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 May 20, 2005.

Members present:

Linda M. Schuett, Esq., Vice Chair

F. Vernon Boozer, Esq.
Lowell R. Bowen, Esq.
Hon. James W. Dryden
Hon. Ellen M. Heller
Hon. Joseph H. H. Kaplan
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Timothy F. Maloney, Esq.
Hon. John F. McAuliffe
Robert R. Michael, Esq.
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Larry W. Shipley, Esq.
Hon. William B. Spellbring, Jr.
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
Del. Joseph F. Vallario, Jr.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Adam Hadbezy, Maryland State Bar Association
Richard Montgomery, Director, Legislative Relations, Maryland State Bar Association
Herbert R. O'Conor, III, Esq.

In the Chair's absence, the Vice Chair convened the meeting. She asked if there were any additions or corrections to the minutes of the January 7, 2005 and February 11, 2005 meetings. The Reporter replied that there are a few typographical errors. The Committee approved the minutes as presented, subject to correcting the typographical errors.

Agenda Item 1. Consideration of proposed amendments to: Rule 17-101 (Applicability), Rule 17-104 (Qualifications and Selection of Mediators), and Rule 17-109 (Mediation Confidentiality)

The Vice Chair presented Rules 17-101, Applicability, and 17-104, Qualifications and Selection of Mediators, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

AMEND Rule 17-101 to exclude health care malpractice claims with a certain exception from the applicability of Title 17 and to add a Committee note after section (a), as follows:

Rule 17-101. APPLICABILITY

(a) Generally

Except for the provisions of Rule 17-104, ~~The~~ the rules in this Chapter ~~apply only to civil actions in a circuit court. The rules in this Chapter~~ do not apply to health care malpractice claims. The Rules in this Chapter also do not apply to actions or orders to enforce a contractual agreement to submit a dispute to alternative dispute resolution. The rules in this Chapter otherwise apply to all civil actions in circuit court.

Committee note: Alternative dispute resolution proceedings in a health care malpractice claim are governed by Code, Courts Article, §3-2A-06C.

(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 appointed under Rules 2-541, 2-542, or 2-543.

Source: This Rule is new.

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

The Maryland Patients' Access to Quality Health Care Act of 2004 (HB 2) contains a section providing for alternative dispute resolution in health care malpractice claims. To conform the new statute to the Title 17 Rules, the Subcommittee recommends modifying section (a) of Rule 17-101 (1) to provide that Title 17, Chapter 100 does not apply to health care malpractice claims, except in Rule 17-104 and (2) to add a Committee note referring to the new statute.

MARYLAND RULES OF PROCEDURE

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

AMEND Rule 17-104 by deleting language from section (c) and by adding a new section (e) and cross reference, as follows:

Rule 17-104. QUALIFICATIONS AND SELECTION OF MEDIATORS

(a) Qualifications in General

To be designated by the court as a mediator, other than by agreement of the parties, a person must:

(1) unless waived by the court, be at least 21 years old and have at least a bachelor's degree from an accredited college or university;

Committee note: This subsection permits a waiver because the quality of a mediator's skill is not necessarily measured by age or formal education.

(2) have completed at least 40 hours of mediation training in a program meeting the requirements of Rule 17-106;

(3) complete in every two-year period eight hours of continuing mediation-related education in one or more of the topics set forth in Rule 17-106;

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

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

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

(b) Additional Qualifications - Child Access Disputes

To be designated by the court as a mediator with respect to issues concerning child access, the person must:

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

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

(3) have observed or co-mediated at least eight hours of child access mediation sessions conducted by persons approved by the county administrative judge, in addition to any observations during the training program.

(c) Additional Qualifications - Business and Technology Case Management Program Cases

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

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

(2) within the two-year period preceding application for approval pursuant to Rule 17-107, have completed as a mediator at least five non-domestic circuit court mediations or five non-domestic non-circuit court mediations of comparable complexity (A) at least two of which are among the types of cases that are assigned to the Business and Technology Case Management Program or (B) have co-mediated~~, on a non-paid basis,~~ an additional two cases from the Business and Technology Case Management Program with a mediator already approved to mediate these cases;

(3) agree to serve as co-mediator with at least two mediators each year who seek to meet the requirements of subsection (c)(2)(B) of this Rule; and

(4) agree to complete any continuing education training required by the Circuit Administrative Judge or that judge's designee.

(d) Additional Qualifications - Marital Property Issues

To be designated by the court as a

mediator in divorce cases with marital property issues, the person must:

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

(2) have completed at least 20 hours of skill-based training in mediation of marital property issues; and

(3) have observed or co-mediated at least eight hours of divorce mediation sessions involving marital property issues conducted by persons approved by the county administrative judge, in addition to any observations during the training program.

(e) Additional Qualifications - Health Care Malpractice Claims

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

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

(2) have completed as a mediator at least five non-domestic circuit court mediations or five non-domestic non-circuit court mediations of comparable complexity;

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

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

Cross reference: Code, Courts Article, §3-2A-06C (c).

Source: This Rule is new.

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

> The Alternative Dispute Resolution Subcommittee recommends deleting the words "on a non-paid basis" from subsection (c)(2) of Rule 17-104 because this requirement is too restrictive.
>
> The Subcommittee also recommends adding a new section (e) to Rule 17-104 setting out additional qualifications for mediators in health care malpractice cases to conform to the Maryland Patients' Access to Quality Health Care Act of 2004 (HB 2).

The Vice Chair explained that the Maryland Patients' Access to Quality Health Care Act of 2004 contained some provisions pertaining to Alternative Dispute Resolution (ADR) in health care malpractice claims. Initially, the ADR Subcommittee considered amending all of the Title 17 Rules that are affected by the statute to conform to it. The Subcommittee decided that this would make the Rules unnecessarily complicated. A better method of conforming the Rules is to exempt health care malpractice claims out of the Rules in Title 17, except for Rule 17-104, and add to Rule 17-104 a new section pertaining to additional qualifications for mediators in health care malpractice claims. The proposed new language mirrors the qualifications for mediators in business and technology case management program cases. The ADR Subcommittee deleted the language "on a non-paid basis" from subsection (c)(2) of Rule 17-104, because the co-mediation experience is equally valuable if the mediator was paid. There being no comments on the proposed amendments to Rules 17-101 and 17-104, the Committee approved the Rules as presented.

The Vice Chair presented Rule 17-109, Mediation Confidentiality, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

AMEND Rule 17-109 to permit a certain disclosure pertaining to certain allegations of fraud or duress, as follows:

Rule 17-109. MEDIATION CONFIDENTIALITY

(a) Mediator

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

(b) Parties

Subject to the provisions of sections (c) and (d) of this Rule, (1) the parties may enter into a written agreement to maintain the confidentiality of all mediation communications and to require any person present or otherwise participating in the mediation at the request of a party to maintain the confidentiality of mediation communications and (2) the parties and any person present or otherwise participating in the mediation at the request of a party may not disclose or be compelled to disclose mediation communications in any judicial, administrative, or other proceeding.

(c) Signed Document

A document signed by the parties that

reduces to writing an agreement reached by the parties as a result of mediation is not confidential, unless the parties agree in writing otherwise.

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

(d) Permitted Disclosures

In addition to any disclosures required by law, a mediator and a party may disclose or report mediation communications to a potential victim or to the appropriate authorities to the extent that they believe necessary to help:

(1) prevent serious bodily harm or death, ~~or~~

(2) assert or defend against allegations of mediator misconduct or negligence~~.~~, or

(3) assert or defend against a claim or defense that because of fraud or duress a contract arising out of a mediation should be rescinded.

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

(e) Discovery; Admissibility of Information

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

Committee note: A neutral expert appointed pursuant to Rule 17-105.1 is subject to the provisions of sections (a), (b), and (e) of this Rule.

Source: This Rule is new.

Rule 17-109 was accompanied by the following Reporter's Note.

> At a Court conference on the One Hundred Fifty-Second Report of the Rules Committee, the Hon. Alan M. Wilner requested that the Rules Committee examine the issue of fraud in the mediation and consider recommending amendments to Rule 17-109 to address that issue.
>
> The proposed addition of new subsection (d)(3) to Rule 17-109 expands upon Subsection 6 (b)(2) of the Uniform Mediation Act (2001), drafted by the National Conference of Commissioners on Uniform State Laws, which reads as follows:
>
> > Section 6. Exceptions to Privilege.
> >
> > . . .
> >
> > (b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:
> >
> > . . .
> >
> > (2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.
> >
> > (c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(2).

[**NOTE**: Subsection 6 (a)(6) to which Subsection 6 (c), above, refers, reads as follows:

(a) There is no privilege under Section 4 for a mediation communication that is:

. . .

(6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice field against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation ...]

The Vice Chair stated that the ADR Subcommittee expanded the language of the Uniform Mediation Act and added it into the Rule as subsection (d)(3). The Committee approved the Rule as presented.

Agenda Item 2. Consideration of proposed amendments to: Rule 2-341 (Amendment of Pleadings) and Rule 2-504 (Scheduling Order)

The Vice Chair presented Rule 2-341, Amendment of Pleadings, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 300 - PLEADINGS AND MOTIONS

AMEND Rule 2-341 to delete a certain time period from sections (a) and (b) and to add new language to those sections, as follows:

Rule 2-341. AMENDMENT OF PLEADINGS

(a) ~~Prior to 15 days of Trial Date~~ By Date Set Forth in Scheduling Order

A party may file an amendment to a pleading without leave of court at any time prior to ~~15 days of a scheduled trial date~~ the date set forth in a scheduling order. Within 15 days after service of an amendment, any other party to the action may file a motion to strike setting forth reasons why the court should not allow the amendment. If an amendment introduces new facts or varies the case in a material respect, an adverse party who wishes to contest new facts or allegations shall file a new or additional answer to the amendment within the time remaining to answer the original pleading or within 15 days after service of the amendment, whichever is later. If no new or additional answer is filed within the time allowed, the answer previously filed shall be treated as the answer to the amendment.

(b) ~~Within 15 days of Trial Date and Thereafter~~ After Date Set Forth in Scheduling Order

~~Within 15 days of a scheduled trial date or after trial has commenced, a~~ A party may file an amendment to a pleading after the date set forth in a scheduling order only ~~by written consent of the adverse party or~~ by leave of court or by written consent of all parties that includes an agreement that the filing of the amendment will not cause the need for any changes in the scheduling order. If the amendment introduces new facts or varies the case in a material respect, the new facts or allegations shall be treated as having been denied by the adverse party. The court shall not grant a continuance or mistrial unless the ends of justice so require.

Committee note: By leave of court, the court may grant leave to amend the amount sought in a demand for a money judgment after a jury verdict is returned.

(c) Scope

An amendment may seek to (1) change the nature of the action or defense, (2) set forth a better statement of facts concerning any matter already raised in a pleading, (3) set forth transactions or events that have occurred since the filing of the pleading sought to be amended, (4) correct misnomer of a party, (5) correct misjoinder or nonjoinder of a party so long as one of the original plaintiffs and one of the original defendants remain as parties to the action, (6) add a party or parties, (7) make any other appropriate change. Amendments shall be freely allowed when justice so permits. Errors or defects in a pleading not corrected by an amendment shall be disregarded unless they affect the substantial rights of the parties.

(d) If New Party Added

If a new party is added by amendment, the amending party shall 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 the new party.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 320.
Section (b) is new and is derived in part from former Rule 320 e.
Section (c) is derived from sections a 2, 3, 4, b 1 and d 5 of former Rule 320 and former Rule 379.
Section (d) is new.

Rule 2-341 was accompanied by the following Reporter's Note.

The Honorable Thomas P. Smith, of the Circuit Court for Prince George's County, wrote a letter expressing his concern that there is an inconsistency between Rules 2-341 and the scheduling orders issued pursuant to Rule 2-504 because the scheduling order provides that amendments to pleadings and the addition of parties must be completed by a

> date certain, while Rule 2-341 (a) provides that a party may file an amendment to a pleading any time prior to 15 days before the trial date without leave of court. In response to Judge Smith's letter, the Management of Litigation Subcommittee proposes changes to Rule 2-341 tying the filing of amendments to the date set forth in the scheduling order and providing that a party may file an amendment after the date set forth in a scheduling order if the parties file a written consent agreeing that the filing of the amendment will not cause the need for any changes in the scheduling order. The Subcommittee also proposed changes to Rule 2-504 to include the time periods that were originally in Rule 2-341 and to add other items to the contents of the scheduling order. Rule 2-504 also has new language providing that the court may modify the scheduling order to prevent manifest injustice.

The Vice Chair told the Committee that part of the impetus for changing the Rule was a letter from the Honorable Thomas P. Smith, of the Circuit Court for Prince George's County who had pointed out that there is a conflict between Rule 2-341, which states that a party may file an amendment to a pleading any time prior to 15 days before trial, and Rule 2-504.2 (b)(4), which provides that at a pretrial conference, the court may consider any amendment required of the pleadings. Many practitioners have observed that there can be inconsistencies between scheduling orders entered pursuant to Rule 2-504 and some of the Rules, the biggest problem being Rule 2-341.

The Vice Chair said that in 1984, when Rule 2-341 was adopted, the Committee had decided not to adopt the federal approach requiring leave of court for any amendment. Rule 2-341

allows amendment as of right up to 16 days before trial, but a scheduling order may not allow this. To conform the pleading rules to the scheduling orders that are being entered, the suggested new language allows amendment without leave of court at any time prior to the date set forth in a scheduling order. After that date, the suggestion is to allow amendment by written consent of all parties, including an agreement that the filing of the amendment will not cause the need for any changes in the scheduling order, as well as by leave of court, which is already permitted by the Rule. Mr. Sykes questioned as to how cases that do not have scheduling orders will be handled. Judge McAuliffe suggested that the 15-day time period already in the Rule should apply when there is no scheduling order. Mr. Maloney added that the 15-day period should also apply where the timing of amendments is not referenced in the scheduling order. Mr. Klein pointed out that the proposed amendments to Rule 2-504 that are contained in today's meeting materials will require the court to include in every scheduling order a date by which amendments to pleadings are allowed as of right. Mr. Sykes remarked that there may have been no cutoff dates for amendments to pleadings without leave of court in scheduling orders entered before the proposed Rules changes go into effect. Additionally, there may be cases in which no scheduling order is entered if, pursuant to section (a) of Rule 2-504, the County Administrative Judge has ordered that no scheduling order be entered in one or more categories of actions. Retaining the 15-day period will close those gaps.

Mr. Maloney inquired as to whether the proposed amendments will affect when the *ad damnum* clause may be amended. The Vice Chair replied that the Committee note after section (b) of Rule 2-341 states that the court may grant leave to amend the amount of the *ad damnum* clause after a jury verdict. Mr. Michael expressed the concern about the fact that it requires leave of court to amend the *ad damnum* clause. An attorney may have obtained a judgment in excess of the *ad damnum* clause and not be granted leave to amend. The Vice Chair commented that judgments in excess of what was asked for are extremely rare.

Mr. Michael raised the issue of whether the Rules should address amendments to conform to the evidence. Currently, this is up to the judge's discretion. If the judge does not allow amendments to conform to evidence, there is a problem. Judge Heller inquired as to whether the federal rule concerning amendments to conform to the evidence had been considered. The Vice Chair responded that during the 1984 revision of the Maryland Rules, the Committee looked at Fed. R. Civ. P. 15 (b) and decided not to incorporate its provisions.

Judge McAuliffe asked about the origin of the Committee note following section (b) of Rule 2-341. Judge Spellbring answered that it is *Falcinelli v. Cardascia*, 339 Md. 414 (1995). Judge Heller remarked that case law holds that amendments should be freely allowed as justice permits. Judge McAuliffe cautioned about being too liberal. Judge Heller suggested that the

standard should be "when justice so requires." The Vice Chair said the Subcommittee can look at that. She questioned as to whether the 15-day period for cases that do not have a scheduling order is too short. Judge Heller replied that this period is too short. She suggested a deadline of 30 days after discovery is completed. Judge McAuliffe commented that this time period is too vague. Mr. Klein suggested that the time period could be a certain number of days before the trial date or after the case is at issue. Judge McAuliffe suggested a 30-day period, and the Vice Chair suggested 90 days. Judge Heller proposed a compromise of 60 days. The Vice Chair agreed with that number, although she noted that it would depend on the circumstances of the case. Mr. Michael said that 60 days would be enough for a track 1 case.

Ms. Ogletree pointed out that in Caroline County, trial is set to be within 30 days of the settlement conference. The Vice Chair remarked that in some counties, the trial date is not set until after the settlement conference is held. There may only be two weeks between the conference and the trial. Mr. Klein noted that in those cases a scheduling order has been entered, so this aspect of the Rule would not apply. Ms. Ogletree responded that this is not true in a simple uncontested divorce case. Judge Kaplan suggested that the language of the Rule could be: "60 days prior to the trial date or as otherwise set by the court."

Mr. Sykes suggested that this matter be remanded to the Subcommittee for an investigation into the various practices around the State. Judge Dryden noted that in the simple cases

where there is no scheduling order, amendment is not frequent, and a 30-day period would not be harmful. The Vice Chair said that Rule 2-341 would go back to the Subcommittee for further investigation.

The Vice Chair 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 to add language to and reletter subsection (b)(1), to delete language from and reletter subsection (b)(2), and to add a new section (c), 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 (f) (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 the parties must arrange a one-week period, before any discovery is conducted or trial preparations begin, to confer about settlement;

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

~~(E)~~ (F) 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;

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

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

~~(F)~~ (I) 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 additional parties must be joined;~~

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

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

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

~~(G)~~ (F) 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 may be modified by the court to prevent manifest injustice.

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

Source: This Rule is new.

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

> Herbert R. O'Conor, III wrote a letter suggesting a change to Rule 2-504. At the April 15, 2005 Management of Litigation Subcommittee meeting, Mr. O'Conor fine-tuned his suggestion. His proposal is that Rule 2-504 provide for a one-week period for counsel to confer about settlement. This period would take place prior to discovery or trial preparations. He further suggests that subsection (b)(2)(D) be deleted from the Rule. The Subcommittee does not agree with the deletion of subsection (b)(2)(D). Mr. O'Conor believes that efforts in compliance with the scheduling order are misinterpreted as encouraging trial. The best potential for settlement is before discovery and motions, and requiring a period early on in the case for discussing settlement may encourage it.
>
> For an explanation of the other changes to Rule 2-504, see the Reporter's Note to Rule 2-341.

The Vice Chair explained that Rule 2-504 is a companion to Rule 2-341. She told the Committee that Herbert O'Conor, Esq., had sent a letter suggesting that Rule 2-504 be amended to provide that on a joint motion, the parties could request a change to the scheduling order to set up a discussion period to consider settlement or mediation. The period would last for 10 to 180 days. At the Subcommittee meeting, a proposed change was made to subsection (b)(1)(D) to provide for a date by which the parties must arrange a one-week period before discovery or trial preparations begin to confer about settlement. This would stimulate the parties to speak with one another early in the process. The Vice Chair expressed her support for this idea.

Judge Heller commented that it is a good idea to encourage opposing attorneys to speak early in the litigation process. The

thought and philosophy behind the proposed change is good, but the Rule, as written, would not work in Baltimore City. The reason is in most civil non-family cases, Baltimore City has required mediation very early in the process. The dates in the scheduling order are set up by computer after the case is at issue. The dates include a scheduling conference, a pretrial conference, and the trial. The proposed language in subsection (b)(1)(D) would throw off every date set out in the scheduling order. A judge would have to reissue the order, changing all of the dates. This would be very time-consuming. Mr. Klein inquired as to when the mediation in Baltimore City is set. Judge Heller replied that it depends on the track that the case was placed in. In all cases but medical malpractice, the date is early in the case, before discovery is concluded. A one-week continuance put in as a matter of right would throw off the scheduling order.

The Vice Chair said that she agreed with the concept of the one-week period to discuss settlement, but in light of Judge Heller's concerns, placing this into the Rules of Procedure may not work. Although the discovery Rules and the Maryland State Bar Association's discovery guidelines encourage discussion, when she was in private practice, she never found that this rarely occurred in a meaningful way. Mr. Michael questioned as to whether the proposed language means that the attorneys have to set aside a week for conferencing. Mr. O'Conor responded that the language means that within the first six weeks after the

answer is filed, the attorneys would talk with each other. This could be for 10 minutes or for several hours, depending on the nature of the case and their relationship. This would take place shortly after the answer is filed, but before discovery begins. Mr. Michael asked if this would be applicable to all cases, and Mr. O'Conor answered affirmatively. The Vice Chair pointed out that Mr. Sykes had observed that not all cases have a scheduling order. The proposed change should not create the potential to delay the case. It is possible that it could be put in another rule relating to events that occur after the complaint is filed. Mr. Klein suggested that the timing of the discussion could be tied to service. The Reporter suggested that since the entry of the computer-generated scheduling order is triggered by the filing of an answer, the Rule could provide that the parties could request a one-week delay in the entry of the scheduling order after the case is at issue or a one-week period that is built into the dates that are included in the scheduling order. If the Rule were to provide for this, there would be no need for a judge to reissue a scheduling order to accommodate the proposed one-week conferencing period.

Mr. O'Conor pointed out that the scheduling order system in Baltimore City is unique. Judge Heller added that it affects thousands of cases. The dates that go into the scheduling order were reached with the consensus of the bar. With the mandatory mediation, there is already informal discussion. Mr. O'Conor responded that if attorneys are required to speak early in the

process, there is a better chance to find out early if the case has to be tried.

Mr. Michael observed that in major cases, such as products liability or malpractice, the plaintiff has investigated the case and knows a lot about the case before the plaintiff files the complaint. The defense often knows nothing about the case until served with the complaint. The defense must "play catch-up" and plead all defenses. In multi-party cases, there are too many players and too much inadequate information for the proposed procedure to work. Mr. Sykes added that reasonable counsel do not need a mandatory rule. Mr. O'Conor responded that the current system is not working. Mr. Sykes remarked that although Mr. O'Conor's idea is a good one, it would be better to be effected through encouraging the use of the civility code and hortatory statements for lawyers. He has never found this to be a problem in his law practice. In his experience, opposing counsel always have conversations about the possibility of settlement. Even if discussions are mandatory, they will not always be fruitful. The Vice Chair suggested that subsection (b)(1)(D) be deleted. Judge Dryden asked whether the proposed language should be couched as optional rather than mandatory. Judge Spellbring commented that there is a potential for abuse of the rule by attorneys who would use it for purposes of delay and never make themselves available for meaningful conversation about settlement of the case. By consensus, the Committee agreed to delete subsection (b)(1)(D).

The Vice Chair drew the Committee's attention to subsection (b)(1)(F). She said that in the Circuit Court for Anne Arundel County, dispositive motions are required to be filed before the date by which discovery must be completed. She had spoken with the Honorable Joseph Manck, Administrative Judge for the Circuit Court for Anne Arundel County, and had told him that this issue would be discussed by the Rules Committee. The Management of Litigation Subcommittee feels strongly that the date by which dispositive motions must be filed should not be until after the date by which all discovery must be completed. Mr. Maloney questioned as to what Judge Manck's reasons are. The Vice Chair answered that the thinking is that it is not necessary to know all that is learned in discovery in order to know whether a dispositive motion should be granted or denied. Although she understands what Judge Manck is saying, the Rules of Procedure are written for good attorneys who want to know what the discovery reveals, because otherwise they would not know whether there are facts to support a good faith motion for summary judgment.

The Vice Chair stated that subsection (b)(1)(G), concerning a date by which any additional parties must be joined, has been moved from subsection (b)(2) to subsection (b)(1). This becomes a mandatory, rather than permissive, part of the scheduling order. This change and proposed new subsection (b)(1)(H) are in conjunction with the proposed changes to Rule 2-341.

The Vice Chair noted that proposed new section (c) expressly

allows the court to modify the scheduling order. Mr. Maloney questioned whether a standard other than "to prevent manifest injustice" might be more appropriate in the Rule. The proposed language presents too high a bar. The Vice Chair responded that this language is used elsewhere in the Rules, such as in section (c) of Rule 2-504.2, Pretrial Conference. Mr. Sykes suggested that the word "manifest" be eliminated, and the Committee agreed with this suggestion by consensus.

The Vice Chair said that she and Mr. Klein had discussed the potential for adding a hierarchy into Rule 2-504. Mr. Klein added that one of his partners complained about the fact that the scheduling order does not provide for dates by which experts must be deposed or the sequence by which experts must be deposed. In the absence of a scheduling order specifically directing otherwise, some plaintiff attorneys have been known to insist on taking depositions of defense experts before any plaintiff's expert has been deposed. Mr. Klein suggested that the following language be added to subsection (b)(2) of Rule 2-504: "a date by which the deposition of any person whom the plaintiff expects to call as an expert witness at trial must be completed, and one or more later dates by which the deposition of any person whom any other party expects to call as an expert witness at trial must be completed." This would cover third-party defendants. The Vice Chair pointed out that the language suggested by Mr. Klein that reads "one or more" tracks the language of subsections (b)(1)(B) and (b)(1)(C).

Judge Heller commented that Mr. Klein's proposal would work in medical malpractice cases. She asked if a generic scheduling order would cover a minor traffic accident to a complex case. Mr. Michael remarked that the other side of the fence is that in a multi-party setting, numerous defense attorneys would have to be coordinated. It may be difficult to arrange the depositions of experts within the time frame set out in the scheduling order. There are often motions to strike, and plaintiffs may drag their feet. He asked if plaintiff attorneys frequently are taking depositions of defendants' experts before the plaintiffs' experts are deposed. Mr. Klein replied that this is not a problem of epidemic magnitude. Mr. Michael observed that to do so is not smart economics.

The Committee remanded the Rule as amended to the Subcommittee in conjunction with the remand of Rule 2-341.

Agenda Item 3. Consideration of proposed amendments to: Rule 2-126 (Process - Return) and Rule 3-126 (Process - Return)

Because the Chair of the Process, Parties, and Pleading Subcommittee was not present, the Reporter presented Rules 2-126 and 3-126, Process - Return.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 100 - COMMENCEMENT OF ACTION AND PROCESS

AMEND Rule 2-126 to add language to sections (a) and (b) requiring individuals serving process to provide certain information, as follows:

Rule 2-126. PROCESS - RETURN

(a) Service by Delivery or Mail

An individual making service of process by delivery or mailing shall file proof of the service with the court promptly and in any event within the time during which the person served must respond to the process. The proof shall set out the name of the person served, the date, and the particular place and manner of service. If service is by certified mail, the proof shall include the original return receipt. If service is made by an individual other than a sheriff, the individual shall file proof under affidavit which shall also provide the name, address, and telephone number of the affiant and state that the affiant is of the age of 18 or over.

(b) Service by Publication or Posting

An individual making service of process pursuant to Rule 2-122 shall provide to the court the individual's name, address, and telephone number and shall file with the court proof of compliance with the Rule together with a copy of the publication or posted notice promptly and in any event within the time during which the person notified must respond. The certificate of the publisher constitutes proof of publication.

(c) Other Process

When process requires for its execution a method other than or in addition to delivery or mailing, or publication or posting pursuant to Rule 2-122, the return shall be filed in the manner prescribed by rule or law promptly after execution of the process.

(d) Service Not Made

An individual unable to make service of process in accordance with these rules shall file a return as soon thereafter as practicable and in no event later than ten days following the termination of the validity of the process.

(e) Return to Include Process

A return shall include a copy of the process if served and the original process if not served.

(f) Place of Return

In every instance the return shall be filed with the court issuing process. In addition, when a writ of attachment, a writ of execution, or any other writ against property is executed in another county, a return shall be filed with the court of that county.

(g) Effect of Failure to Make Proof of Service

Failure to make proof of service does not affect the validity of the service.
Source: This Rule is derived as follows:
Section (a) is derived from former Rules 104 b 2, 107 a 2 and 116 c 1 and 2.
Section (b) is derived from former Rule 105 b 1 (a) and b 2.
Section (c) is new.
Section (d) is new.
Section (e) is new.
Section (f) is derived from former Rules 104 a (2) and 622 h 2.
Section (g) is derived from the 1980 version of Fed.R.Civ.P. 4 (g) and former Rules 104 h 3 (c) and 116 c 3.

Rule 2-126 was accompanied by the following Reporter's Note.

The Process, Parties & Pleading Subcommittee recommends adding language to sections (a) and (b) of Rules 2-126 and 3-126 because Master Richard J. Gilbert of the

Circuit Court for Baltimore County has requested that individuals serving process be required to include their name, address, and telephone number with the affidavit of service. He had a modification of custody case involving an order of default against the mother in which the father's girl friend had served the motion. This was not evident from the affidavit and only came to light from the father's testimony at the hearing. Master Gilbert pointed out there is no hardship in requiring this information from the affiant, and it could be useful later if there are questions relating to the manner of service.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE--DISTRICT COURT

CHAPTER 100 - COMMENCEMENT OF ACTION AND PROCESS

AMEND Rule 3-126 to add language to sections (a) and (b) requiring individuals serving process to provide certain information, as follows:

Rule 3-126. PROCESS - RETURN

(a) Service by Delivery or Mail

An individual making service of process by delivery or mailing shall file proof of the service with the court promptly and in any event within the time during which the person served must respond to the process. If service by certified mail is made by the clerk, the receipt returned through the Post Office shall be promptly filed by the clerk as proof of service. The proof shall set out the name of the person

served, the date, and the particular place and manner of service. If service is made by an individual other than a sheriff or clerk, the individual shall file proof under affidavit which shall also provide the name, address, and telephone number of the affiant and state that affiant is of the age of 18 or over~~, and if~~. If service is by certified mail, the proof shall include the original return receipt.

(b) Service by Publication or Posting

An individual making service of process pursuant to Rule 2-122 shall provide to the court the individual's name, address, and telephone number and shall file with the court proof of compliance with the Rule together with a copy of the publication or posting notice promptly and in any event within the time during which the person notified must respond. The certificate of the publisher constitutes proof of publication.

(c) Other Process

When process requires for its execution a method other than or in addition to delivery or mailing, or publication or posting pursuant to Rule 2-122, the return shall be filed in the manner prescribed by rule or law promptly after execution of the process.

(d) Service Not Made

An individual unable to make service of process in accordance with these rules shall file a return as soon thereafter as practicable and in no event later than ten days following the termination of the validity of the process.

(e) Return to Include Process

A return shall include a copy of the process if served and the original process if not served.

(f) Place of Return

In every instance the return shall be filed with the court issuing process. In addition, when a writ of attachment, a writ of execution, or any other writ against property is executed in another county, a return shall be filed with the court of that county.

(g) Effect of Failure to Make Proof of Service

Failure to make proof of service does not affect the validity of the service.

Source: This Rule is derived as follows:
Section (a) is derived from former M.D.R. 104 b 2 and h 3 (a), 107 a 2 and 116 c 1 and 2.
Section (b) is derived from former Rule 105 b 1 (a) and b 2.
Section (c) is new.
Section (d) is derived from former M.D.R. 103 d 2.
Section (e) is new.
Section (f) is derived from former M.D.R. 104 a (ii) and 622 h 2.
Section (g) is derived from the 1980 version of Fed.R.Civ.P. 4 (g) and former M.D.R. 104 h 3 (c) and 116 c 3.

Rule 3-126 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 2-126.

The Reporter explained that Master Richard J. Gilbert of the Circuit Court for Baltimore County had requested that individuals serving process be required to include their name, address, and telephone number with the affidavit of service. The Subcommittee agreed with Master Gilbert. Mr. Klein asked whether the telephone number should be the business or home number. The Vice Chair pointed out that section (a) of Rule 1-311, Signing of Pleadings and Other Papers, provides: "Every pleading or paper

filed shall contain the address and telephone number of the person by whom it is signed." She said that she had never seen proof of service by a private process server that did not have the name and telephone number of the person serving the process. Rule 1-311 requires a telephone number, but does not specify whether it is a business or home number.

Judge Norton expressed the opinion that the proposed change to the Rules is a good idea. Section (a) of Rules 2-121 and 3-121, Process – Service – In Personam, was changed to allow anyone who is a resident of an abode, but who is not the defendant being served, to accept service on behalf of the defendant if the resident is "of suitable age and discretion." However, there often is no information as to the identity of the person who accepted service. It is helpful to tighten up the Rules regarding information about the process server. The Vice Chair suggested that Rules 2-126 and 3-126 also be modified to state that if the process server served someone other than the defendant, then the process server must state who was served and how the process server concluded that the person served is of suitable age and discretion. The Committee agreed by consensus to this suggestion.

By consensus, the Committee approved the changes to Rules 2-126 and 3-126 as amended.

The Vice Chair adjourned the meeting.