to whichever trial court was able to deal with it. The thinking has changed on this, because it is probably an unworkable idea. The hearings have to be held within three days. In an emergency, the Court of Appeals may not be available. An attack could happen just as easily in Annapolis as in Oakland. The idea is that the petition

would be filed in the circuit court where the isolation or quarantine is occurring, or if that court is not available, in any other circuit court. The matter would be put directly into the trial court rather than filing it in the Court of Appeals which has no original jurisdiction. At some point, although it has not happened yet, all the judges in the State will be cross-designated. If an emergency happens, a judge will have to be found wherever one can be located. Whether it is a District Court judge or an appellate judge, he or she would have to sit as a circuit court judge for these purposes.

The Vice Chair asked how this issue arose. The Chair referred to the recent discovery of a car bomb that had not yet detonated in Times Square in New York City, and he said that an emergency situation could happen that could lead to a quarantine or isolation order. Ms. Pitts commented that there had been some discussion through e-mails about filing pursuant to Rule 1-322, Filing of Pleadings and Other Papers. If someone is required to file in person, but they are under an order of isolation or quarantine, this could be a problem. The Chair said that this will have to be addressed, and also the issue of electronic filing will have to be considered.

Mr. Patterson noted that the issue of initiation of a proceeding to contest isolation or quarantine comes under the heading of habeas corpus relief. It is conceivable, although it may be far-fetched, that the grounds of the habeas corpus relief are an illegal action by the judge. If the case is in a county with only one judge, and

the Rule requires that the action be filed there with that judge, this might be a problem. The Chair responded that it would be a problem in that kind of case, but that is not the likely kind of case that would arise. Most of the cases would be because the Secretary of Health and Mental Hygiene has issued a quarantine order that is being enforced. People have a right to file to object to this. Mr. Patterson asked whether Rule 15-1103 would apply only in quarantine situations, or whether it would apply in any situation.

By consensus, the Committee approved Rule 15-1103 as presented.

Agenda Item 2. Consideration of a Policy Question concerning "Vexatious" Litigants

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The Chair said that he had one comment on the vexatious litigant issues, and then he would have to leave the meeting. This issue had arisen before in the Court of Special Appeals, but in a slightly different context. It came up because of a litigant whose name is Michael Sindram and an inmate in the Division of Correction named Aaron Holsey. The matter concerning both of these people, who had each filed extensive litigation, was addressed by the Chief Judge following an order in Sindram's case in the United States Supreme Court, 498 U.S. 177 (1991). Both were dealt with without any hearing. Mr. Sindram was filing as an indigent, and he asked for a waiver of the filing fees. He had filed countless lawsuits, all of which turned out to be frivolous.

Mr. Maloney commented that Mr. Sindram used to select names from

the telephone book and claim that those people had rear-ended his car. The Chair noted that the situation had gotten to the point where the clerks were frightened of him. He had been filing frivolous lawsuits in the U.S. Supreme Court. Over a dissent, the Supreme Court in a per curiam opinion ordered that the clerk of that Court was not to accept any more *in forma pauperis* filings from him without prior permission from the Court.

Because of the Supreme Court decision, the Court of Special Appeals did the same thing. It was not a matter of holding that Mr. Sindram could not file an appeal without prior permission; it was a decision that he would not get a waiver of costs because Rule 1-325, Filing Fees and Costs – Indigency, provides that costs may be waived if the court is satisfied that the person is unable by poverty to pay the filing fee and that the appeal is not frivolous. The Chair said that he suspected that in most cases, this approach could be used to address the situation, but it could not have been used in *Riffin v. Baltimore County*, 190 Md. App. 11 (2010), a copy of which is included in the meeting materials, because Mr. Riffin was not filing *in forma pauperis*. (See Appendix 1).

The Vice Chair presented a policy question concerning vexatious litigants to the Committee for their consideration.

MEMORANDUM

TO : Members of the Rules Committee

FROM : Process, Parties, & Pleading Subcommittee

DATE : August 20, 2010

SUBJECT : Policy Question Concerning Vexatious Litigants

A "vexatious" litigant is one who files repeated, frivolous lawsuits. *Riffin v. Baltimore County*, 190 Md. App. 11 (2010) poses the question of whether the Rules Committee should propose a rule that expressly authorizes pre-filing orders that require an alleged frivolous or vexatious litigant to obtain judicial approval for the filing of any future pleading.

The Process, Parties, and Pleading Subcommittee, noting that six states have addressed this issue by statute, asks whether it would be more appropriately addressed by statute or by case law.

SBL:cdc

The Vice Chair told the Committee members that the question before them was whether vexatious litigants should be addressed by Rule or by statute. Ms. Potter asked the Chair his opinion. He answered that, to the extent that it is a constitutional due process issue, the legislature cannot do anything more than the Court of Appeals can by Rule. Judge Norton said that he also had been pursued by Mr. Sindram. Several years ago, a litigant in his court was filing 80-page lawsuits three times a week suing every politician in the State, every celebrity, and people who were deceased. Most of the lawsuits requested a waiver of costs due to indigency, and most were for $800 million. He would sue for the correct amount in District Court, but allege that Maryland owed him that sum. He also got into

the Court of Special Appeals. The denial of his waiver requests kept most of the cases from progressing. Judge Norton expressed the view that the court should have some ability to get rid of a case that is patently ridiculous. If a case has progressed, there will be a hearing and a record that is subject to appellate review. The court should have the ability to stop these cases at some point, subject to a review of the judge's discretion in deciding this. The Court of Special Appeals had invited the Rules Committee to consider a Rule addressing this. That Court does not seem to have a problem if there were a rule on this subject. The trial judges eventually have to start disqualifying themselves.

The Chair said that he gave the Reporter a copy of the order of the U.S. Supreme Court and the order of the Court of Special Appeals. Judge Norton said that he had looked over the meeting materials. He thought that the federal criteria made sense, but California's criteria, which required five litigations in seven years for the court to take action, was somewhat ridiculous, because there could be 500 cases a year of which someone loses 10. Judge Pierson commented that he had had a similar circumstance. He pointed out that the court has the inherent power to limit frivolous cases, and he expressed doubt as to what a rule on this would add. He had a case where a litigant filed 50 repeated requests for reconsideration. He had looked at the *Riffin* case and tried to follow the procedure suggested in that case, which is to issue a show cause order and set a hearing. What would

a Rule regulate if one assumes the court has the power to limit this? It may not be necessary to have a Rule that sets out specific conditions.

Judge Norton responded that the benefit of many Rules is that they lay out a recipe for trial judges to follow. Judge Pierson inquired as to what the Rule would tell judges to do. Judge Norton answered that the Rule could allow the judge to dismiss the case without a hearing. Judge Pierson said that it is not a matter of dismissing the case; it is the fact that the person cannot file a case without permission of the court.

Ms. Smith questioned whether the clerk can be ordered not to accept the filing. Judge Pierson replied that the judge would have to order the clerk not to accept the filing. Ms. Smith pointed out that people can get a friend or neighbor to come to the clerk's office, so the clerk does not recognize the person. Mr. Brault commented that the Process, Parties, and Pleading Subcommittee had discussed this, and the sense of the Subcommittee was that a Rule is not necessary. The case states that it is an injunction filed against the vexatious litigant. Therefore, it is appealable. It is not a good idea to dignify these vexatious litigants by putting in an entire set of Rules recognizing that this problem exists. It is a problem, but it does not happen very often. The *Riffin* case indicates that the procedure should be that the court issues a show cause order and holds a hearing. The Vice Chair remarked that in the case, the judge

was reversed for not providing due process. A Rule would give the basic guidance as to how to proceed. The initial question is if this is in the domain of the legislature, or if it should be addressed by Rule.

Mr. Brault said that the case held that the court has the inherent power to control its own docket. This is not substantive; it is procedural. The issue is whether a Rule is to be written that provides procedures for pre-filing orders involving frivolous litigants, or whether the Rules pertaining to injunctions, Rules 15-501 through 15-505, and the case law are sufficient. It is not a different type of show cause order. Even though the Honorable John G. Turnbull, II, of the Circuit Court of Baltimore County, the judge in *Riffin,* acted on a letter and not a petition, an unusual way to address this situation, the case itself informs judges what to do in the future when they encounter this circumstance as well as any Rule could do. Presumably, the judiciary is well aware of this now. The Subcommittee has not proposed any Rule, and this is why the Subcommittee raised the issue before the Committee to decide if a Rule is necessary. Mr. Sykes expressed the opinion that this is a matter of judicial education. The judges should know about this subject. It can be explained in training seminars and bench books. There should be some administrative communication to the judges. The Vice Chair added that it would also be helpful for attorneys to have a rule on this issue.

Judge Kaplan moved that a Rule should be drafted that would set forth the procedures for dealing with a vexatious litigant, so that the Committee can see what such a Rule would look like. The motion was seconded, and it carried with two opposed.

Mr. Brault said that the Process, Parties & Pleading Subcommittee would draft a Rule.

Agenda Item 3. Consideration of Rules changes recommended by the Process, Parties, and Pleading Subcommittee: Amendments to: Rule 1-311 (Signing of Pleadings and Other Papers), Rule 2-305 (Claims for Relief), Rule 2-311 (Motions), Rule 2-332 (Third-Party Practice), Rule 2-331 (Counterclaim and Cross-Claim), Rule 3-331 (Counterclaim and Cross-Claim), Rule 3-332 (Third-Party Practice), Rule 2-504 (Scheduling Order), and Rule 15-1001 (Wrongful Death)

Mr. Brault presented Rule 1-311, Signing of Pleadings and Other Papers, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

AMEND Rule 1-311 to require pleadings and papers to contain the business facsimile number of the person signing the pleading or paper, as follows:

Rule 1-311. SIGNING OF PLEADINGS AND OTHER PAPERS

(a) Requirement

Every pleading and paper of a party represented by an attorney shall be signed by at least one attorney who has been admitted to practice law in this State and who complies with Rule 1-312. Every pleading and paper of a party who is not represented by an attorney shall be signed by the party. Every pleading or paper filed shall contain the address and telephone number of the person by whom it is signed. It also ~~may~~ shall contain that person's ~~business electronic mail address and~~ business facsimile number, if any, and may contain that person's business electronic mail address.

Committee note: The last sentence of section (a), which allows a pleading to contain a business electronic mail address and a business facsimile number, does not alter the filing or service rules or time periods triggered by the entry of a judgment. See *Blundon v. Taylor*, 364 Md. 1 (2001).

(b) Effect of Signature

The signature of an attorney on a pleading or paper constitutes a certification that the attorney has read the pleading or paper; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for improper purpose or delay.

(c) Sanctions

If a pleading or paper is not signed as required (except inadvertent omission to sign, if promptly corrected) or is signed with intent to defeat the purpose of this Rule, it may be stricken and the action may proceed as though the pleading had not been filed. For a wilful violation of this Rule, an attorney is subject to appropriate disciplinary action.

Source: This Rule is derived as follows:
Section (a) is derived from former Rules 302 a, 301 f, and the 1937 version of Fed. R. Civ. P. 11.
Section (b) is derived from former Rule 302 b and the 1937 version of Fed. R. Civ. P. 11.

> Section (c) is derived from the 1937 version of Fed. R. Civ. P. 11.

Rule 1-311 was accompanied by the following Reporter's note.

> A Judge of the Circuit Court for Baltimore City requested that the Rules Committee consider requiring counsel to put their fax number on pleadings, because this would make it easier and quicker for judges to communicate with counsel. The Process, Parties, and Pleading Subcommittee recommends adopting the suggestion and amending Rule 1-311 accordingly.

Mr. Brault explained that the Honorable Evelyn Omega Cannon, of the Circuit Court for Baltimore City, had raised the issue of requiring attorneys to include their facsimile number when filing a pleading or other paper. Mr. Klein suggested that the business electronic mail address should also be required. The Vice Chair agreed, pointing out that if an attorney has an e-mail address, it should be included. She suggested that the new language should read as follows: "It also shall contain that person's facsimile number, if any, and e-mail address, if any." Judge Pierson noted that this Rule applies to self-represented litigants as well as to attorneys. Ms. Ogletree inquired how it would be known whether a self-represented person has an e-mail address. Judge Pierson observed that pleadings cannot be served by e-mail. The Vice Chair commented that although her suggested change may not make sense for unrepresented litigants, it makes sense for those with counsel. Rule 8-503, Style and Form of Briefs, was changed recently to require that any e-mail address

be included in the appellate briefs. This morning, the Committee discussed requiring an e-mail address in the context of parenting coordination. Mr. Brault agreed, noting that in federal court as well as in District of Columbia Superior Court, all communica-tions are done electronically.

Mr. Klein moved that the Rule require that every pleading or paper have both a person's business facsimile address as well as a business e-mail address. The motion was seconded, and it passed with three opposed. The Vice Chair noted that the Committee note would have to be changed. Judge Pierson said that the word "business" is confusing, and he asked why it has to be in the Rule. The Vice Chair answered that other rules also refer to "business" fax and e-mail address. Mr. Klein referred to Ms. Ogletree's point made at another time that people have multiple e-mail addresses. Ms. Ogletree added that only one should be used. The Vice Chair suggested that the word "business" be retained in the Rule. Judge Pierson remarked that attorneys have an office for the practice of law, and he suggested that the language should be "office business facsimile number." Judge Weatherly pointed out that in her county, in 87% of cases, one or more parties are *pro se*. She expressed the view that the word "office" should not be included in the Rule. The Vice Chair said that anyone could include his or her e-mail address, if the person wanted to. A *pro se* litigant is not likely to have an office e-mail address.

Mr. Johnson asked what the sanction would be if someone does not

include his or her facsimile or e-mail address. The Vice Chair replied that no real sanction exists. Mr. Klein inquired if the address of someone's place of employment could be used. Judge Pierson expressed the opinion that neither the word "office" nor the word "business" should be used in the Rule. Mr. Klein suggested that the last sentence of section (a) read as follows: "It shall also contain that person's business facsimile number and e-mail address, if any." The Vice Chair added that the word "e-mail" could be taken out of all of the Rules in which it appears, because of the broad applicability of the Rules in Title 1, as provided in Rule 1-101 (a). By consensus, the Committee approved these suggested changes.

By consensus, the Committee approved Rule 1-311 as amended.

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

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 300 - PLEADINGS AND MOTIONS

AMEND Rule 2-305 to change the requirement of including the amount of damages sought in a demand for money judgment to a statement that the amount of damages sought is more than the required jurisdictional amount and to add a reference to "punitive damages," as follows:

Rule 2-305. CLAIMS FOR RELIEF

> A pleading that sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain a clear statement of the facts necessary to constitute a cause of action and a demand for judgment for relief sought. Unless otherwise required by law, a demand for a money judgment ~~shall include the amount sought~~ may not contain a statement of the amount of damages sought other than that they are more than the required jurisdictional amount. Relief in the alternative or of several different types, including punitive damages, may be demanded.
>
> Source: This Rule is derived in part from former Rules 301 c, 340 a, and 370 a 3 and the 1966 version of Fed. R. Civ. P. 8 (a) and is in part new.

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

> A member of the bar has suggested that the requirement for pleading specific amounts in circuit court complaints be eliminated. He suggests instead the *ad damnum* pleading requirements in medical malpractice actions be used. His view is that *ad damnum* clauses are damaging to defendants who become frightened upon receiving complaints with huge amounts specified in the clauses and to plaintiffs who may become disillusioned as to the value of their case. He also noted that they are damaging to the legal profession as they lead to a negative public perception by distorting the amounts sought out in tort cases. The Process, Parties, and Pleading Subcommittee recommends adopting the suggestion. They also recommend referring to punitive damages in the Rule, since it may not be clear from the revised language that punitive damages may be pleaded in the complaint.

Mr. Brault explained that the proposed change to Rule 2-305 is to eliminate the *ad damnum* clause in all cases seeking money judgments. This was requested by Kevin McCarthy, Esq., an attorney

in Prince George's County. It is a concept that has been around for a long time. Mr. McCarthy had asked that, in place of dollar amounts, the language of Code, Courts Article, §3-2A-02 addressing medical malpractice should be used: "A claim filed under this subtitle and an initial pleading filed in any subsequent action may not contain a statement of the amount of damages sought other than that they are more than a required jurisdictional amount."

Mr. Brault said that he had been on the Governor's Commission when this was recommended, and the philosophy about this in the area of malpractice litigation was that in order for attorneys to get their name in the newspaper to improve their business, they would sue a physician for a very large amount of money, and a newspaper might have a headline for an article indicating that Dr. _____ was sued for this large amount of money. The medical profession was very displeased about this, as were the insurers of physicians. The headlines and stories were damaging to physicians' professional reputations. The concept of the statutory language was developed to stop the newspaper articles about the filing of these lawsuits. It also encouraged other litigation, because people get the idea that they can make huge amounts of money by suing their physician. The amount of damages in dollars was left in for other types of cases.

Mr. Brault said that the request is from a plaintiff's attorney. The argument against this traditionally had been from the defense bar, whose position was that a person has to know what he or she is being

sued for to know whether the claim is within the defendant's insurance policy limits and to know whether certain extra-contractual responsibilities on the part of the insurance company are triggered.

The insurance companies often advise the insured of his or her rights to have personal attorneys check on the case, because there may be personal liability in the future. The argument made to the Subcommittee was that attorneys put in ridiculous amounts anyway in the *ad damnum* clause, because the Rules in Maryland previously have limited the amount of recovery to that stated in the *ad damnum* clause. The post-verdict Rules did not allow for the adjustment of the *ad damnum* clause to conform to a higher judgment amount.

The motivation for the requested change is to encourage reasonable demands for money amounts when a case is filed. There has been no comment from the insurers on this issue. As far as the medical malpractice litigation is concerned, the insurance carriers routinely write a letter in every malpractice case to the physician letting him or her know that there is a chance the case will go beyond the insurance policy coverage. The insurance companies are going to either have to look at the case realistically and figure out which cases deserve a letter based on coverage and the nature of the client or simply write to everybody.

Mr. Klein inquired if a mechanism exists to remove cases to federal court when no jurisdictional amount is stated. This could be a reason to have the amount stated. Mr. Brault replied that

medical malpractice cases are removed routinely and frequently. One has to state in the petition for removal that the amount of controversy exceeds $75,000. Mr. Michael noted that the plaintiff may want to avoid being transferred out in a diversity case, so he or she would have the option of pleading $74,999 to avoid the transfer. The question is what to do. It is a motions practice issue. If a plaintiff does not want the removal to occur, he or she can file an affidavit that his or her damage request and the amount of the verdict will be limited to no more than $74,999. He expressed the view that the statutory language will work in the Rule and will not hurt plaintiffs who want to keep their case within the local circuit court. A procedure is available to handle this. The *ad damnum* clause is irrelevant, anyway.

Mr. Klein added that a large amount in an *ad damnum* clause might raise false expectations. Mr. Michael said that the clauses are ridiculously high as Mr. Brault had noted. The *ad damnum* clause does not serve a purpose.

Mr. Klein asked if there should be a rule prohibiting *ad damnum* clauses. Mr. Brault commented that he was in the process of closing a case that involved a plaintiff with intestinal problems. She was not dead, brain-damaged, or paralyzed. There were three pages of allegations, and the plaintiff claimed $10 million in damages and punitive damages against a major health care institution. The plaintiff's attorney stated that he wanted $4.7 million to settle the

case. A very good mediator was assigned to the case. The next demand went from $4.7 million to $950,000, and the case settled for about $400,000. This is the kind of case that the proposed change is designed to address.

Mr. Klein said that he had a question about the last sentence of section (a) of Rule 2-305. Is the language clear that if punitive damages are requested, no amount should be stated? The Vice Chair expressed the view that the proposed language is confusing. Mr. Michael explained that this language comes from the line of cases that states that the complaint must be specific as to the basis for the punitive damages and as to the amount. Judge Pierson remarked that if the rules pertaining to *ad damnum* clauses were eliminated, then there would not be a problem. Mr. Klein commented that an attorney would want to know that punitive damages are being claimed. The Vice Chair suggested that the language of the Rule could be: "A demand for a money judgment or for punitive damages may not contain a statement of the amount of damages sought". Mr. Brault remarked that the Rule could not refer to "punitive damages" at all, because it is a demand for a money judgment.

Judge Pierson pointed out that he had a problem with the specific language in the Rules but stated that he was also concerned about other unintended possible consequences. A case that is between $5,000 and $30,000 may be filed in circuit court for a contract case. To determine a right to a jury trial requires a different amount. It

requires a request for $10,000, and it may increase to $15,000, depending on the election, because this issue is on the ballot for the general election. It may not be correct for the language in the Rule to be "are more than the required jurisdictional amount," because it has to be the appropriate amount for there to be a jury trial. It may be a case where the plaintiff wants to file in circuit court but does not want a jury trial. This Rule is being proposed only for circuit court and not for District Court. Is this intentional? He also expressed the concern that there may be other issues besides the right to a jury trial that may not have been considered influencing whether the amount in controversy should be stated in the complaint.

Mr. Brault responded that the jury trial issue had not been considered, and it should have been. The Vice Chair asked if all issues that relate to an amount would be handled in the same manner. If a demand is made for a jury trial, the amount would be alleged. Ms. Potter referred to concurrent jurisdiction. For example, in Baltimore City, some damages are so low, that the attorney files for a judge trial. Without an *ad damnum* clause, this would not be clear. Some attorneys file for an amount under $75,000 to avoid the case being sent to federal court. To avoid a motions practice, it is necessary to put the jurisdictional amount in the complaint. Judge Pierson added that it is the same issue regarding a prayer for a jury trial. It would have to be more than $5,000 but less than $15,000. His concern was the creation of a laddered *ad damnum* clause. Mr. Michael

referred to Ms. Potter's statement about a motions practice. If the defendant demands a jury, the plaintiff can file a motion to strike, explaining that no jurisdiction exists for a jury demand, because the damages will be limited to $29,999. It implicates another step that does not exist now and may lead to a more extended motions practice. Ms. Potter commented that she was in favor of getting rid of *ad damnum* clauses, but she would like to present the issue to the Maryland Association for Justice (MAJ) and to the plaintiffs' bar to try to draft a rule that would avoid creating motion practices.

Mr. Johnson referred to Mr. Brault's statement that the insurance companies send out letters to their customers warning them of a possible liability beyond the insurance policy limits. The rights between the insured and the insurance company are triggered by the amount of the claim that is involved. If the Rule is changed, it could affect the relationship between the company and the insured which is a contractual matter. If the insurance company does not know the amount of the claim, how can it be determined whether the insured is exposed to liability above the policy limit? Mr. Michael inquired if this could be determined by discovery, or if it would be too late. Mr. Johnson responded that later on in the case, there may be additional litigation as to whether there was proper notice of the potential exposure to liability in excess of the policy limit. The alternative is for the insurance company to send a letter to the insured in every case.

Mr. Brault commented that this has been the reason that the Rule was never changed. He expressed the view that the proposed change to the Rule will not have a great impact on litigation, but it could. Ms. Ogletree noted that the Rule could provide that if the case is under the jurisdictional limit for a transfer to federal court, $75,000, the amount should be stated in the *ad damnum* clause, but anything over that amount can be addressed by the proposed language. Then no one would know if the amount requested is $10 million or $2 million. Mr. Michael added that this would solve the District Court problem. Ms. Ogletree remarked that it would not solve the problem raised by Mr. Johnson about the insurance companies not knowing whether the claim exceeds the policy limits.

Judge Norton said that this would not be helpful in the District Court. It is important to establish whether it is a small claim, and whether any appeal is de novo or on the record. There is not much benefit, because the jurisdiction of the District Court is under $75,000. Mr. Michael said that this is only proposed for the circuit court. The Reporter pointed out that Rule 3-305, Claims for Relief, is silent on this issue. Judge Norton observed that replevin cases are not limited by their amount. He noted that in replevin cases, there are damages for losses caused by retention of the property. They are isolated, and it is not worth addressing them in Rule 3-305. Mr. Johnson commented that landlord-tenant cases in the District Court also could involve a large sum of money. Mr. Sykes questioned

whether the landlord-tenant cases include commercial leases regardless of the amount of the lease. Judge Norton answered affirmatively.

The Vice Chair referred to Ms. Potter's request to share the proposed changes with other groups. Mr. Brault reiterated the suggestion by Ms. Ogletree, which was the following language: "Unless otherwise required by law a demand for a money judgment greater than $75,000 may not contain...". Master Mahasa asked whether the amount being sued for could be communicated to the insurance companies. Mr. Johnson replied that the amount will not be known. The defendant will be served with a lawsuit. He or she would send it to the insurance company, and the company does not know what the amount claimed is. It has to set aside reserves.

Mr. Brault remarked that the insurers do not pay attention to the *ad damnum* clauses. They have interior ways of setting aside reserves that are based on their expertise, experience, what the case claims are, and their investigation. They will set what they call "realistic reserves." Mr. Michael noted that the insurers want to know what the parameters of the damages are. What are the lost wages, and the medicals, is there a life health care plan, etc? Mr. Brault observed that some insurance companies feed the facts of the case into a computer, and the computer informs them what the average verdict is in the country, in that state, in that county. The company sets the reserve, and they set the maximum they will pay.

Ms. Potter asked if she could research how this is handled in other states. The Vice Chair asked whether there is an appellate case where the plaintiff's view was that the damages were an amount to be proven at trial. Judge Pierson noted that in *Hoang v. Hewitt Avenue Associates*, 177 Md. App. 562 (2007), the plaintiff sought damages in excess of a certain amount and damages of at least a certain amount, and the court held that this did not comply with Rule 2-305. The Vice Chair commented that before the Rule is sent to the Court of Appeals, it would be important to know what appellate case law is being overruled by Rule. Did the Committee decide to leave out the language referring to "punitive damages?" By consensus, the Committee indicated this language was to be left out.

The Vice Chair asked if the Committee approved of the suggestion to require that if the amount requested in the *ad damnum* clause is less than $75,000, the amount would be stated, but otherwise the amount would not be stated. Mr. Klein said that if this change is made, a note should be added that would explain the derivation of the $75,000 amount. Another way to do this is to refer to the "federal amount in controversy." The Vice Chair pointed out that the language in the medical malpractice statute provides that the amount cannot be stated, other than that the damages are more than a required jurisdictional amount. She suggested that the words "the required jurisdictional amount" should be changed to the words "a required jurisdictional amount" in the Rule. Are there times in the circuit

court when there is no jurisdictional amount? For example, if the jurisdictional amount is $4,000, and the case should be in the District Court, but the plaintiff is seeking an injunction, so the case cannot be in the District Court, there would be no relevant jurisdictional amount. Mr. Klein said that the Rule could provide that the amount shall be stated unless it exceeds _____. There is no need to refer to "the jurisdictional amount." By consensus, the Committee agreed to delete the language "other than that they are more than the required jurisdictional amount."

The Reporter inquired how the Rule should read. The Vice Chair answered that it would read as follows: "Unless otherwise required by law, a demand for a money judgment greater than $75,000 may not contain a statement of the amount of damages sought." The last sentence would not be changed. Ms. Potter remarked that she would research this issue. Mr. Brault said that the Process, Parties & Pleading Subcommittee can look at it again.

Mr. Brault presented Rule 2-311, Motions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 300 - PLEADINGS AND MOTIONS

AMEND Rule 2-311 by adding a new section requiring a party to indicate under the caption of any motions filed if a hearing has been requested, as follows:

Rule 2-311. MOTIONS

(a) Generally

An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, and shall set forth the relief or order sought.

(b) Response

Except as otherwise provided in this section, a party against whom a motion is directed shall file any response within 15 days after being served with the motion, or within the time allowed for a party's original pleading pursuant to Rule 2-321 (a), whichever is later. Unless the court orders otherwise, no response need be filed to a motion filed pursuant to Rule 1-204, 2-532, 2-533, or 2-534. If a party fails to file a response required by this section, the court may proceed to rule on the motion.

Cross reference: See Rule 1-203 concerning the computation of time.

(c) Statement of Grounds and Authorities; Exhibits

A written motion and a response to a motion shall state with particularity the grounds and the authorities in support of each ground. A party shall attach as an exhibit to a written motion or response any document that the party wishes the court to consider in ruling on the motion or response unless the document is adopted by reference as permitted by Rule 2-303 (d) or set forth as permitted by Rule 2-432 (b).

(d) Affidavit

A motion or a response to a motion that is based on facts not contained in the record shall be supported by affidavit and accompanied by any papers on which it is based.

(e) Hearing - Motions for Judgment Notwithstanding the Verdict, For New Trial, or to Amend the Judgment

When a motion is filed pursuant to Rule 2-532, 2-533, or 2-534, the court shall determine in each case whether a hearing will be held, but it may not grant the motion without a hearing.

(f) Hearing - Other Motions

A party desiring a hearing on a motion, other than a motion filed pursuant to Rule 2-532, 2-533, or 2-534, shall request the hearing in the motion or response under the heading "Request for Hearing." Except when a rule expressly provides for a hearing, the court shall determine in each case whether a hearing will be held, but the court may not render a decision that is dispositive of a claim or defense without a hearing if one was requested as provided in this section.

(g) Indication of Request for Hearing

A party who files a motion pursuant to this Rule shall indicate any request for a hearing under the caption of the motion.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 321 a.
Section (b) is new.
Section (c) is derived from former Rule 319.
Section (d) is derived from former Rule 321 b.
Section (e) is derived from former Rule 321 d.
Section (f) is new but is derived in part from former Rule 321 d.
Section (g) is new.

Rule 2-311 was accompanied by the following Reporter's note.

A judge of the Circuit Court for Prince George's County has requested that the Committee consider amending Rule 2-311 to require parties who file motions to indicate under the caption of the motion if they are requesting a hearing.

> The judge explained that parties often indicate at the end of the motion, buried within the motion, or in attached exhibits that a hearing has been requested making it difficult for judges to determine whether a hearing has been sought. Adding the requirement of indicating a request for a hearing under the caption of the motion will make this known to the judge considering the motion at the outset, and hearings can be scheduled more promptly. The Process, Parties, and Pleading Subcommittee recommends adopting the proposal.

Mr. Brault told the Committee that the change to Rule 2-311 had been suggested by the Honorable Michele D. Hotten, who had been on the Circuit Court for Prince George's County and a former member of the Rules Committee, but is now on the Court of Special Appeals. She had explained in her letter that circuit court judges get a large number of motions to look at in chambers, and it may be necessary for the judge to read through many pages of legal argument to find out that at the end of the motion, a hearing has been demanded. If the judge had known this at the outset, it would not have been necessary to search through the entire motion to locate a request for a hearing.

Mr. Klein commented that he already does what the new language provides for. In the title of the motion, he states that it is a motion for _____ and includes a request for a hearing. This ensures that the clerk finds out that a hearing has been requested. Judge Pierson remarked that he has had cases that require him to burrow into the document. The problem with this is that section (f) provides that the movant should request a hearing under the heading "Request for Hearing," but section (g) requires that the request for a hearing

should be put under the caption of the motion. This may lead to arguments if someone puts it in one place but not in the other place. Whenever he gets a motion, he immediately checks the end of the motion to see if a hearing is being requested.

The Vice Chair said that the intention of the new language is if a hearing is requested, the request should also be included in the caption. Ms. Potter added that it should not be under the caption, but in the caption. Mr. Sykes suggested that the request should be only in one place in the motion, right at the top. The Vice Chair inquired if all requests for a hearing should only be as part of the caption. She always sees them in a separate request. Mr. Klein noted that he puts his requests in the caption. Mr. Johnson suggested that a motion could be titled "Motion for Summary Judgment and Request for a Hearing." This would not dramatically change the practice of law. He expressed the opinion that the idea of the Rule is a good one.

Mr. Klein asked if the caption would be "Smith v. Jones" and the title "Motion for _____." The Vice Chair commented that the suggestion is that the first sentence of section (f) would read as follows: "A party desiring a hearing on a motion ... shall request the hearing in the title of the motion or response." Ms. Ogletree noted that one would get a hearing if the motion is dispositive of a claim or defense. Mr. Sykes said that the Rule does not require that there always be a hearing whenever one is requested. Mr. Brault

added that the judge is required to have a hearing only if the case is going to be dismissed. The Vice Chair remarked that if the request for a hearing is not in the title of the motion or response, there will be no hearing. Mr. Michael pointed out that the judge may deny a dispositive motion without a hearing. Mr. Klein commented that the Rule has read this way for a long time, and it would be preferable not to create litigation. The Vice Chair noted that the second sentence of section (f) provides that the court may not render a decision that is dispositive of a claim or defense without a hearing if one was requested.

The Reporter inquired as to how one would request a hearing in the title. Mr. Johnson commented that, ordinarily, a hearing is requested at the end of the motion before the signature line. The Vice Chair said that the proposed change would eliminate the need to do this, but Mr. Johnson remarked that he would continue do this anyway. Judge Weatherly observed that Judge Hotten had stated that often the request for a hearing is in the body of the attorney's motion. Judge Weatherly added that she had seen this also.

Mr. Klein noted that section (f) provides that the hearing must be requested in the motion or response under the heading "Request for Hearing." This section should be amended to state that one requests a hearing in the title of the motion. He suggested that a Committee note be added indicating that this is a change in the longstanding practice, and there should be a forgiveness period. For a time, a

person should not be denied a hearing, because he or she requested it the old-fashioned way. Mr. Sykes observed that when a Rule is changed, the Court of Appeals states the effective date of the change. The Vice Chair commented that the circuit court would be on shaky grounds if a hearing were not granted, because it was requested under the procedure of the old Rule. Judge Pierson stated that when he gets a motion, if it states anywhere that there is a request for hearing, he will grant a hearing.

Mr. Brault noted that the Rule is being amended in section (f) to read as follows: "A party desiring a hearing on a motion...shall request the hearing in the title of the motion or response." Mr. Johnson commented that there are other motions to which this does not apply. The Vice Chair pointed out that these are addressed in section (e).

By consensus, the Committee approved Rule 2-311 as amended.

Mr. Brault presented Rules 2-332, Third-Party Practice; 2-331, Counterclaim and Cross-Claim, 3-331, Counterclaim and Cross-Claim; and 3-332, Third-Party Practice, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 300 - PLEADINGS AND MOTIONS

AMEND Rule 2-332 (a) to delete the word "previously," as follows:

Rule 2-332. THIRD-PARTY PRACTICE

(a) Defendant's Claim Against Third Party

A defendant, as a third-party plaintiff, may cause a summons and complaint, together with a copy of all pleadings, scheduling notices, court orders, and other papers previously filed in the action, to be served upon a person not ~~previously~~ a party to the action who is or may be liable to the defendant for all or part of a plaintiff's claim against the defendant. A person so served becomes a third-party defendant.

. . .

Rule 2-332 was accompanied by the following Reporter's note.

An attorney raised the issue of the meaning of the phrase "not previously a party." He had been involved in a multi-party case in which a potential third-party defendant had been in the action, but then the claim involving that person had been dismissed without prejudice. The attorney who wished to file the third-party claim later was not allowed to do so pursuant to Rule 2-332 (a), because the potential third-party defendant was not "not previously a party." The question is whether the phrase "not previously a party" means the potential party had never been a party before, or the potential party is not a party at the time the current claim is filed. To clarify this ambiguity, the Process, Parties, and Pleading Subcommittee recommends deleting the word "previously" from Rules 2-332 (a), 2-331 (c), 3-331 (c), and 3-332 (a).

CHAPTER 300 - PLEADINGS AND MOTIONS

AMEND Rule 2-331 (c) to delete the word "previously," as follows:

Rule 2-331. COUNTERCLAIM AND CROSS-CLAIM

. . .

(c) Joinder of Additional Parties

A person not ~~previously~~ a party to the action may be made a party to a counterclaim or cross-claim and shall be served as a defendant in an original action. When served with process, the person being added shall also be served with a copy of all pleadings, scheduling notices, court orders, and other papers previously filed in the action.

. . .

Rule 2-331 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 2-332.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE -- DISTRICT COURT

CHAPTER 300 - PLEADINGS AND MOTIONS

AMEND Rule 3-331 (c) to delete the word "previously," as follows:

Rule 3-331. COUNTERCLAIM AND CROSS-CLAIM

. . .

(c) Joinder of Additional Parties

A person not ~~previously~~ a party to the action may be made a party to a counterclaim or cross-claim and shall be served as a defendant in an original action. When served with process, the person being added shall also be served with a copy of all pleadings, scheduling notices, court orders, and other papers previously filed in the action.

. . .

Rule 3-331 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 2-332.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE -- DISTRICT COURT

CHAPTER 300 - PLEADINGS AND MOTIONS

AMEND Rule 3-332 (a) to delete the word "previously," as follows:

Rule 3-332. THIRD-PARTY PRACTICE

(a) Defendant's Claim Against Third Party

A defendant, as a third-party plaintiff, may cause a summons and complaint, together with a copy of all pleadings, scheduling notices, court orders, and other papers previously filed in the action, to be served upon a person not ~~previously~~ a party to the action who is or may

> be liable to the defendant for all or part of a plaintiff's claim against the defendant. A person so served becomes a third-party defendant.
>
> . . .

Rule 3-332 was accompanied by the following Reporter's note.

> See the Reporter's note to Rule 2-332.

Mr. Brault explained that a request had been made to eliminate the word "previously" from Rules 2-332, 2-331, 3-331, and 3-332. In the current Rule, in a third-party practice, the defendant is supposed to serve copies of all pleadings, notices, court orders, and other papers on a person "not previously a party." It was pointed out that a person can be a party and then be dropped as a party. As an example, there are defendants A and B. Mr. Brault represents defendant A. At some point, defendant B settles with the plaintiff under a joint tortfeasor release. Defendant B is dropped from the case. It is a dismissal. As defendant A's attorney, Mr. Brault would seek contribution. He sues defendant B as a third party. However, under the language of the Rule, he cannot go against defendant B, because he can only do so against someone who was not previously a party. This is a problem that no one had considered. The word "previously" has no meaning. The Subcommittee has proposed deleting the word from all four Rules.

By consensus, the Committee approved the changes to Rules 2-332, 2-331, 3-331, and 3-332.

Mr. Brault presented Rule 2-504, Scheduling Order, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-504 (b)(2) to add a reference to "reply memoranda" permitted in a scheduling order and to make stylistic changes, as follows:

Rule 2-504. SCHEDULING ORDER

(a) Order Required

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

(2) The County Administrative Judge shall prescribe the general format of scheduling orders to be entered pursuant to this Rule. A copy of the prescribed format shall be furnished to the Chief Judge of the Court of Appeals.

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

(b) Contents of Scheduling Order

(1) Required

A scheduling order shall contain:

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

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

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

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

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

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

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

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

(2) Permitted

A scheduling order may also contain:

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

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

(C) a date by which any reply memoranda permitted by the court shall be filed;

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

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

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

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

~~(G)~~ (H) provisions for discovery of electronically stored information;

~~(H)~~ (I) a process by which the parties may assert claims of privilege or of protection after production; and

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

(c) Modification of Order

The scheduling order controls the subsequent course of the action but shall be modified by the court to prevent injustice.

Cross reference: See Rule 5-706 for authority of the court to appoint expert witnesses.

Source: This Rule is in part new and in part derived as follows:

Subsection (b)(2)(G) is new and is derived from the 2006 version of Fed. R. Civ. P. 16 (b)(5).

Subsection (b)(2)(H) is new and is derived from the 2006 version of Fed. R. Civ. P. 16

(b)(6).

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

> A member of the bar has requested that the Rules Committee address reply memoranda in motions practice. He pointed out that despite the absence of an express provision in Rule 2-311 setting a deadline for the filing of reply memoranda, most attorneys and judges do not consider that absence to prohibit the filing of replies. He also noted that it is not clear when a reply must be filed.
>
> The Process, Parties, and Pleading Subcommittee recommends amending Rule 2-504 to provide that the date that any reply memoranda are to be filed may be included in the scheduling order. The Subcommittee felt that amending Rule 2-311 to include a reference to "reply memoranda" could result in too many of them being filed. Amending Rule 2-504 provides an avenue for setting a deadline for the memoranda to be filed and does not encourage practitioners to file so many that it could clog the courts.

Mr. Brault told the Committee that the Subcommittee had debated at great length the term "reply memorandum." Mr. Connolly from the law firm of Murphy and Shaffer had spoken eloquently to the Subcommittee about the need for the authority for a reply memorandum filed by the person who filed the motion initially to reply to the opposing party's response to the initial motion. The Honorable John Fader, retired judge of the Circuit Court for Baltimore County, had also been at the meeting, and he had spoken eloquently about the fact that reply memoranda cause problems to judges. He did not want the Subcommittee to do anything that would encourage replies.

Mr. Brault remarked that the attorneys in favor of a reply memorandum indicated that in the complicated cases, particularly in the federal cases, they get motions for summary judgment. The opposition may raise many issues that were not articulated in the main motion, and the attorneys need to reply to the response filed by the opposing party. Judge Fader's view was that if a reply memorandum is needed, the attorney can ask for leave to file one. He and other judges feel that a reply memorandum lengthens the period of time the case takes. The Subcommittee tried to compromise the issue by proposing that the scheduling order could contain a provision for a reply memorandum. This did not satisfy anyone but the Subcommittee. The proposed language is in subsection (b)(2)(C), and it reads as follows: "a date by which any reply memoranda by the court shall be filed." Mr. Brault proposed changing this language to comply with the language of Rule 1-203, Time, so that it would read: "the time within which any reply memoranda...". The question is whether the Rules should address reply memoranda. By including any reference to them, it may encourage the practice of filing them.

The Vice Chair said that she wanted to hear what the judges think. Every time she files a motion, she files a reply to the response that had been filed by the opposing party to her motion. She assumed that judges read the reply memoranda and appreciate them. Judge Kaplan remarked that he reads the reply memoranda, because they are important and allow further understanding of the case. The Vice Chair

commented that she had never been challenged as to the ability to file the reply memoranda. Mr. Brault observed that he had seen a rule in either the U.S. District Court in Maryland or in the D.C. Superior Court which had a provision that nothing beyond a reply is allowed. An attorney would have to ask the judge to be able to file a surreply which is in response to the reply memorandum. He had always assumed that an attorney could file a reply, but not a surreply without the judge's permission. Mr. Michael noted that this provision is in Section 2. of U.S. District Court Local Rule 105, Motions, Briefs, and Memoranda. Mr. Klein stated that he always files reply memoranda if an issue is raised for the first time by the opposition. He does not rehash what was already addressed. The Vice Chair pointed out that Mr. Connolly wrote in the letter that he had been before a trial judge who said that he would not read the reply memorandum.

Judge Pierson remarked that many judges that he knows take the position that since the Rule does not address reply memoranda, they are not permitted. He stated that he is conflicted about this issue, because he feels that a reply memorandum should not be prohibited. The main problem that he has is not setting a specific time limit as to when the memoranda may be filed. It sounds as if the attorney may file the reply memorandum at any time. The Rule should be left as it is. The judges in Baltimore City address all the motions within 21 days, assuming a response is received within the 18-day period. There is no response to many of the motions. The judges then extend

the deadline another 10 days. If a provision is included in the Rules, this time period would have to be extended by another 10 days. An ambiguity may be created as to whether one would have to file a reply or not.

Mr. Klein agreed that no rule change is necessary given the "umbrella" clause in subsection (b)(2)(J) that reads: "any other matter pertinent to the management of the action." Many parties craft their own scheduling orders and submit them. These build in a reply period. There is no rule providing for this, but it is authorized by subsection (b)(2)(J).

Mr. Brault read Local Rule 105.2 of the U.S. District Court for the District of Maryland: "Unless otherwise ordered by the Court, surreply memoranda are not permitted to be filed." In the U.S. District Court in Maryland, the judges allow the attorneys to write letters. In the D.C. federal court, no communication with the court is allowed, except by motion. Courts handle this issue in a variety of ways. He handles his cases similar to the way the Vice Chair had mentioned. He always sends a reply to every motion. He never fails to file a reply if he deems it necessary, and no judge had ever refused to read one of his reply memoranda.

The Vice Chair expressed the concern that there are judges who believe that a reply memorandum is prohibited. She remarked that some clarification is necessary. One suggestion is to file a reply within five days, but after that nothing else can be filed. This

covers the somewhat absurd situation of an opposition to a reply. Judge Kaplan moved that the Rule should not be changed. The motion was seconded. The Vice Chair inquired what would be the harm in expressly allowing a reply memorandum during a short period of time after a response is filed, and then prohibiting anything else beyond that. The letter from Mr. Connolly suggests that the Rule could state that one may file a reply, but that it would not be required. Judge Pierson suggested that the time frame could be that a reply can be filed within 21 days from the filing of the motion. It would be 18 days plus three for mailing. The Vice Chair suggested that the time period could be 28 days. Judge Pierson responded that every motion would have to be held. The time should not be more than five days; the attorneys who wrote the letters asked for 10 days.

The Vice Chair suggested that a Committee note could be added that would provide that the Rule does not prohibit the filing of a reply memorandum. This would help the situation where trial judges feel that they cannot allow them. Mr. Klein suggested that this could be put in Rule 2-311, Motions. Mr. Brault said that the alternative is to put in a provision that reply memorandum must be filed within ___ number of days. Master Mahasa pointed out that this language may compel litigants to file reply memoranda. However, a Committee note gives just enough notice about the issue without compelling attorneys to file reply memoranda. Ms. Potter noted that if the Rule is not changed, then judges such as Judge Fader may not read the reply

memoranda. The Vice Chair called the question on Judge Kaplan's motion to make no change. It failed on a vote of 4 in favor, 11 opposed.

Judge Pierson said that he wanted to check with the clerk in Baltimore City about the consequences of having a time period within which the reply memoranda could be filed. Five days may not be enough. Master Mahasa commented that it would not be necessary to be concerned about the number of days if a Committee note is added that would indicate attorneys who have filed motions may file reply memoranda to reply to the opposing party's response to the initial motion. It can be subsumed into the time allowed for the reply. The reply memoranda could be filed within the same time frame. If a reply is filed, a party would not get extra time to file. Judge Pierson remarked that he had changed his position on this, and he expressed the opinion that reply memoranda should be expressly allowed.

Mr. Klein expressed his agreement with the Vice Chair's suggestion to include a Committee note in Rule 2-311 that would provide that the Rule does not prohibit a reply memorandum coupled with the knowledge that Rule 2-504 already has the catchall provision in subsection (b)(2)(J). The Vice Chair asked if this was a motion, and Mr. Klein said that it was. The motion was seconded. Mr. Johnson said that he liked the language of Local Rule 105.2, which expressly states that no surreply is allowed. The Vice Chair noted that a Committee note cannot state that surreplies are prohibited.

Mr. Brault pointed out that if the language is put in that the Rule does not prohibit reply memoranda, then it would not prohibit surreplies or replies to surreplies. Judge Pierson asked Judge Weatherly if the clerk in her county holds the reply memoranda. Judge Weatherly answered that she thought that the time period ran from the filing of the motion and is not triggered by the opposition.

The Reporter asked if the Committee note could reiterate the fact that the reply memorandum is only to address new issues raised in the response. Judge Pierson moved that this matter be deferred. The motion was seconded, and it passed unanimously. The Vice Chair said that it would be important to get information from each jurisdiction as to how it would affect the jurisdiction to have a built-in reply memorandum time.

Mr. Brault presented Rule 15-1001, Wrongful Death, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 - OTHER SPECIAL PROCEEDINGS

CHAPTER 1000 - OTHER SPECIAL PROCEEDINGS

AMEND Rule 15-1001 to reverse the order of sections (c) and (d), to add a specific form of notice to use plaintiffs, and to change the procedure for service of the notice, as follows:

Rule 15-1001. WRONGFUL DEATH

(a) Applicability

This Rule applies to an action involving a claim for damages for wrongful death.

Cross reference: See Code, Courts Article, §§3-901 through 3-904, relating to wrongful death claims generally. See Code, Courts Article, §5-806, relating to wrongful death claims between parents and children arising out of the operation of a motor vehicle. See also Code, Labor and Employment Article, §9-901 et seq. relating to wrongful death claims when workers' compensation may also be available, and Code, Insurance Article, §20-601, relating to certain wrongful death claims against the Maryland Automobile Insurance Fund. See also Code, Estates and Trusts Article, §8-103, relating to the limitation on presentation of claims against a decedent's estate.

(b) Plaintiff

If the wrongful act occurred in this State, all persons who are or may be entitled by law to damages by reason of the wrongful death shall be named as plaintiffs whether or not they join in the action. The words “to the use of" shall precede the name of any person named as a plaintiff who does not join in the action.

~~(d)~~ (c) Complaint

In addition to complying with Rules 2-303 through 2-305, the complaint shall state the relationship of each plaintiff to the decedent whose death is alleged to have been caused by the wrongful act.

~~(c)~~ (d) Notice to Use Plaintiff

The party bringing the action shall ~~mail~~ serve a copy of the complaint ~~by certified mail to any use plaintiff at the use plaintiff 's last known address. Proof of mailing shall be filed as provided in Rule 2-126.~~ on any use plaintiff pursuant to Rule 2-121. The complaint shall be accompanied by a notice in substantially the

following form:

[Caption of case]

NOTICE TO [Name of Use Plaintiff]

You may have a right to claim an award of damages in this action. You may elect to make a claim, but if so, you must notify the court in writing of your election. You may represent yourself, or you may hire an attorney to represent you. To avoid forfeiture of any rights you may have, you or your attorney must respond within 30 days if you reside in Maryland, 60 days if you reside in another State, or 90 days if you reside outside of the United States.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule Q40.
Section (b) is derived from former Rule Q41 a.
Section ~~(d)~~ (c) is derived from former Rule Q42.
Section ~~(c)~~ (d) is new.

Rule 15-1001 was accompanied by the following Reporter's note.

The consolidated cases of *Williams v. Work, et al.* and *Williams v. Ace American Insurance Company, et al.*, 192 Md. App. 438 (2010) addressed the issue of notice to use plaintiffs in wrongful death actions. A judge of the Court of Appeals has requested that the Rules Committee consider whether any changes to the Rules pertaining to notice to use plaintiffs as a means of protecting statutory beneficiaries are necessary. The Process, Parties, and Pleading Subcommittee recommends expanding the notice provision in Rule 15-1001 to include a specific form of notice to use plaintiffs and changing the way notice is served on use plaintiffs from mailing by certified mail to the notice procedures in Rule 2-121.

Mr. Brault told the Committee that this issue arose from the

consolidated cases of *Williams v. Work, et al.* and *Williams v. Ace American Insurance Company, et. al.*, 192 Md. App. 438 (2010). The behavior of the attorney in these cases was egregious and if the cases had not been referred to Bar Counsel, they should have been. The problem is that in a wrongful death case, the attorney filing the case must name as a "use plaintiff" anyone who might have a claim. This was not a major problem until Maryland amended Code, Courts Article, §3-904, Action for Wrongful Death, to include solatium damages. When the law provided for notifying those persons with a pecuniary interest only, the persons who would have some interest in the decedent were those who were supported in some way by the decedent or who shared in some of the decedent's income or the decedent's household services. This was a defined group of people. When the law was amended to include solatium damage, the initial amendment was related to the death of children and then the death of parents for minor children. This did not produce a problem, because this is a finite group. At the persuasion of the plaintiff's bar, this was opened up because of many sad cases. Now anyone within a certain degree of relationship to the decedent, regardless of the relative's age, can claim.

Mr. Brault said that he had had a case where the decedent was 72 years old and married for the second time. He had divorced his first wife, then he had been remarried for at least 25 years, and his widow brought a malpractice case. Mr. Brault represented the plaintiff. The decedent had three daughters by his first wife. The

daughters became estranged from the father when he left his wife, their mother. The daughters had not had any contact with the father for at least 25 years. They were women in their 40's. The problem arises because the statute requires the attorney filing the case to name as use plaintiffs anyone who might have a claim under the Wrongful Death statute. The three daughters had statutory rights. It is not clear how the attorney is to proceed. The daughters wanted nothing to do with their father.

Mr. Brault pointed out that under the Estates and Trusts law, the second wife could not be appointed after filing a petition to become personal representative, because the daughters had co-equal rights. A petition to appoint the wife was filed in the Orphans' Court in Harford County. Mr. Brault had to write letters to the daughters, and they refused to answer the letters or talk to him. Finally, after enough time had passed, the Orphans' Court judge in Harford County was persuaded that this was wrong. He wrote an opinion interpreting the lack of response as a waiver, and he appointed the widow as the personal representative. Mr. Brault filed a suit naming the daughters as use plaintiffs. He mailed copies of the suit and letters to the daughters, and they did not answer the letters.

Mr. Brault noted that in *Williams*, the attorney filed suit on behalf of the second wife, obtained a recovery, then filed it for the children of the first wife. He filed two lawsuits, and the conflict was glaring. The insurance carrier felt that since there was a

judgment in the first case, the case had ended. The judgment, however, was not worth anything, due to the fact that not all of the necessary parties were notified. The case went up on appeal, and the judgment was set aside. The Court of Special Appeals remanded the case and consolidated it, so the case was retried with all of the families in the same case. The case briefly mentioned at the end that there was no endorsement of the conduct of the attorneys. Mr. Michael wrote an article about it. He attended the Subcommittee meeting and spoke very articulately about the problem that this creates for plaintiffs who do not know how to proceed.

The language proposed by the Subcommittee was suggested by Mr. Michael. It includes a notice and an effort to create a waiver so that the problem can be limited by appropriate notice. The question is if the language affects substantive rights too much. Mr. Brault expressed the view that it does not. The Subcommittee decided that it is procedural. The notice that was put into the Rule is to those statutory use plaintiffs who are not represented by the attorney. The notice reads as follows: "You may have a right to claim an award of damages in this action. You may elect to make a claim, but if so, you must notify the court in writing of your election. You may represent yourself, or you may hire an attorney to represent you. To avoid forfeiture of any rights you may have, you or your attorney must respond within 30 days if you reside in Maryland, 60 days if you reside in another State, or 90 days if you reside outside of the United

States."

Mr. Brault said that he thought that this was important and helpful. It straightens out a significant defect in the Wrongful Death Act procedure. The time to answer follows the time periods in Rule 2-321, Time for Filing Answer. Some attorneys make the use plaintiffs defendants in the case. How can a use plaintiff be a defendant? The Subcommittee felt that by setting up this procedure, the persons notified are use plaintiffs as the statute requires. The use plaintiffs get the same notice as any litigant, and they get the same time frame to answer as in any other case. They get a copy of the complaint, which they can give to an attorney. They can look at what their rights are under the statute. They have to take some action, so the case is not stalled forever.

Ms. Ogletree inquired as to what would happen if the use plaintiffs do nothing. Mr. Michael replied that the case would proceed just as if a defendant had been served. If there are children who will not cooperate, the case cannot be settled and would have to be tried. Under the statute, the jury will make an award for each party. For the three daughters who have not seen their father for 25 years, the award is likely to be zero. To settle the case and get a release, all plaintiffs, including the use plaintiffs, have to sign off. Ms. Ogletree asked about the mechanics of how to proceed in this type of case. The Vice Chair questioned how the plaintiff would get a default judgment. Mr. Sykes suggested that the word "forfeiture"

should be changed to the word “waiver,” because the latter is less substantive. By consensus, the Committee agreed to this change.

Mr. Klein referred to methods for settling cases, such as in asbestos cases where the person who was exposed to asbestos is very ill, and the parties are anxious to settle the cases while the sick person is still alive. However, the case cannot be settled unless the wrongful death claim is settled. The only way he knew of to do this was to identify every beneficiary and have them sign a release waiving their interest in the wrongful death action. Mr. Brault said that a new cause of action arises when the person dies. Theoretically, the settlement is for the lifetime damage, but not for the death. When the person dies, there is a new cause of action. Mr. Michael noted that the attorney is getting someone to waive a right of action that is not yet in existence. Under the law, one can waive a chose in action before it is ripe.

The Vice Chair pointed out that the notice does not say what the 30, 60, or 90 days runs from. Mr. Michael responded that the time should run from receipt of the notice. Ms. Potter suggested that the Subcommittee should look at the termination of parental rights (TPR) cases as far as cutting off someone’s rights in a certain amount of time. The Vice Chair agreed that this is a good idea. Ms. Ogletree added that TPR cases have the same kind of notice. Master Mahasa said that this is in Code, Family Law Article, Title 5.

The Vice Chair pointed out that the time should not run from the

date the person received the notice. Ms. Ogletree remarked that the notice is served with the complaint, so it runs from the date the person was served. The Vice Chair observed that this may not mean anything, because the notice could have been left at someone's house, but the person did not actually see it for a week. It is important to be very specific as to which date the 30, 60, or 90 days runs from. Mr. Brault inquired if it would run from the date of service.

Judge Weatherly noted that Rule 9-105, Show Cause Order; Disability of a Party; Other Notice, has a form for notifying parents about the fact that a petition for adoption or guardianship of their child has been filed. Ms. Ogletree added that the form requests that the parent file a notice of objection within _____ days after the order is served on the person. The Reporter noted that this is different from a certain number of days from receipt of the notice. Mr. Michael explained that one of the reasons the Rule provides for notice to use plaintiffs pursuant to Rule 2-121, Process – Service – In Personam, is that Rule 2-121 states that if personal service cannot be effected, service should be made pursuant to Rule 2-122, which provides for posting of property after the person trying to make service proves that he or she has attempted personal service or that someone is evading service. It is necessary to calculate the time of service done through Rule 2-122. Ms. Ogletree responded that it would be the date that the person serving accomplishes what the order has instructed him or her to do. Master Mahasa added that it also

provides for service by publication.

Ms. Potter inquired if an affidavit of service is to be filed. This is not addressed in this Rule. Ms. Ogletree answered that if the service is in rem, an affidavit of service must be filed. The Vice Chair reiterated that service can be made pursuant to Rule 2-122 if if it can be proved that someone is evading service. Mr. Michael added that once the service rules are applicable, the affidavit requirement must be complied with. Ms. Ogletree said that there is a date certain.

Mr. Brault remarked that the form in Rule 9-105 states, as follows: "...If you do not make sure that the court receives your notice of objection on or before the deadline stated above, you have agreed to a termination of your parental rights." This is in bold print in that Rule, and the same type of language should be put in bold print in the notice form in Rule 15-1001, as follows: "If you do not make sure that the court receives your election by the deadline stated above, you have agreed that you waive your rights to any claim." Judge Pierson said that he did not like this language. He preferred that the language be: "If you do not...., you may lose your right to participate." Thirty days is a relatively short amount of time. A TPR involves years of notice. Ms. Ogletree commented that this is an attempt at finality. The TPR procedure has been tested. If someone knows that they have a child, that person may have rights.

The Vice Chair suggested that a new section (e) should be added

to the Rule to provide this, because the notice provision alone is not sufficient. Mr. Brault responded that the Subcommittee would redraft the Rule. The Reporter asked if the time period should be a flat 90 days from the date of notice, regardless of whether someone is in or out of the country. Mr. Brault commented that notice should be sent by certified letter. Judge Weatherly noted that notice could be served by a private process server. Ms. Ogletree added that if service is not effected, then service can be by an in rem proceeding, mailing, posting, and publication. The Vice Chair said that if the Rule provides that service is to be made pursuant to Rule 1-121, this must be the method of service, unless the person can prove affirmative acts of evasion to accept service. Ms. Ogletree said that Rule 1-121 would not work if the person's whereabouts are unknown. Mr. Michael pointed out that the plaintiff's attorney has to undertake the obligation to find all of the people who are going to help erode the recovery of the person who hired the attorney.

The Vice Chair stated that Rule 15-1001 would be sent back to the Subcommittee.

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