COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100A of the People's Resource Center, 100 Community Place, Crownsville, Maryland on March 10, 2000.

Members present:

Hon. Joseph F. Murphy, Jr., Chair
Linda M. Schuett, Esq., Vice Chair

Albert D. Brault, Esq.
Hon. James W. Dryden
H. Thomas Howell, Esq.
Hon. G. R. Hovey Johnson
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Joyce H. Knox, Esq.
Anne C. Ogletree, Esq.
Larry W. Shipley, Clerk
Melvin J. Sykes, Esq.
Roger W. Titus, Esq.
Hon. James N. Vaughan
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Hon. Paul H. Weinstein, Circuit Court for Montgomery County

The Chair convened the meeting. He said that there were no minutes to approve, but at the next meeting, two or three sets would be ready.

Agenda Item 1. Reconsideration of proposed new Rule 16-810.1 (Immunity)

The Chair presented Rule 16-810.1, Immunity, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

ADD new Rule 16-810.1, as follows:

Rule 16-810.1. IMMUNITY

(a) Immunity From Civil Liability

(1) Official Conduct

Members of the Commission, Investigative Counsel, the Executive Secretary, and their agents and employees shall be absolutely immune from suit and civil liability for any ~~conduct~~ decision or communication in the course of their official duties prescribed by these Rules.

(2) Communications With Disciplinary Authorities

Communications with the Commission, Investigative Counsel, Executive Secretary, and their employees and designees relating to alleged disability or sanctionable conduct, including testimony or statements given in a disciplinary action, proceeding, or investigation, shall be absolutely privileged, and no claim or action predicated thereon shall be instituted or maintained. A complainant or witness shall be immune from suit and civil liability for any communication that is privileged under this section.

Committee note: Subsection (a)(2) of this Rule does not grant immunity for a communication other than a communication with the Commission, Investigative Counsel, Executive Secretary, and their employees and designees, even if the communication is identical to a communication that is privileged under this subsection.

(b) Immunity From Prosecution, Penalty, and Forfeiture

In accordance with Md. Const., Art. IV, §4B (a), upon written request or on its own initiative and at any stage of the proceedings, the Commission may grant immunity from prosecution or from penalty or forfeiture to any person and order the person to testify, answer, or otherwise provide information, notwithstanding the person's claim of privilege against self-incrimination. If the Commission grants immunity, the Commission shall inform the person in writing of the scope of the immunity. No person who has been granted immunity under this section shall refuse to answer or provide information on the basis of the privilege against self-incrimination.

Cross reference: See Code, Courts & Jud. Proc. Art. §13-401 - 403.

Source: This Rule is new.

Rule 16-810.1 was accompanied by the following Reporter's Note.

Proposed new Rule 16-810.1 originally was transmitted to the Court of Appeals as part of the One Hundred Forty-Fifth Report of the Rules Committee. At the November 8, 1999 conference on that Report, the Court concluded that the Rule was overly-broad as drafted, and remanded it to the Committee. Changes proposed by the General Court Administration Subcommittee to narrow the Rule are shown by highlighting and a strike-through.

Section (a) is patterned after proposed new Rule 16-724, Immunity from Civil Liability, in the proposed revised Attorney Disciplinary Rules.

Subsection (a)(1) provides for immunity from suit for the Commission, Investigative Counsel, Executive Secretary,

and other agents and employees of the Commission for decisions in the course of their official duties prescribed by these Rules. This is based on the principle of prosecutorial immunity which includes immunity for investigatory activities prior to a prosecution.

The Committee proposes subsection (a)(2) to encourage complainants and witnesses to participate fully in judicial disciplinary proceedings without fear of retaliation. It is based in principle on Article IV, §4B of the Maryland Constitution which, in subsection (a)(1)(ii), allows the Commission to grant immunity from prosecution to witnesses and, in subsection (a)(3), provides that all proceedings before the Commission are confidential and privileged, except as provided by rule of the Court of Appeals or as ordered by the Court of Appeals.

Section (b) sets out the procedures by which the Commission may grant immunity from prosecution, penalty, and forfeiture and compel a person to provide information. This section expands upon current Rule 16-806 (b)(4), which is proposed to be deleted. New Rule 16-810.1 (b) makes clear that the Commission may grant immunity at any stage of the proceedings. Except where a grant of immunity is on the Commission's own initiative, a request for immunity must be in writing. All grants of immunity must be in writing and specify the scope of the immunity.

The Chair explained that Rule 16-810.1 is a revised immunity rule for members of the Judicial Disabilities Commission, its Investigative Counsel, and related persons. When the Judicial Disabilities Commission Rules were presented to the Court of Appeals, the Honorable John C. Eldridge, a Judge of the Court, expressed the view that Rule 16-810.1 was

too broad. The Rule was sent back to the General Court Administration Subcommittee, which has revised it to conform to the immunity rule in the revised Attorney Discipline Rules. The Committee agreed by consensus to approve the revised Rule.

Agenda Item 2. Continued consideration of proposed Products Liability Form Interrogatories and proposed amendments to certain other forms in Appendix: Form Interrogatories: Form No. 2 - General Definitions, Form No. 3 - General Interrogatories, and Form No. 7 - Motor Vehicle Tort Interrogatories. (See Appendix 1).

Mr. Klein presented the proposed Products Liability Form Interrogatories for the Committee's consideration. (See Appendix 1). Mr. Klein told the Committee that he would highlight the significant changes that had been made. In section (e) of Form No. 9, Product Liability Definitions, Mr. Klein said that he felt it was better to generalize and use the language "a product" in place of "the product." If necessary, the language "the product" can be used in context. The change makes a more useful definition. Sections (f) and (g) and the Committee note are an effort to articulate why it is too difficult to define the term "substantially similar" product. Mr. Klein noted that in making the changes from the last meeting, he inadvertently left out some language. The second sentence of the Committee note should have the language "for such terms" added after the word "definition" and before the word "without." In the same sentence, the word "definition" should be pluralized the second time it appears. The Style Subcommittee can review the way the Committee note is phrased.

Mr. Titus suggested that in the fourth sentence of the

Committee note, the language “in the interrogatories that they propound” should be deleted as unnecessary. The Committee agreed by consensus to this suggestion.

Turning to Interrogatory No. 33, Mr. Klein pointed out that the wording was changed to avoid the question being too broad. Originally, the interrogatory asked whether any product information was changed in any way with respect to the product. It is better to limit the question to the use or risk at issue in the case to focus on matters particularly at issue, and not any change in the product. The Vice Chair commented that she would want to see all changes to decide if they were relevant to the case. Mr. Klein observed that some changes have nothing to do with what is at issue. The Vice Chair remarked that if she were propounding the interrogatory, she would want to determine what changes are relevant and would not want that determination made by the person answering the interrogatory.

Mr. Klein pointed out that Interrogatory No. 37 is an example of a change necessitated by the modification of the definition of “product information” as not necessarily referring to the particular product. Mr. Sykes remarked that a “product” is a defined term that means the particular product. The change to the definition made the term “product information” refer to “a product” rather than “the product.” It is not clear that this does not refer to the particular product. Mr. Klein said that the language “a product” is not

bolded. Mr. Sykes asked if the key to this is the bolding of the language. He expressed the view that one must be sophisticated to understand this difference. He suggested that there could be a Committee note pointing out the distinction. Mr. Titus suggested that it might be helpful to bold the word "the" when referring to "**the** product," to indicate that one is referring to a particular product. The Committee agreed by consensus to this change.

Mr. Brault commented that if each question in the Interrogatories were to count as one, there would be as many as 90 interrogatories. The Vice Chair said that she had brought up this issue at the previous meeting but was told that it is too late to do anything about this. The Reporter noted that the same issue arises in the domestic interrogatories. Mr. Titus observed that this is the price to pay for uniformity of the questions. Mr. Klein explained that the Interrogatories are a composite of questions suggested by the practicing bar. When he began working on the Interrogatories, there were even more questions.

Turning to Interrogatory Nos. 61 to 67, Mr. Klein pointed out that these have been reworked. One of the changes is the addition of the phrase "state any facts that support your contention." Interrogatory No. 62 was eliminated, and Interrogatory No. 62 was redrafted, so that the language in No. 62 was built in as a subpart of Interrogatory No. 61. Mr. Titus inquired as to why Interrogatory No. 62 asks for the

cost of an alternate design and questioned as to why this information is relevant. The Vice Chair replied that it is an element of the plaintiff's proof to show cost. Mr. Klein noted that the jargon is "r.a.d." (reasonable alternate design.)

Mr. Klein explained that former Interrogatory No. 80 was too broad. He commented that if he were the plaintiff, he would not want to answer former Interrogatory No. 80. The way the question had been framed, the defendant would not have been likely to get a meaningful answer. The interrogatory has been deleted. The other changes are numbering changes. The interrogatories which were not related to product liability were not changed.

The Reporter noted that section (b) of the definitions in Form No. 2 of the General Interrogatories, which appear in the package after the Product Liability Interrogatories, needed a correction which added as part of the questions the identity of the present custodian of the document.

The Reporter said that Interrogatory No. 6 of Form No.3 of the General Interrogatories had been added by the Subcommittee some time ago. The Chair pointed out that the word "statement" could be substituted for the word "admission," but the argument could then be made that this is not a statement under Rule 5-803(a). Mr. Sykes observed that one cannot tell what is an admission until the issues are framed at trial. Mr. Brault remarked that when the Evidence

Rules were written, there was discussion of admissions against interest. In reality, every statement by a party-opponent is an admission. There is case law on this subject. Using the term “admission” may create confusion. The statement of a party-opponent has to be against a party’s interest. Statements against interest include an admission of a crime or wrongdoing.

The Vice Chair commented that when the General Interrogatories originally were before the Rules Committee, this issue was discussed. She suggested that the minutes of those meetings could be reviewed. She does not like this question because the attorney has to figure out what statements are admissions against interest based on legal theories in the case. This is attorney work product. Mr. Titus suggested that this Interrogatory go back to the Subcommittee for further review. The Reporter said that the Subcommittee had looked at the former interrogatories of former Judge Niles, and that there had been debate over one of those interrogatories that was similar to this.

Mr. Brault suggested that Interrogatory No. 6 could begin, as follows: “If you contend that any statement by this party supports your contention...”. Mr. Titus pointed out that Interrogatory No. 1 of Form 3, General Interrogatories, provides: “**Identify** each **person**, other than a **person** intended to be called as an expert witness at trial, having discoverable information that tends to support a position that

you have taken or intend to take in this action...". Mr. Brault suggested that Interrogatory No. 6 could have the following language after the language which reads "declaration against interest": "**identify** any statement made by a party...".

Mr. Sykes asked if this problem is self-correcting. If the defendant files an interrogatory which says "if you contend that I made a declaration against interest, tell me what it is," the party asserting the admission has to identify it. This is an exception to the hearsay rule. The party who wants the statement admitted has the burden of giving advance notice. Mr. Brault noted that the quantity of related conversations can cause a serious problem. The Vice Chair commented that in her practice in Baltimore, everyone refused to answer Interrogatory No. 6, and the issue never went before a judge for a resolution. She recommended that the Committee give this serious thought. It is a question that is difficult to answer in advance of trial. Every statement is a potential admission. One may need to hear the evidence to answer the question. The Chair said that someone may know the day after an accident that the defendant admitted to his neighbor that he had drunk too much. This kind of information can be given out. The Vice Chair agreed, but remarked that the broadness of the question concerns her.

Judge Dryden observed that some information is hidden. The Chair asked where this kind of information comes out, and

Mr. Brault answered that it often comes out in depositions. The Chair pointed out that in some cases there are no depositions, because the parties cannot afford them. The Interrogatory should be narrowed to statements admissible under Rule 5-803 (a). The Vice Chair suggested that the minutes of the meeting where the Interrogatories were discussed should be looked at. Mr. Titus said that this matter would be tabled for now. The Committee agreed by consensus.

The Chair drew the Committee's attention to Form No. 7 of the Motor Vehicle Tort Interrogatories. Judge Vaughan asked what the term "written" means. He asked if something is "written" if it is typed in a computer, but it is never printed. The Vice Chair responded that in her opinion, what is typed into the computer would be written. Judge Vaughan suggested that the language "or document" could be added after the word "report." The Committee agreed by consensus to this change. The Chair questioned as to how oral reports would be handled. He said that if this is a concern, the language "written or oral" could be deleted, and the language "if applicable" could be substituted for the language "if written." The Vice Chair inquired as to why the language "if written" is in the interrogatory. The Reporter replied that this is probably because there is no custodian of an oral report.

Mr. Titus suggested that the language "written or oral"

could be deleted, and the last part of the interrogatory could read as follows: "... person who made the report and, if the report is contained in a document, the custodian." The Vice Chair agreed with Mr. Titus' suggestion to delete the language "written or oral," and the Committee agreed by consensus to make this change. The Chair suggested that the language "of any document" be added after the word "custodian," and the Committee agreed by consensus to this change. Mr. Brault said that one problem is that reports to insurance companies are not discoverable. The Chair commented that the language is "in the ordinary course of business," as opposed to "in preparation of litigation." Mr. Brault noted that for large businesses with a lot of accidents, making reports to insurance companies is part of the ordinary course of business, but the reports should not be discoverable. The Chair replied that the Interrogatory may need to be restyled. The Committee approved the Interrogatory, subject to Style revisions.

Agenda Item 3. Reconsideration of certain rules in proposed revised Title 9, Chapter 200 (Divorce, Annulment, Alimony, Child Support, and Child Custody): Rule 9-210 (Annulment--Criminal Conviction), Rule 9-211 (Revocation of Limited Divorce--Joint Application), and Rule 9-212 (Attachment, Seizure, and Sequestration).

In the absence of the Chair of the Family and Domestic Subcommittee, the Reporter presented Rule 9-210, Annulment--Criminal Conviction, for the Committee's consideration.

Rule 9-209. ANNULMENT--CRIMINAL CONVICTION

Upon the filing of a complaint by an interested person, together with a certified copy of the docket entries of a judgment of conviction of one or both spouses of bigamy or of marrying within a prohibited degree, the court shall enter a judgment of annulment and may grant other appropriate relief.

Cross references: For within what degrees of kindred or affinity marriages are void, see Family Law Article, §§2-201 and 2-202. For crime of bigamy, see Article 27, §l8. For crime of unlawful marriage, see Family Law Article, §2-202. For venue, see Code, Courts and Judicial Proceedings Article, §§6-201 and 6-202.

Source: This Rule is derived from former Rule S76.

Rule 9-210 was accompanied by the following Reporter's Note.

This Rule is derived from Rule 9-209 (former Rule S76). It clarifies how a judgment of annulment may be obtained following a criminal conviction of one or both parties of bigamy or of marrying within a prohibited degree.

At its January, 2000 meeting, the Rules Committee remanded this Rule to the Family/Domestic Subcommittee for research into its history. Research revealed that the Rule is based on a statute that was repealed in 1962 (Code, Article 62, §16) and that on two occasions (June, 1965 and May, 1996), the Committee had voted to delete the Rule. The Subcommittee considered whether the Rule should be deleted or retained, and concluded that it should be retained with modifications.

Although a marriage within a prohibited degree or one that is bigamous

> is void *ab initio*, a judgment of annulment is desirable to permanently establish the status of the parties and resolve any issues arising out of the unlawful marriage, such as a determination of marital property issues, ownership of real and personal property, and any entitlement to alimony. See Townsend v. Morgan, 192 Md. 168 (1949) and Code, Family Law Article, §§8-202, 8-203, and 11-101.
>
> The current Rule provides that a judgment of conviction of the unlawful marriage serves as an annulment, provided that a transcript of the docket entries in the criminal proceeding is recorded on the records of the circuit court of the same county. The Subcommittee believes that the annulment process should be commenced by the filing of a complaint, as in other civil actions. The Subcommittee also recommends that the provisions of Code, Courts Article, §§6-201 and 6-202 should govern venue, and has added those sections to the cross reference that follows the Rule. Because the action may be filed in a county other than the county in which the judgment of conviction was entered, the copy of the docket entries must be certified. Also added to the Rule is the statement that the court "may grant other appropriate relief" in addition to the annulment which the court "shall" grant.

The Reporter explained that Rule 9-210 had been remanded to the Subcommittee for further research which indicated that previously on two occasions, the Committee had voted to delete the Rule. When the Subcommittee recently considered the Rule, they first agreed with the previous decisions to delete it, but then they decided it should be retained with some modifications. As the Reporter's note indicates, a judgment of annulment is desirable to permanently establish the status

of the parties and resolve any issues arising out of the unlawful marriage, such as marital property, real and personal property, and alimony.

The Chair said that if Rule 9-210 is literally applied, someone could come to the court with a judgment and docket entries, and be awarded relief that the other side may not even know about. He suggested that the Rule should be deleted. The Reporter pointed out that the complaint requires service, but the Vice Chair observed that the Rule does not read that way. The Chair commented that this is similar to a confessed judgment. He noted that even without the Rule, the court can grant relief. Judge Vaughan noted that there is very little law pertaining to annulments.

The Vice Chair inquired as to whether there are other grounds for annulment besides bigamy and marrying within a prohibited degree. The Reporter answered that other grounds exist, such as fraud or the fact that the marriage was never consummated. The Vice Chair remarked that there is no rule pertaining to the other grounds for an annulment, and this does not happen very often. The Reporter replied that bigamy and marrying within a prohibited degree do occur and that these are the only two grounds for which there can be a criminal conviction based on a marriage that is void ab initio. She explained that the purpose of the Rule is so that no one can argue that the marriage was already annulled by the criminal conviction, leaving no opportunity for alimony or

other relief. Also, if a title search is made on property purchased as tenants by the entirety because the couple thought that they were married, the title to the property could be affected, but no one will search the criminal records.

The Vice Chair asked if this Rule should be put into a general rule pertaining to filing complaints for annulments. The Reporter responded that some annulments are voidable, and some are void ab initio. In the two situations to which the Rule refers, the criminal convictions determine that the marriage was void ab initio and it is annulled on that basis. Mr. Sykes noted that if the marriage is void ab initio, a complaint may be filed by an interested person for a judgment of annulment. The procedure is the same as any family law case where someone wants an annulment and financial relief. The Vice Chair commented that if someone came to her with a void ab initio marriage asking to have the court grant relief, it would not occur to her that she would not be able to file a complaint. Mr. Brault observed that under the existing rule, a judgment of conviction shall serve as an annulment. The change is that the court has to enter a second judgment.

Judge Johnson expressed his agreement with the Reporter as to the difficulty in finding this in a title search. The Chair said that the current Rule requires the judgment to be recorded in the records of the circuit court. He commented that if a party wanted to get a judgment of annulment on the

basis of bigamy or marrying within a prohibited degree, and after a complaint is filed, the court grants the relief, the Rule would provide better protection for a subsequent title search. A judgment of annulment is similar to a judgment of divorce. Mr. Brault noted that under the current Rule, the judgment of annulment is recorded in the judgment records, similar to a civil judgment. Mr. Titus suggested that the current Rule could provide that the judgment of annulment is recorded in the civil judgment records. The Chair remarked that there is the financial concern of forcing the person to have to file a complaint and involve a judge.

The Vice Chair inquired as to why there has to be a judgment of annulment. The parties can remarry because the last marriage was void. Judge Vaughan pointed out that the spouse may not want the annulment. The Reporter responded that this does not matter because the marriage is void.

The Chair suggested that this matter could be handled on the criminal side. The Committee could send a letter to the legislature asking that the bigamy law be changed so that when the judge enters a judgment of conviction, the judge shall order that the judgment be recorded in the civil records. The Vice Chair asked what happens if the judgment of conviction is reversed on appeal. The Chair replied that the judgment of a void marriage is voided. The Vice Chair noted that this is a policy question. The 1962 statute was repealed, and twice the Committee voted to repeal this provision. If the Rule is

repealed, the annulment is not automatic. Judge Johnson noted that the under the common law, the annulment is automatic. The Vice Chair said that the statute was created to provide that the judgment of conviction constituted the automatic annulment. Judge Johnson observed that the statute memorialized the common law.

The Chair suggested that the procedure should require that a party has to file a complaint to annul the marriage, and the court can make the decision. The Vice Chair moved to delete Rule 9-210, the motion was seconded, and it passed on a vote of eight in favor, four opposed.

The Reporter presented the deletion of Rule 9-211, Revocation of Limited Divorce--Joint Application, for the Committee's consideration.

~~Rule 9-211. REVOCATION OF LIMITED DIVORCE -- JOINT APPLICATION~~

~~On the joint application of the parties filed at any time after entry of a judgment for limited divorce, the court that entered the judgment may revoke it.~~

~~Source: This Rule is derived from former Rule S77 a.~~

~~Cross reference: See Article III, §38, Maryland Constitution. See also Koger v. Koger, 217 Md. 372 (1958); Weiss v. Melnicove, 218 Md. 571 (1959). For other powers of the court as to judgments for limited divorce, see Code, Family Law Article, §§1-201 and 1-203.~~

Rule 9-211 was accompanied by the following Reporter's

Note.

As originally approved by the Committee, proposed revised Rule 9-211 retained the substance of current Rule 9-210 a (former Rule S77 a). Section b of current Rule 9-210 was omitted as unnecessary, in light of Code, Family Law Article, §8-102.

The Family/Domestic Subcommittee recommends that the remainder of the Rule also be deleted as unnecessary, in light of Code, Family Law Article, §7-102 (d).

The Reporter explained that the Rules Committee had approved Rule 9-211 but had deleted section b of the current rule because it was covered by Code, Family Law Article, §8-102. Because the remainder of the Rule is covered by Code, Family Law Article, §7-102 (d), the Subcommittee decided, through a conference call, to delete the Rule entirely. The Committee agreed by consensus that the Rule should be deleted.

The Reporter presented Rule 9-211, Attachment, Seizure, and Sequestration, for the Committee's consideration.

Rule ~~9-212~~ 9-211. ATTACHMENT, SEIZURE, AND SEQUESTRATION

(a) Alimony From a Nonresident Defendant

A plaintiff who seeks an order for the attachment or sequestration of the defendant's property under Code, Family Law Article, §11-104 shall proceed in accordance with Rule 2-115. The court may pass any order regarding the property that is necessary to make the award effective.

(b) Enforcement of a Judgment Awarding Child Support, Alimony, Attorney's Fees, or

a Monetary Award

> When the court has ordered child support, alimony, attorney's fees, or a monetary award, the property of a noncomplying obligor may be seized or sequestered in accordance with Rules 2-648 and 2-651.
>
> Source: This Rule is new.

Rule 9-211 was accompanied by the following Reporter's Note.

> This Rule is new. Its two sections establish procedures in certain actions arising under this Chapter in which attachment, seizure, or sequestration may be appropriate.
>
> Section (a) directs a plaintiff who seeks an award of alimony from a nonresident defendant under Code, Family Law Article, §11-104 to proceed in accordance with Rule 2-115. Because the court does not exercise personal jurisdiction over the defendant, this is an *in rem* proceeding. The Family/Domestic Subcommittee believes that the procedures set out in Rule 2-115 (Attachment Before Judgment) provide the appropriate mechanism to be used in cases under Code, Family Law Article, §11-104.
>
> Section (b) makes clear that the procedures set forth in Rules 2-648 (Enforcement of Judgment Prohibiting or Mandating Action) and 2-651 (Ancillary Relief in Aid of Enforcement) may be used to seize or sequester the property of a noncomplying obligor who has been ordered to pay child support, alimony, attorney's fees, or a monetary award.

The Reporter explained that this Rule had been several pages long, but it had been redrafted to shorten it. Section

(a) provides that if alimony from a nonresident defendant over whom the court is unable to exercise personal jurisdiction is being sought, and the defendant has property in Maryland, the plaintiff shall proceed in accordance with Rule 2-115, Attachment Before Judgment, to effectuate the provisions of Code, Family Law Article, §11-104. Section (b) is the sequestration portion of the Rule that may be used to enforce child support, alimony, attorney's fees and monetary awards when someone is not fulfilling his or her obligations. At the previous meeting, Master Raum had explained that he used sequestration for these purposes and had suggested that a rule on the procedure for this would be helpful to practitioners. The Committee decided that the Rule should refer to Rule 2-648. The Subcommittee added the reference to Rule 2-651.

Ms. Ogletree, Chair of the Family/Domestic Subcommittee, continued with the presentation of the Rule. Mr. Brault inquired whether there should be a footnote to section (a) which states that this is an in rem proceeding. Ms. Ogletree responded that there is no jurisdiction over the person of the defendant, but he or she has property in Maryland. The statute gives the plaintiff the right to attach the property. Mr. Brault commented that he sees this proceeding differently. The property is taken, the case is then tried. If the plaintiff wins, he or she gets a form of attachment. Ms. Ogletree countered that it is a prejudgment attachment. Mr. Brault remarked that the plaintiff does not have to prove the

case to encumber the property. The Vice Chair noted that the attachment before judgment proceeding would be the one which is appropriate. Mr. Brault inquired if the reference should be to "Rule 2-122" instead of to "Rule 2-115." The Vice Chair responded that Rule 2-122 is only a service provision. Mr. Brault remarked that in rem or quasi in rem proceedings are covered by Rule 2-122. Ms. Ogletree pointed out that the attachment process is dealt with in Rule 2-115. The Chair added that Rule 2-115 refers to Rule 2-122 for service.

The Vice Chair pointed out that the title of the Rule does not appear in the substance of the Rule. The Style Subcommittee can look at this. Mr. Titus asked about the jurisdiction of the court to grant a divorce when one of the parties cannot be found. Ms. Ogletree responded that the statute, Code, Family Law Article §11-104, permits the court to award alimony, and the Rule is the procedure to do this. Mr. Brault noted that the statute does not provide that the court can sequester property. The Chair said that the Rule gives that right. The Vice Chair added that the language in the second sentence of section (a) which reads, "[t]he court may pass any order..." provides a mechanism to make the Rule effective. She suggested that section (a) begin as follows: "[A plaintiff who has sought alimony under Code, Family Law Article, §11-104...". Mr. Howell suggested that language should be: "A plaintiff who seeks alimony from a nonresident defendant under Code, Family Law Article, §11-104...". The

Chair suggested that the language be: "A plaintiff who seeks alimony from a nonresident defendant under Code, Family Law Article, §11-104 may seek an order for the attachment or sequestration of the defendant's property in accordance with Rule 2-115." The Committee agreed by consensus with the Chair's suggestion.

Turning to section (b), the Vice Chair commented that the tagline refers to a judgment awarding child support. In a domestic situation, there may be an order to pay child support, but no judgment, because all claims have not been resolved. The Chair suggested that the word "order" be substituted for the word "judgment" in the tagline. The Vice Chair pointed out that Rules 2-648 and 2-651 pertain to enforcement of judgments, not orders. The Chair reiterated that the word "order" should replace the word "judgment." Ms. Ogletree remarked that this would take care of pendente lite matters. The Committee agreed by consensus to this change.

Agenda Item 4. Consideration of a policy issue concerning Offers of Judgment or Compromise (See Appendix 2).

The Honorable Paul H. Weinstein, County Administrative Judge for the Circuit Court of Montgomery County, Maryland, presented the issue of a proposed new rule pertaining to offers of judgment. (See Appendix 2). Judge Weinstein said

that for years his view has been that Maryland should adopt a rule similar to the federal rule on offers of judgment. Recently, more members of the bar have been in support of this. The details of his plan are set forth in the memorandum to the Rules Committee. The proposal is flexible with respect to the effective date. He provided for a window of time with respect to when the court can assess costs.

Judge Weinstein explained that the insurance companies are becoming inflexible about offering money to settle cases, and this is clogging up the District and circuit courts. The value of a case is not necessarily what the plaintiff believes it to be, but there is usually some value to the case. It is a misperception that an offer of judgment rule favors the defense. It is equally beneficial to either side. As Chair of the Conference of Circuit Judges, Judge Weinstein said that he has spoken to judges around the state who are in favor of this rule. He urged the Committee to consider either his proposal or another similar proposal.

Judge Kaplan expressed his agreement with Judge Weinstein. With District Court defendants praying jury trials, many cases are more difficult to settle. The insurance companies have one monetary figure set by a computer that the representatives of the companies are allowed to offer, and they have no authority to deviate from that amount. One advantage is that this has discouraged plaintiffs' attorneys from filing frivolous suits, but on the other hand,

the system is being tied up with small cases.

The Vice Chair asked about cases other than insurance cases. The Chair responded that the federal courts have extensive experience with offers of judgment. Mr. Klein commented that the details of this idea need to be discussed. He has seen proposals with a bilateral rule as opposed to a defendant-only rule. This is a significant difference as it shifts from the American Rule to the English Rule. There is a risk that attorney's fees will be shifted to the defendant, which could be a tool of abuse in a multi-party case. In thirty-one of the thirty-eight states which have an offer of judgment rule, it is a defendant-only rule as is the federal rule. Only seven states permit the plaintiff to make an offer. Alaska allows the plaintiff to recover attorney's fees. None of the other states allow this, except for Connecticut, which limits the fees to $350. Lawsuits, such as asbestos cases, are bankrupting corporations, because the cases are not settling. If the offer of judgment procedure shifts to the English rule, then the plaintiff controls whether the case goes forward. This is fraught with mischief and will result in more litigation with the advantage going to the plaintiff. In multi-party cases, if an offer is made 60 days after service, the defendant may not have any idea as to how to respond.

Mr. Klein inquired as to how the offer of judgment rule would work in asbestos cases. Judge Kaplan replied that

certain case values have developed over time for the various illnesses associated with asbestos. The problem is when the plaintiff asks for more than these values. Mr. Klein remarked that if the plaintiff has the opportunity to recover 100% of the attorney's fees, there will always be a trial.

Mr. Howell inquired if the defendant is liable for the contingency fee, and Mr. Klein responded in the affirmative. Mr. Howell expressed the view that this may not be a reasonable fee. The Chair said that there has been litigation over what a reasonable fee should be. Mr. Howell suggested that what a reasonable fee is could be spelled out in the Rule. The Chair commented that the Rule could be structured another way. If one side is willing to offer money, and the other side will not accept the offer, the attorney could write a letter stating the amount of the attorney's fee so far and explaining that if the case goes to trial, and the award is no more than what the party is willing to offer, the other side may have to pay the attorney's fee calculated from the time of the offer to the time of the trial. Rule 1-341 allows this relief. The fact that an insurance company will not settle will force the plaintiff's attorney to incur expenses. Something is needed in the Rule that gives the judge discretion to act when there is a refusal to negotiate in good faith.

Mr. Brault commented that juries have been giving lower awards in automobile tort cases. The reason is that the cost

of automobile liability insurance is known to the jurors. They look at small injuries with a jaundiced eye. This has been a bonanza for the insurance industry. Mr. Brault expressed the opinion that the American Rule should not be changed. Fee-shifting is a major step. The Vice Chair remarked that there have been past discussions on the same topic. The federal rule involves only costs, but the discussion today pertains to attorney's fees. There may be a good faith dispute over liability, and the offer of judgment may have a chilling effect on access to the courts. If there is a threat that one party must pay the other side's attorneys fees, the rule may keep out people who should have access to the court. There should be a middle ground between costs and attorney's fees. The Chair suggested that a family division version of the Rule could be tested and then expanded. Judge Weinstein said that the principles of Rule 1-341 could be crafted into the offer of judgment rule. He remarked that he is not asking for the English rule to be adopted. There could be a limit on attorney's fees, or criteria added as to when attorney's fees should be awarded.

The Chair commented that at a settlement conference, the judge or presiding officer could state what the case should settle for. An offer of judgment may be made by someone at the settlement conference and refused at the conclusion of the conference. The proposed Rule in subsection (d)(3) should not require the judge to enter an order requiring the offeree to

pay to the offeror all costs, reasonable litigation expenses, and attorney's fees incurred after the making of the offer. The word "shall" should be changed to the word "may." The key to the settlement conference is the neutral pronouncement. From that moment on, costs and counsel fees may be awarded. Mr. Sykes pointed out that the neutral pronouncement may not reflect a deep understanding of the case. Following the case through at this point is a gamble. It could be reversed on appeal. Everyone in good faith does not necessarily assess the value of the case correctly. If the case is assessed incorrectly, fee-shifting should not be the result. A client who must pay the other side's attorneys fees probably will sue his or her own attorney for malpractice because the attorney has been unreasonable as declared by the settlement judge. The offer of judgment sounds like a good idea, but it is not workable. The law of unexpected results takes over, and it may cause more harm than good.

Judge Vaughan suggested that to get rid of the minor cases, the rule should be limited to cases where the *ad damnum* clause is less than $100,000. The Chair asked Judge Weinstein whether there have been any cases in which an attorney tried to use Rule 1-341 to recoup attorney's fees beyond a certain point. Judge Weinstein answered that there have been a few such cases over the years, and Judge Kaplan added that he has awarded Rule 1-341 fees. Mr. Brault commented that when Rule 1-341 first was introduced, it was used very often. The

Honorable Howard Chasanow, former Judge of the Court of Appeals, had written an opinion which held that Rule 1-341 is limited to unusual situations. Judge Weinstein remarked that at that point, the use of the Rule almost disappeared.

The Chair said that a judge may suggest a settlement, and one of the parties refuses. Later on, the attorney for the other side may ask for a sanction under Rule 1-341, claiming that his client offered to settle, and now has to pay $1000 in legal fees. The Vice Chair noted that Rule 1-341 cannot be used for this purpose. Judge Kaplan suggested that Rule 1-341 could be modified to include the failure to settle. The Vice Chair observed that there has been much litigation over the bad faith failure to settle. Mr. Brault pointed out that the case of Needle v. White, 81 Md. App. 463 (1990) held that the issue of bad faith is for the jury and is not determined under Rule 1-341. Ms. Ogletree commented that a change to Rule 1-341 for bad faith failure to settle could be useful in domestic cases where a settlement is reached but does not hold up.

The Vice Chair said that she had a major philosophical problem with an offer of judgment rule. If a claim or defense is not made in bad faith, and is not so bad as to warrant the attorney's fees, the courts are available to work this out. The judiciary wants mechanisms to get rid of bad cases, which is a good goal, but this is not the way to accomplish it. If the bar supports mandatory alternative dispute resolution

(ADR), there would be a greater ability to resolve these issues. In mediation, one person hears both sides and helps the parties to resolve the conflict. Mr. Sykes pointed out that the Fourth Circuit has mandatory mediation supplied by the judicial system. Mr. Brault remarked that the quality of mediators in the Fourth Circuit would be hard to match in ordinary situations. Judge Weinstein told the Committee that he is a leading proponent of ADR, but he has the sense that the Court of Appeals does not favor mandatory ADR.

The Chair suggested that instead of a mechanical rule, language could be added to Rule 1-341 which would include the idea that refusing to accept an offer of compromise in bad faith or without substantial justification could warrant sanctions under the Rule. Mr. Brault pointed out that the Court of Appeals turned down the idea of modifying Rule 1-341 the last time it was proposed. The Chair commented that the Court probably will not be interested in a mechanical offer of judgment rule.

Judge Weinstein said that there have been many major changes in the practice of law over the past 20 years. Pro se litigation is exploding in the family area. This is a serious problem as the parties do not understand the law, resulting in frivolous cases. Judge Johnson added that these parties often expect the court to be their lawyer. The Vice Chair asked if an offer of judgment rule would address these problems. Mr. Titus inquired as to why Rule 1-341 cannot take care of this.

The Vice Chair remarked that when a case is truly frivolous, something should be done. If a case is not truly frivolous, there could be a potential threat to keep the person from pursuing the claim. What motivates this push to make a change is the inflexible attitudes of the insurance companies at settlement conferences.

Mr. Howell commented that where a judge presides at a settlement conference and makes an educated guess as to the settlement amount, and a party is unreasonable, there should be some kind of sanction based on the outcome of the case. This should not be part of Rule 1-341. Mr. Brault responded that there is a problem with this, especially in the domestic area. He had a case where after the case had settled, the relationship between the husband and wife deteriorated further. The wife became outraged at the settlement, claiming that her attorney sided with the husband. She sued the attorney. In this kind of situation, the attorneys cannot always control the parties' reaction to the offer. The Vice Chair noted that an attorney may be unreasonable, and the client is penalized. She questioned as to how the judge would know whether the client or the attorney is acting in bad faith.

Mr. Titus said that previously the Management of Litigation Subcommittee had considered an offer of judgment rule and concluded that it could not recommend this Rule or a similar one. This is a policy decision for the full

Committee. Should the Subcommittee try to redraft another version of this?

The Vice Chair moved to reject the idea of an offer of judgment rule. The motion was seconded, and it passed on a vote of nine in favor, six opposed.

The Chair adjourned the meeting.