COURT OF APPEALS STANDING COMMITTEE

ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Rooms UL 4 and 5 of the Judicial Education and Conference Center, 2011 Commerce Park Drive, Annapolis, Maryland on October 12, 2018.

Members present:

Hon. Alan M. Wilner, Chair

H. Kenneth Armstrong, Esq.
Hon. Yvette M. Bryant
James E. Carbine, Esq.
Sen. Robert G. Cassilly
Hon. John P. Davey
Mary Anne Day, Esq.
Alvin I. Frederick, Esq.
Ms. Pamela Q. Harris
Victor H. Laws, III, Esq.
Dawne D. Lindsey, Clerk
Bruce L. Marcus, Esq.
Donna Ellen McBride, Esq.
Hon. Danielle M. Mosley
Hon. Douglas R. M. Nazarian
Hon. Paula A. Price
Steven M. Sullivan, Esq.
Gregory K. Wells, Esq.
Hon. Dorothy J. Wilson
Thurman W. Zollicoffer, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Richard S. Gordon, Esq., Gordon, Wolf & Carney, Chtd.
Phillip Robinson, Esq., Consumer Law Center, LLC.
John Conwell, Esq., Comcast
Sara H. Arthur, Esq., Arthur Law Group, LLC.
Michael Schatzow, Esq., Chief Deputy State's Attorney for Baltimore City

The Chair convened the meeting. He said that he had a few announcements to make. He announced that the Court of Appeals held its open meeting on the Committee's 196th Report last Tuesday. The Court approved everything except for the proposed

amendments to Rule 4-347, which deals with revocation of probation proceedings. The Committee proposed to amend the Rule to require that pre-trial release hearings be held within five business days of an arrest.

The Chair said that the Maryland Alliance for Justice Reform and the Office of the Public Defender opposed the proposal. They wanted the Rule to require that a hearing be held within three days or the next court session. There was a discussion on that issue at the open meeting, and the Court deferred action on that item.

The Court directed the Committee to do further investigation on the feasibility of courts to hold pre-trial release hearings within three days or a period of shorter than five days. The Court also instructed the Committee to provide a supplemental report on that issue in early November. Aside from that one item, everything else was approved and those Rules will take effect on January 1st.

The Chair announced that the Attorneys and Judges Subcommittee will meet after today's Committee meeting.

The Chair said that the former Deputy Director, Susan Macek, has departed the Rules Committee Office. The Rules Committee has been advertising for her replacement. The Reporter announced that the closing date for the job posting for the Deputy Director position is Monday. She invited Committee

members to encourage anyone who would be a good candidate for the Deputy Director/Assistant Reporter position to apply.

The Chair said that the 198th Report, which substitutes the Uniform Bar Examination for the traditional Maryland Bar Examination, and several other items is mostly complete and will likely be filed next week. The Reporter said that when the 198th Report goes to the Court it will be posted online for comment. The Report will be heard by the Court on December 4th.

The Reporter said that Minutes for the months of January, April, and June of 2018 were sent to the Committee for approval. She called for a motion to approve the January, April, and June 2018 Minutes. Judge Price moved to approve the Minutes. The motion was seconded. The Chair invited discussion on the Minutes. The motion carried by a majority.

Agenda Item 1. Consideration of proposed new Rule 5-413 (Sex Offense Cases; Other Sexually Assaultive Behavior By Defendant). Proposed amendments to Rule 4-251 (Motions in District Court) and Rule 5-404 (Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes).

Mr. Armstrong presented Rules 5-413 Sex Offense Cases; Other Sexually Assaultive Behavior By Defendant; 4-251 Motions in District Court; and 5-404 Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 – EVIDENCE

CHAPTER 400 – RELEVANCY AND ITS LIMITS

ADD new Rule 5-413, as follows:

Rule 5-413. SEX OFFENSE CASES; OTHER SEXUALLY ASSAULTIVE BEHAVIOR BY DEFENDANT

In prosecutions for sexually assaultive behavior as defined in Code, Courts Article, §10-923 (a), evidence of other sexually assaultive behavior by the defendant occurring before or after the offense for which the defendant is on trial may be admissible in accordance with §10-923.

Cross reference: See Rule 4-251 (b)(4), concerning the time for determination of a motion in the District Court.

Rule 5-413 was accompanied by the following Reporter's note.

REPORTER'S NOTE

New Rule 5-413 is proposed in light of Chapters 362/363, 2018 Laws of Maryland (HB 301/SB 270), which added Code, Courts Article §10-923.

A cross reference following the Rule refers to the time for determination of a motion of intent to introduce evidence of other sexually assaultive behavior that is filed in a criminal action in the District Court.

MARYLAND RULES OF PROCEDURE

TITLE 4 – CRIMINAL CAUSES

CHAPTER 200 – PRETRIAL PROCEDURES

AMEND Rule 4-251, by adding a reference to a motion under Code, Courts Article, §10-923, as follows:

Rule 4-251. MOTIONS IN DISTRICT COURT

. . .

(b) When Made; Determination

(1) A motion asserting a defect in the charging document other than its failure to show justification in the court or its witness is worn and before evidence is received on the merits.

(2) A motion filed before trial to suppress evidence or to exclude evidence by reason of any objection or defense shall be determined at trial.

(3) A motion to transfer jurisdiction of an action to the juvenile court shall be determined within 10 days after the hearing on the motion.

(4) Other motions, including a motion under Code, Courts Article, §10-923, may be determined at any appropriate time.

Rule 4-251 was accompanied by the following Reporter's note.

REPORTER'S NOTE

Rule 4-251 (b)(4) is proposed to be amended by adding a reference to Code, Courts Article, §10-923, which applies to motions of intent to introduce sexually assaultive behavior.

MARYLAND RULES OF PROCEDURE

TITLE 5 – EVIDENCE

CHAPTER 400 – RELEVANCY AND ITS LIMITS

AMEND Rule 5-404 by adding a reference to Rule 5-413, as follows:

Rule 5-404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

. . .

(b) Other Crimes, Wrongs, or Acts

Evidence of other crimes, wrongs, or other acts including delinquent acts as defined by Code, Courts Article §3-8A-01 is not admissible to prove the character of a person in order to show action in the conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, ~~or~~ absence of mistake or accident~~.~~, or in conformity with Rule 5-413.

Rule 5-404 was accompanied by the following Reporter's note.

REPORTER'S NOTE

Rule 5-404 (b) is proposed to be amended by adding a reference to proposed new Rule 5-413.

The new text adds an example of an additional purpose for which other crimes evidence may be admissible. Under Rule 5-413, and in accordance with Code, Courts Article, §10-923, in a prosecution for sexually assaultive behavior, evidence of other sexually assaultive behavior for which the defendant is not on trial may be admissible.

Mr. Armstrong said that Item 1 is in response to the statute recently passed by the General Assembly which adds Code, Courts Article §10-923. The statute provides for the admission of evidence of sexually assaultive behavior if it complies with the conditions of the statute. The statute requires the State to file a motion within 90 days if it intends to introduce such evidence. A hearing is required, and the court may admit that evidence if certain conditions contained in the statute are met.

Mr. Armstrong said the initial issue was whether the Evidence Subcommittee would draft a proposal that is essentially a copy of Code, Courts Article §10-923 or add a new Rule after Rule 5-412 that incorporates the statute. The Subcommittee decided to create Rule 5-413, which incorporates the statute into the Rules.

The Chair observed that there is a line missing in Rule 4-251 (b)(1) of the Committee's materials. There are also a few changes that will be made by the Style Subcommittee.

Mr. Armstrong noted that there are three Rules impacted by the statute. The first is new Rule 5-413, which incorporates the statute. The second is Rule 4-251, which covers motions made in the District Court. The amendment to Rule 4-251 is in subsection (b)(4). Language is added to allow a motion under Code, Courts Article §10-923 as a part of the motions practice in District Court. There does not appear to be a need to change Rule 4-252, which covers the motions practice in the circuit courts.

Mr. Armstrong said that for purposes of consistency, there is a proposed amendment to Rule 5-404. Under the "other crimes" section of Rule 5-404 (b), there is language added to include evidence offered in conformity with Rule 5-413.

Mr. Armstrong added that under Rule 4-251 (b)(1) the line that reads "justification" should be "jurisdiction" and the following line which is missing, that is already in the current Rule, should be added.

The Reporter noted that there were a few other corrections to the language of Rule 4-251. The word "worn" in subsection (b)(1) should be changed to "sworn". The cross reference that is currently between (b)(3) and (b)(4) needs to be added back

in. All of those changes consist of the current language in the Rule. There are no problems with the proposed new language that is being added to the Rule.

The Chair invited comments on Rules 5-413, 4-251, and 5-404. The Chair said that the Style Subcommittee will make the corrections discussed. He asked if there were any objections to the corrections, and there were none. There being no motion to amend or disapprove proposed new Rule 5-413 and the amendments to Rules 4-251 and 5-404, the proposed Rules changes were approved.

Agenda Item 2. Consideration of proposed amendments to Rule 5-703 (Bases of Opinion Testimony By Experts).

Mr. Armstrong presented Rule 5-703 Bases of Opinion Testimony By Experts, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 – EVIDENCE

CHAPTER 700 – OPINIONS AND EXPERT TESTIMONY

AMEND Rule 5-703, to set forth four elements to be considered and stated on the record when the court determines whether facts and data relied upon by an expert may be disclosed to the jury, to make stylistic changes, and to add a case citation to the Committee note at the end of the Rule, as follows:

Rule 5-703. BASES OF OPINION TESTIMONY BY EXPERTS

(a) In General

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

(b) Disclosure to Jury

If ~~determined~~ the court determines and states on the record that the facts or data relied upon by an expert pursuant to section (a) of this Rule ~~to be~~(1) are trustworthy, ~~necessary to illuminate testimony, and~~ (2) are unprivileged, (3) were reasonably relied upon by the expert in forming the expert's opinion, and (4) are necessary to illuminate the expert's testimony, the facts or data, ~~reasonably relied upon by an expert pursuant to section (a) may,~~ in the discretion of the court, may be disclosed to the jury even if ~~those~~ the facts ~~and~~ or data are not admissible in evidence. Upon request, the court shall instruct the jury to use those facts and data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.

(c) Right to Challenge Expert

This Rule does not limit the right of an opposing party to cross-examine an expert witness or to test the basis of the expert's opinion or inference.

Committee note: Subject to Rule 5-403, and in criminal cases the confrontation clause, experts who rely on information from others may relate that information in their

testimony if it is of a type reasonably relied upon by experts in the field. If it is inadmissible as substantive proof, it comes in merely to explain the factual basis for the expert opinion. The opposing party then is entitled to an instruction to the jury that it may consider the evidence only for that limited purpose. *See, e.g., Maryland Dept. of Human Resources v. Bo Peep Day Nursery,* 317 Md. 573 (1989); *Attorney Grievance Commission v. Nothstein,* 300 Md. 667 (1984); *Beahm v. Shortall,* 279 Md. 321 (1977); *Hartless v. State,* 327 Md. 558 (1992)~~.~~; *Lamalfa v. Hearn*, 457 Md. 350 (2018).

Source: Section (a) of this Rule is derived from F.R.Ev. 703. Sections (b) and (c) are derived from Ky.R.Ev. 703(b) and (c).

Rule 5-703 was accompanied by the following Reporter's note.

REPORTER'S NOTE

Rule 5-703 is proposed to be amended in response to footnote 7 in *Lamalfa v. Hearn*, 457 Md. 350 (2018).

In *Lamalfa*, the Court cites *Brown v. Daniel Realty Co.,* 409 Md. 565, 601 (2009), which provides four elements that must be satisfied for facts and data upon which an expert relied to be disclosable to a jury under Rule 5-703 (b). The Rule is restyled to clearly set out the four elements.

The Rule also is amended to add the requirement that the court state on the record the court's determination of the four elements.

Mr. Armstrong said that Item 2 is in response to the Court of Appeal's decision in *Lamalfa v. Hearn*. The Court held, in essence, that under Rule 5-703 (b), which covers the admission of the bases of an expert's opinion testimony, the word "disclose" means admissible if all four elements in the Rule are satisfied. The Court referred the matter to the Rules Committee for consideration of whether Rule 5-703 (b) should require the trial court to make an announcement on the record that it has considered each of the four elements set forth in the Rule and determined whether they are satisfied.

Mr. Armstrong said that the changes that are proposed in Rule 5-703 are structural in nature to make it clear that there are four elements that the court must consider and state on the record when determining whether to disclose the bases of an expert's opinion to the jury. The judge must determine whether the facts and data relied on by the expert are trustworthy, unprivileged, reasonably relied upon by the expert, and necessary to illuminate the expert's testimony. The Subcommittee has taken a stylistic approach of enumerating the four elements in hopes that it will be helpful to the trial courts. The change also makes it clear that the court must make a decision on the record as to whether those elements are present in order to allow that evidence to be considered by the jury, potentially with a limiting instruction.

The Chair invited comments on Rule 5-703.

Judge Bryant said that she believes the proposed amendments could lead to a lot of reversals on appeal if a trial judge forgets to state one of the four elements on the record. She asked whether there was any consideration to changing the language of the Rule to say that a judge "may admit the evidence unless there is a negative finding as to one of the four elements."

The Chair responded that the Court of Appeals had commented on the trial court's lack of findings in the *Lamalfa* case.

Mr. Armstrong noted that in footnote 7 of the *Lamalfa* opinion, there is a description of what the Court of Appeals found as best practice.

Judge Bryant said that she was aware of the footnote but wondered whether the Court considered how many times they may be called upon to fix a case if a judge fails to state his or her consideration of all four elements on the record. She added that re-training judges to state the four elements on the record may prove a little difficult. Judge Bryant said that she also would like to hear what some of the other trial judges think about the proposed amendments.

Judge Mosley said that the Court of Appeals has said it wants the elements to be enumerated on the record. She said that she agrees with Judge Bryant that this may lead to judges

being reversed because they have not articulated with specificity. However, she did not read the *Lamalfa* opinion as saying that a trial court's failure to enumerate the elements with specificity means that it was not done correctly.

The Chair commented that a Rule change requiring the four elements to be stated on the record is something that could be dealt with by creating one of the many bench sheets that are available now for judges. The bench sheet would be used in situations when a judge has expert testimony presented and is deciding what can be disclosed to the jury. This situation would come up in the circuit courts and would not be a District Court issue.

Judge Bryant said that this issue reminds her of situations where a party wants to discharge counsel. Judges see many cases where parties ask the court to discharge their counsel. When just one consideration is missed in the heat of the moment, that creates an appellate issue.

Judge Nazarian inquired as to the language of the Rule that a judge "may" disclose but "shall determine on the record." The conclusion is that it is still within the judge's discretion to choose whether to disclose the facts or data to the jury.

The Chair clarified that the decision is discretionary.

Judge Nazarian added that if a judge makes a decision and does not state his or her consideration of the four elements on

the record, the question will be whether the judge made the right decision. He said that he believes the appellate court would read the record with an eye toward understanding what the trial court was actually doing when the court fails to use the exact phrases from the Rule on the record.

Judge Bryant moved to have the Rule indicate that "the court may allow disclosure to the jury unless the court makes a negative finding as to one of the elements."

The Chair asked whether there was a second to that motion. The motion was seconded. The Chair invited comments on Judge Bryant's motion.

Mr. Armstrong said that he was trying to conceptualize how that situation would play out at trial. He said the language proposed by Judge Bryant will result in inadmissible testimony being put into evidence unless the judge makes a negative finding.

Mr. Zollicoffer asked whether, under Judge Bryant's motion, the language of the Rule would still indicate that a judge "may" disclose to the jury.

Judge Bryant answered in the affirmative. She said that the ultimate standard would not change under her motion, it is just with whom the burden rests to make the record.

Judge Price said that the opposing party is going to make an objection to the admission of the evidence and if no objection is made, the evidence will come in.

The Chair said that the only change made by the Subcommittee's proposed amendment to the Rule is with regard to the announcement of the court's findings on the record. The current Rule already requires affirmative findings. However, under the current Rule, the judge is not required to state his or her findings on the record. In the *Lamalfa* case, the Court was concerned that it did not know whether the trial court had made the necessary findings under the Rule.

Judge Bryant said that her motion places the obligation on counsel to argue that a negative finding on one of the elements precludes admission of the evidence, instead of having the judge make the affirmative findings on all four elements. Under the current Rule, judges were always presumed to have made the proper findings. However, the findings were not required to be stated on the record.

Judge Nazarian said that what may be different about this Rule, besides some of the specificity, is the specific reference to "determining and stating on the record," as opposed to making affirmative or negative findings. That is where the trap is from the trial judge's perspective. He said if the elements are not determined and stated on the record, then the trial judge is

left in a situation where the appellate court decides whether the elements had been adequately determined or stated.

The Chair said that if Judge Bryant's motion is to require that the trial court state the findings in the negative, including the determination, then that would be a substantive change to the current Rule. He said as he reads the current Rule, it requires that the court has to determine the four elements before the evidence gets to the jury.

Judge Bryant said that it is easier for a trial judge to make the record about one adverse finding than to remember every time that four distinct findings have to be made. Counsel will draw the court's attention to all four of the elements. The Chair replied that counsel may or may not draw the trial court's attention to the four elements, but they will certainly draw the appellate court's attention to the elements.

Judge Nazarian said that footnote 7 of the *Lamalfa* case draws the distinction between the status quo, which requires that the elements be determined, and the Court's description of the best practice. He said he unsure of how Judge Bryant's motion deviates from the status quo.

Judge Bryant said that her concern is with the number of appeals that may arise. She added that her concern is not due to the fact that judges care about being reversed because judges have to assume that parties will appeal their decisions.

Mr. Wells said that footnote 7 refers the issue to the Rules Committee to decide whether the Rule should require an announcement by the trial court that the four elements have been satisfied. It is up to the Committee to say "yes" or "no." He said that if the Committee prefers that the trial court should not have to state its findings on the record, the Court of Appeals has given the Committee the option to make that recommendation.

Judge Nazarian said he believes the cleanest way to address Judge Bryant's concern is to remove the language "and states on the record."

Mr. Marcus said a Committee note may well solve the problem by indicating that best practice is for the trial court to make the announcement on the record as opposed to putting that language directly in the Rule.

Judge Nazarian said that the Maryland Rules are precise rubrics that need to be followed. Including the language "states on the record" in the Rule may force reversals that otherwise would not be required if the appellate court could see from the record that the trial court, in fact, considered the issue.

Judge Bryant added that while it may be more of a business issue, it costs litigants more money to appeal for something

that could be avoided if the Committee can figure out a way to properly word the Rule.

Mr. Armstrong said that he would like to make a motion if Judge Bryant is comfortable withdrawing her motion. Judge Bryant withdrew her motion. Mr. Armstrong moved to remove the language “and states on the record” from the proposed draft.

The Chair noted that the Committee could decide to make any changes so long as a majority of the Committee agrees. He inquired as to how the appellate court would know whether the trial court determined the four elements were met if the trial court does not state them on the record.

Ms. McBride commented that the appellate court would have to presume that the trial court considered the four elements if the trial judge decided to disclose the evidence to the jury.

Judge Nazarian added that the appellate court would have to look at the transcript of the motion hearing. If there is no objection, and there is no colloquy, then the evidence automatically comes in. If there is an objection, and there is a back-and-forth between both sides, then the appellate court would have to look at the arguments of both sides and the trial court’s response. If the objection is to only one of the four elements, and the trial court resolves that objection, that will likely be enough. If the objection is to all four elements and

the trial court only responds to three of the objections, then that may be a problem or it may be harmless error.

The Chair noted that in a civil case, a harmless error may be enough for the appellee to prevail. However, in a criminal case, where the standard is beyond a reasonable doubt, that is more problematic.

Ms. McBride inquired as to whether it would be up to the attorney who is objecting to the evidence to ask that the trial court put the basis for its ruling on the record. Mr. Zollicoffer responded that he did not think that would happen.

Judge Nazarian said that it would be up to the lawyer to make the objection. So, if there are four bases for which someone can object to the evidence coming in, and the attorney objects to only one or two of them, it is fair for the trial court to address only those two elements.

Mr. Zollicoffer said that the trial court is supposed to be the gatekeeper. The only reason the expert is testifying is to illuminate to the jury on some issue. He added that in his experience, the underlying facts and data which help to form the expert's opinion are oftentimes hotly contested. If the judge does not make a determination as to the weight of the authority from which the expert formed his or her opinion, or that the authority is not uniformly accepted, that creates an appellate issue.

Mr. Armstrong clarified that there are two different issues at hand. The first issue is whether the expert's opinion is admissible. The trial court's determination on that issue is one gatekeeping function. The trial court's gatekeeping function with regard to Rule 5-703 (b) relates to the determination of whether the facts and data relied upon by the expert in forming the basis of the expert's opinion will be disclosed to the jury after it has been deemed inadmissible.

Judge Nazarian added that the Rule covers the portion of the underlying basis of the opinion that is not otherwise admissible. There will be things that an expert bases his or her opinion on that will be universally admissible. There will be other facts and data that will not be independently admissible. Rule 5-703 (b) relates to the portion that is not independently admissible and whether that evidence comes in for the purpose of helping the jury understand what the expert is trying to opine. Judge Bryant added that a classic example would be hearsay that is not otherwise admissible.

Mr. Zollicoffer said that there is the potential to open Pandora's Box. There can be a scenario where an expert has an opinion and says that he or she is relying on various studies. A plaintiff's attorney can now try to submit the studies to the jury based on the expert's reliance on them.

Judge Bryant inquired as to whether that scenario would be a part of the court's *Frye/Reed* analysis. She said that issue is different from the court's analysis under Rule 5-703. The determination about what is generally accepted in an expert's field should be made before the court gets to the expert's testimony. The decision of whether the facts or data are reliable is one that already should have been made at that point in the trial.

Judge Nazarian said that Mr. Armstrong's amended version of the proposal does not substantively change the Rule; instead, it spells out the four elements more clearly. The question is whether the Committee wants to add to that Mr. Marcus's suggestion of adding a Committee note that refers to the *Lamalfa* case as a best practice.

Senator Cassilly said that the original problem was that the issue was raised and the trial court's findings were not articulated. That created an appellate issue and everyone was blindsided. If no one objects on this issue at that time, then the objection is waived and the evidence comes in. The way the Rule is drafted, as amended, the lawyer has a right to say to the judge "I object because you did not state the elements on the record. I want you to articulate the determination, and the Rule requires that you state it on the record."

Senator Cassilly said the proposed amendments seem to resolve the sleeper appellate issue that created the initial concern. If a party objects, the judge will not inadvertently forget to state the elements on the record because the objecting party will tell the judge that it is a requirement. If the judge elects not to state the elements, then the judge should be reversed on that issue.

Judge Nazarian said that he agreed with Senator Cassilly. He explained that the concern Judge Bryant identified was for the situations where an attorney objects generally, and then the trial judge makes findings on two of the four elements. The Rule as drafted requires that the court must determine and state on the record all four elements. If a judge only addresses two of the four elements, then the person who objected will appeal. That presents a tricky preservation issue on appeal. The problem is solved by removing the language "and states on the record" from the Rule, as Mr. Armstrong suggested. However, it still leaves the issue of whether the court determined the four elements were met.

The Chair said that was the point. He added that when the Subcommittee was looking into the derivation of this Rule, he contacted Lynn McLain. Professor McLain told him that she was not so much concerned with the "untrustworthy" element as she was the "unprivileged" element. If a judge fails to find that

the evidence is not privileged, then that could create an appellate issue. The Chair said that he can foresee a scenario where the objecting party makes a general objection and the objection is overruled. On appeal, the issue can be raised that the judge never focused on the four elements.

Judge Bryant said that an expert may have relied on several deposition transcripts. She asked whether a judge in that situation would have to make a finding that deposition transcripts are not subject to privilege in order to prevent a reversal. She added that she was sure that may be harmless but it still does not prevent the expense of an appeal.

Judge Wilner suggested that the language "states on the record" be removed from the Rule and to keep the term "determines" in. He said that attention could be called to the *Lamalfa* case in the Committee note.

Senator Cassilly suggested to add the language "upon request of a party, the court shall state on the record" the elements. That change would place the burden on the party to request that the court articulate the reason for its decision. Judge Bryant said that would create the problem of litigants telling the judges what to do, which some judges may not take kindly to.

The Chair inquired as to whether Judge Bryant withdrew her previous motion. Judge Bryant answered in the affirmative. He asked where the Committee was with regard to open motions.

Mr. Armstrong stated that his motion was to remove the language "and states on the record" from the draft and to include a comment in the Committee note that contains the reference to footnote 7 from the *Lamalfa* case. The motion was seconded.

The Chair invited comments to the motion.

Mr. Sullivan inquired as to how the Court of Appeals will react to the proposed amendments given that the *Lamalfa* opinion hinted at the Court's preference. He said that the Committee's proposed amendments reword the Rule but do not contain the language recommended by the Court.

The Chair said it is ultimately the Court's decision. If the motion passes and the Rule is transmitted to the Court of Appeals as amended, the Court may reject the Committee's recommendation. If that is the case, the Court will direct the Committee to draft the changes as it sees fit.

The motion passed by a majority vote, and the Rule was approved as amended, subject to the drafting of the Committee note.

Agenda Item 3. Consideration of proposed amendments to Rule 5-902 (Self-Authentication).

Mr. Armstrong presented Rules 5-902 Self-Authentication, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 – EVIDENCE

CHAPTER 900 – AUTHENTICATION AND IDENTIFICATION

AMEND Rule 5-902 by adding a new section (c) pertaining to authentication of certain electronic records and data and by adding a Committee note following section (c), as follows;

Rule 5-902. SELF-AUTHENTICATION

. . .

(c) Certified Records Generated by an Electronic Process or System and Certified Data Copied from an Electronic Device, Storage Medium, or File

(1) Procedure

Testimony of authenticity as a condition precedent to admissibility is not required as to the original or a duplicate of a record generated by an electronic process or system or data copied from an electronic device, storage medium, or file certified pursuant to subsection (c)(2) of this Rule, provided that at least ten days prior to the commencement of the proceeding in which the record [or data] will be offered into evidence, (A) the proponent (i) notifies the adverse party of the proponent's intention to authenticate the record [or data] under this subsection and (ii) makes a copy of the certificate and

record [or data] available to the adverse party and (B) the adverse party has not filed within five days after service of the proponent's notice written objection on the ground that the sources of information or the method or circumstances of preparation indicate lack of trustworthiness.

(2) Form of Certificate

For purposes of subsection (c)(1) of this Rule, records generated by an electronic process or system, or data copied from an electronic device, storage medium, or file shall be certified in substantially the following form:

CERTIFICATE OF AUTHENTICITY OF RECORDS PURSUANT TO RULE 5-902 (c)

I, _____, solemnly affirm under penalties of perjury that the information contained in this certification is true and correct. I am employed by [Provider/Business/Entity], and my title is _____. I am qualified to authenticate the records attached hereto because I am familiar with how the records were created, managed, stored, and retrieved. I state that the records attached hereto are true duplicates of the original records in the custody of [Provider/Business/Entity]. The attached records consist of

_____
[GENERALLY DECRIBE RECORDS (pages/CDs/megabytes)]. I further state that:

a. all records attached to this certificate were made at or near the time of the occurrence of the matter set forth by, or from information transmitted by, a person with knowledge of those matters, they were kept in the ordinary course of the regularly conducted business activity of [Provider/Business/Entity], and they were

made by [Provider/Business/Entity] as a regular practice; and

b. such records were generated by [Provider's/Business's/Entity's] electronic process or system that produces an accurate result, to wit:

1. the records were copied from electronic device(s), storage medium(s), or file(s) in the custody of [Provider/Business/Entity] in a manner to ensure that they are true duplicates of the original records; and

2. that process or system is regularly verified by [Provider/Business/Entity], and at all times pertinent to the records certified here the process and system functioned properly and normally.
I further state that this certificate is intended to satisfy Rule 5-902 (c).

_____ _____

Date Signature

Committee note: Section (c) is derived from Fed. R. Evid. 902 (13) and (14) and section (b) of this Rule. Section (c) sets forth a procedure by which parties can authenticate certain electronic records and data copied from an electronic device, storage medium, or electronic file, other than through the testimony of a foundation witness. The Advisory Committee Notes attached to the Federal provisions provide a helpful explanation of how these provisions are intended to operate. Although the notice and other requirements of this Rule are important, Rule 5-104 (a) does permit a court, in the interest of justice, to decline to require strict application of them in determining issues of authentication. When dealing with unsophisticated self-represented litigants, some discretion may need to be exercised.

Nothing in section (c) is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including under Rule 5-901 or through judicial notice where appropriate.

An objection to self-authentication under subsection (c)(1) of this Rule does not constitute a waiver of any other ground that may be asserted as to admissibility at trial.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the proffered item on other grounds-– including hearsay, relevance, or in criminal cases the right to confrontation. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

Source: This Rule is in part derived from F.R.Ev. 902 and in part new.

Rule 5-902 was accompanied by the following Reporter's note.

REPORTER'S NOTE

See the Committee note following proposed new section (c) of Rule 5-902.

Mr. Armstrong said that Item 3 is an addition to the self-authentication Rule. The amendments to Rule 5-902 deal with two

classes of electronic information; one of which is certified records generated by an electronic process or system. The second is certified data copied from an electronic device, storage medium, or file. The Rule only covers authentication, not admissibility. There has been a suggestion to change the word "process" to "procedure."

The Chair added that the proposed amendments to this Rule are derived from amendments to Fed. R. Evid. 902 that were added within the past year or so. The question arose as to whether Maryland should have a self-authentication Rule for electronically stored information. During the Evidence Subcommittee meeting, Judge Mosely mentioned that in the District Court, litigants often come to court with evidence on their cell phones.

The Chair said the language of the Rule as drafted is so difficult to read that he wonders if any self-represented litigant would understand how the process works. He said that the Style Subcommittee probably can break up the language of the Rule to make the Rule clearer without changing any of the substance of the Rule.

Mr. Armstrong said that the process is that the proponent of the evidence notifies the opposing party at least ten days before the proceeding that the proponent will rely on the certificate of authenticity. The opposing party would then have

five days to object to the authentication by certificate so that the court can issue a decision.

The Chair noted that the certificate form that is included in Rule 5-902 is derived from language used by the Department of Justice in certificates the Department files in federal actions.

Mr. Armstrong said that the certificate is more complicated than the Rule itself but it does tend to follow a business record form for certification of authenticity.

Mr. Frederick inquired as to whether there is a reason behind the ten-day and five-day time requirements in the Rule. Mr. Armstrong replied that the Rule is simply an adoption of the Federal Rule. Mr. Frederick said that it would be more reasonable to have 30 days for the proponent to notify the opposing side and for the opposing side to have 15 days to respond.

Mr. Armstrong replied that part of the reason for the time requirements is that there is a District Court issue. Judge Mosley said that the Subcommittee was trying to figure out a way for the process to work in the District Court. A thirty-day timeline would not work in District Court.

Mr. Frederick said that his concern is that the ten-day and five-day time requirements provide the parties with short windows, and there is a lot of stress involved in trying to deal with this issue. The electronically stored information may be

unimportant in some cases and critical in others. The Rule does not provide enough notice to the opposing party to object. In some instances, counsel will have to consult with an Information Technology ("IT") person.

Judge Bryant said that the timing requirement is the same as section (b), which covers business records.

The Chair said that there was a lot of discussion during the Subcommittee meeting about how the timing would work in the District Court, in particular with domestic violence cases. People will come to court with their cell phones, and they will not know how to authenticate the electronically stored evidence. In those cases, there are typically only seven days between the first hearing and the final hearing.

Mr. Sullivan inquired as to why there could not be a separate provision for the District Court.

Mr. Wells suggested to keep the current time frame and to add the language "or consistent with the deadline set forth in the scheduling order." Judge Nazarian said that in the circuit court, the timeline could be modified by the scheduling order.

Mr. Frederick inquired as to how many members of the practicing bar will pick up that language and understand that when they get the form scheduling order, they will have to raise an objection. Unless the Administrative Office of the Courts promulgates a scheduling order for all of the counties to

follow, that would be an issue. He said that the scheduling order language is a great idea, but he questions whether it will work in practice.

The Chair said that with the ubiquity of electronic records, there will not be paper anymore, and this issue will arise in more and more cases. Maryland currently has the Maryland Uniform Electronic Transactions Act, which governs transactions conducted by electronic means and information related to those transactions.

Mr. Frederick said that the practical fear is that unless someone does a metadata analysis of the electronic document and is comfortable that there has not been any tampering with it, no lawyer in a case of substance will be comfortable with the authenticity Rule. The Rule works for someone who had been in an automobile accident and wants to show a District Court judge photographs of the accident scene and the way the cars were positioned. However, the Rule would present a problem in a multimillion-dollar case where a proponent has a piece of electronic evidence and the opposing side is left with five days to get an IT person to do an analysis of the metadata.

Judge Bryant said that, in the second instance, the party should already have that evidence provided in discovery. The only issue the Rule addresses is whether a custodian must come to court to verify that the evidence is authentic. If a party

receives discovery at the last minute, then that is a separate issue.

Mr. Frederick said that frequently, a party will say that he or she just found the evidence. In that scenario, the opposing side will be provided the evidence at the time the proponent notifies counsel of the intent to authenticate the evidence with a certificate.

Judge Bryant asked whether that problem could be solved by adding in the language "for good cause shown" for extending the time to respond. Mr. Frederick answered in the affirmative.

Mr. Carbine said that the adverse party could simply object to the proponent's notice to authenticate by certificate. The adverse party could always withdraw the objection at a later time.

The Chair said that there is a balancing act that the trial court must conduct, even in the District Court. For example, in landlord-tenant cases, the landlords tend to be represented by agents who are not attorneys. You don't want the landlords coming into court presenting garbage evidence that can't be authenticated. On the other hand, you have domestic violence cases and the peace order cases where the parties are usually *pro se*.

The Chair said that there should not be a problem in substantial circuit court cases because the lawyers should be

able to comply with the Rule. However, if this Rule does not exist, then the parties would need to bring in a custodian unless the courts find a way around the authentication aspect.

Judge Bryant moved to amend the Rule to allow the court to extend the deadline upon a showing of good cause. Therefore, if a situation arises where one party says that they just discovered the electronic evidence, the court can decide whether to allow the certificate of authenticity.

Ms. McBride inquired as to what type of evidence would be covered by the Rule. She said that the type of evidence that came to mind was bank records or a photograph of a car. Mr. Armstrong said that an example would be healthcare records because all health care records are now electronic. Judge Bryant said another example could be government statistical information or data that is computer-generated and stored electronically.

Mr. Carbine postulated an exhibit that is full of numbers. It is a paper exhibit, but a computer had generated the numbers. Without this Rule, that could be objectionable. He added that evidence such as this is very commonplace.

Ms. McBride said that when the opposing party offers evidence like that she is not going to be able to draft an objection, which would go toward the “good cause shown” language. Instead, there would have to be a standard objection

stating that the adverse party is unable to determine whether the evidence is authentic and needs more time to respond to the notice.

Judge Bryant said that there is a provision built into the Rule that indicates the evidence comes in as authenticated unless there is an objection. If there is an objection, the proponent would have to produce the custodian.

Ms. McBride said that the way the Rule is written, it requires the adverse party to state the basis for the objection. She asked what basis would be adequate for a judge to sustain the objection. Judge Bryant responded that the objection would indicate that the adverse party has had insufficient time to determine whether the recently submitted evidence is in fact authentic. The objection does not have to be anything fancy, because the Rule covers it. If there is an objection by the adverse party within five days of receiving the notice, then the burden shifts back to the proponent to produce the custodian of the evidence.

The Chair explained that the Rule was proffered as one of convenience so the proponent would not have to bring in the custodian to say, “Yes, this is a record we keep in the ordinary course of business.”

Mr. Carbine said that this issue goes beyond that point. An expert would have to come in and say, “Our computer works.”

Mr. Laws said that there already is a Rule that addresses regularly conducted business records. He inquired as to what is added by this amendment.

Mr. Robinson said that he had not planned to speak on this Rule, but was prompted by the Committee's discussion. He expressed concern that there may be a debt buyer who has acquired data pertaining to loans that have been sold three or four times. The debt buyer's IT person is going to authenticate how the records are created, but the debt buyer did not create the records. The debt buyer merely acquired the records.

Mr. Robinson said that he is not sure how the debt buyer would know how the data was created. The debt buyer may know how the data was transferred or merged into the debt buyer's system, but the debt buyer would not know what had happened prior to that.

Mr. Armstrong asked whether that issue is already covered in the current statute. Mr. Robinson said that he believes it may be, but debt buyers do not know how the data was created. A lot of the data is sold without representations and warranties as to its accuracy. The debt buyers are buying the debt for six cents on the dollar knowing that the data may be inaccurate. He said that if the Committee is going to consider approving the Rule, there should be some language added to indicate whether or not the data originated with the proponent. The way the

certificate is currently worded, there is no way for the opposing party to know that the data came from somewhere else.

The Chair inquired as to what the Committee wished to do.

Senator Cassilly proposed, in accordance with Mr. Wells' proposal, to add the language "or as specified in the scheduling order." That change will give parties an opportunity to request a 30, 60, or 90-day timeline at the scheduling conference. The scheduling order can be modified for each specific type of case based on counsel's knowledge of what types of evidence may be used. If the attorneys are in a case where this issue may not arise, then they would not bring it up.

The Chair said that might work for cases where scheduling conferences are routine. However, that will only apply to the circuit court and not for every case in circuit court.

The Chair said that there is another option. The Federal Rule is fairly recent, not more than about a year old. Judge Grimm brought this issue to the Subcommittee's attention. He came before the Subcommittee and said that the Rule had only taken effect two days earlier. The Chair said that he does not know what the other States are doing with the Federal Rule. Cases in the federal courts generally have attorneys, so they will not have a problem complying with the Rule.

The Chair noted that it is unknown how many States have adopted the Federal Rule. For the States that may have adopted

the Federal Rule, it is unknown whether those States have made any changes to the Federal Rule. So, there is another option, which is to look at where the rest of the State courts are on this issue. The State courts have to deal with a high number of pro se litigants and issues that federal courts never have to deal with.

Ms. McBride said that it seems like the self-authentication Rules currently govern most of the electronically stored information or data. She added that she did not understand why that evidence would not be considered a business record or self-authenticating under some other category.

Mr. Frederick made a motion to send the matter back to the Evidence Subcommittee to obtain information about what other States are doing with regard to the Federal Rule.

The Chair clarified that it would be a motion to recommit the matter to the Evidence Subcommittee. He explained that the other side of this issue is that if there is not a Rule such as the one proposed, the parties will have to bring in a custodian or stipulate to the authenticity. In small claims cases in the District Court, the parties are not bound by the Rules of Evidence so this is not a problem for cases where the amount in controversy is five thousand dollars or less.

Mr. Frederick's motion was seconded. The Chair invited comments to the motion. The motion passed by a majority vote, and the matter was recommitted to the Evidence Subcommittee.

Agenda Item 4. Consideration of proposed amendments to Rule 2-231 (Class Actions).

Judge Bryant presented Rule 2-231 Class Actions, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 – CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 200 – PARTIES

AMEND Rule 2-231 to prohibit the naming and certification of a defendant class in a class action by adding new section (a), by making conforming amendments throughout, and by adding a Committee note, as follows:

RULE 2-231. CLASS ACTIONS

(a) Permitted Classes

Only plaintiff classes may be named in an action and certified by the court. Defendant classes shall not be named or certified.

~~(a)~~(b) Prerequisites to a Class Action

One or more members of a plaintiff class may sue ~~or be sued~~ as representative parties on behalf of all only if (1) the

class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims ~~or defenses~~ of the representative parties are typical of the claims ~~or defenses~~ of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Cross reference: See Code, Courts Article, § 4-402 (d), regarding aggregation of claims for jurisdictional amount.

~~(b)~~(c) Class Actions Maintainable

Unless justice requires otherwise, an action may be maintained as a class action if the prerequisites of section (a) are satisfied, and in addition:

(1) the prosecution of separate actions by ~~or against~~ individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a

class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution ~~or defense~~ of separate actions, (B) the extent and nature of any litigation concerning the controversy already commenced by ~~or against~~ members of the class, (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum, (D) the difficulties likely to be encountered in the management of a class action.

~~(c)~~(d) Certification

On motion of any party or on the court's own initiative, the court shall determine by order as soon as practicable after commencement of the action whether it is to be maintained as a class action. A hearing shall be granted if requested by any party. The order shall include the court's findings and reasons for certifying or refusing to certify the action as a class action. The order may be conditional and may be altered or amended before the decision on the merits.

~~(d)~~(e) Partial Class Actions; Subclasses

When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or a class may be divided into subclasses and each subclass treated as a class.

~~(e)~~(f) Notice

In any class action, the court may require notice pursuant to subsection ~~(f)~~(g)(2). In a class action maintained under subsection (b)(3), notice shall be given to members of the class in the manner the court directs. The notice shall advise

that (1) the court will exclude from the class any member who so requests by a specified date, (2) the judgment, whether favorable or not, will include all members who do not request exclusion, and (3) any member who does not request exclusion and who desires to enter an appearance through counsel may do so.

~~(f)~~(g) Orders in Conduct of Actions

In the conduct of actions to which this Rule applies, the court may enter appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument, (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in the manner the court directs to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action, (3) imposing conditions on the representative parties or intervenors, (4) requiring that the pleadings be amended to eliminate allegations as to representation of absent persons, and that the action proceed accordingly, (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 2-504, and may be altered or amended as may be desirable from time to time.

~~(g)~~(h) Discovery

For purposes of discovery, only representative parties shall be treated as parties. On motion, the court may allow discovery by or against any other member of the class.

~~(h)~~(i) Dismissal or Compromise

A class action shall not be dismissed or compromised without the approval of the court. Notice of a proposed dismissal or compromise shall be given to all members of the class in the manner the court directs.

~~(i)~~(j) Judgment

The judgment in an action maintained as a class action under subsections (b)(1) and (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subsection (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subsection ~~(e)~~(f)(1) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

Committee note: Nothing in this Rule is intended to interfere with the court's authority to regulate multiple defendant cases under Rules 2-503, 2-504.1, or 2-212, or any other provision for orderly proceedings in multiple defendant cases contained in these Rules.

Rule 2-231 was accompanied by the following Reporter's note.

REPORTER'S NOTE

The Committee was advised that, in at least one instance, a defendant in a class action was designated as a representative party of the defendant's class over the defendant's objection, and the class was certified. Absent the availability of an

> interlocutory appeal, the defendant was forced to bear the substantial costs of serving in this capacity. See Code, Courts and Judicial Proceedings Article, § 12-303. The proposed amendment addresses this issue by prohibiting certification of a defendant class.

Judge Bryant said that the Rules Committee discussed Rule 2-231 at its September 2017 meeting, and referred the Rule to the Process, Parties & Pleading Subcommittee. The proposed amendments are self-explanatory. They eliminate defendant classes from the class action Rule. The impetus for the proposal comes from those who complained that they were designated as defendant class representatives without the opportunity to respond, and sometimes without the resources to fight the battle. That is the basis for the proposed Rule change.

The Chair explained that this issue began with a request to permit an interlocutory appeal from a decision certifying a defendant class or from an order designating a class representative from a defendant class. The Rules Committee was of the view that the requested change probably could not be done by Rule. Legislation would be required. The judge's decision is not a final judgment. It also doesn't seem to fall into the category of interlocutory orders under Code, Courts Article §12-303.

The Chair said that the discussion shifted to the question of whether the Rule should permit a defendant class to be certified, and whether the Rule should permit a judge to pick one defendant to be the lead defendant that would have to bear, at least up front, the costs.

Mr. Carbine said that policy considerations that drive plaintiff classes don't work in the context of defendant classes. There is a potential for many kinds of problems. He said that he tried to draft around those problems to keep the defendant class but fix the Rule to protect the members of the defendant class. Each proposed fix, however, seemed to make matters worse, not better.

Mr. Carbine said that he had questioned why we have defendant classes. During the discussion of that question and the possible ways to fix the Rule, the suggestion to eliminate defendant class actions began. He noted that there will be a lot of discussion about whether that is a good policy decision. However, that is what brought the issue to where it is now.

The Chair said that Mr. Gordon had sent the Committee a letter, and he is present. He invited Mr. Gordon to address the Committee.

Mr. Gordon thanked the Chair for inviting him to the meeting and allowing him to address the Committee. Mr. Gordon introduced himself as an attorney with Gordon, Wolf & Carney in

Towson. He said that he has been handling class actions for 29 years. He estimates that he has been lead counsel in state and federal courts for 100 class actions.

Mr. Gordon said that he opposes the amendment because he believes that it is inappropriate to excise the defendant class vehicle from the Rule. The provisions permitting class actions are as old as the Rules themselves. He said the Maryland Rule is based upon its federal counterpart. He does not know of many defendant class cases that have been brought in Maryland, but there have been several defendant class actions filed around the country that have worked effectively in the appropriate circumstances. Mr. Gordon commented that in his 29 years of practice, he had litigated one defendant class action case. That case obviously has bothered many people because the issue is now before the Rules Committee.

Mr. Gordon said he was unaware of any other defendant class action that has been litigated up to this point. He said that he has filed another case that is a defendant class action for equitable relief only, which is currently pending in the Circuit Court for Montgomery County. That case hasn’t received defendant class certification yet.

Mr. Gordon stated that the *G&G Towing* case shows why defendant class actions are appropriate. He explained that in the *G&G Towing* case, his firm sued a notorious towing company in

Montgomery County for predatory towing practices. It was an epidemic. His firm represented twenty-six thousand plaintiff class members in the case. Judge Rubin made findings of fact and conclusions of law that G&G Towing violated the law in many respects and entered judgment against it for 22 million dollars. The problem was that G&G Towing didn't have the money. However, they had entered into written contracts with 557 parking lot owners. A Montgomery County ordinance specifically provided that the parking lot owners were jointly and severally liable for any violations made by the towing company. Mr. Gordon said that is why he filed the defendant class action.

Mr. Gordon commented there has been some discussion about defendant class representatives. He said no one likes to be sued and he has never met a defendant who has thanked him for suing them. However, the reality is that there has to be a defendant class representative. It is the court's job to look at the defendant class representative to make sure it satisfies the Rule 2-231 (a)(4) requirements, and that it adequately represents the other class members. In this instance, this defendant class representative hired Kramon & Graham, P.A. to represent it.

Mr. Gordon said that he learned that the defendant class representative did not end up bearing the cost of litigation alone. Mr. Ulwick, the lead attorney who represented the

defendant class representative, knew who the other defendant class members were. He contacted the attorneys who represented other defendant class members and received contribution from them to help fund the litigation. The suggestion that the defendant class representative was bearing the cost of litigation on its own is not accurate.

Mr. Gordon noted that what generated so much ire regarding this case is that his firm settled the case. He said he was able to get relief for 16,500 consumers against approximately 505 of the parking lot owners. Kramon & Graham was awarded attorney's fees of over four-hundred thousand dollars. The firm collected most of that as an assessment against each of the defendant class members who agreed to be a part of the settlement. That is also an important part. No one was forced to participate in the defendant class settlement; they were given the choice to opt out. They were also given the opportunity to intervene in the case with their own lawyers. They were given the opportunity to object to the settlement and raise any issues. He said that all three of those alternatives were undertaken by many of the defendant class members.

The Chair said that the initial impetus for this issue was the lack of ability to appeal from an order certifying a class. The argument from both sides at the time was that the court's decision regarding certification of the class determines the

outcome of the case. If the class is certified, the defendants usually settle. On the other hand, if the class is not certified, it is often the end of the plaintiff's case. The Chair asked Mr. Gordon whether he would favor or disfavor a statute permitting an appeal of a certification order. The Chair added that initially, that is what the Committee was asked to do.

Mr. Gordon said that the federal system has Fed. R. Civ. P. 23(f), which permits the appellate court to consider whether or not to grant a petition.

The Chair explained that the Court could not adopt a Fed. R. Civ. P. 23(f) provision by Rule. Mr. Gordon said that he understood, and that is a tough question. Having litigated a number of class actions, he said that there is a misconception that the courts are certifying classes and defendants are forced to settle cases. He assured the Committee that there are preliminary motions to decide whether the case is meritorious at the outset. The judges play a very active role in deciding whether or not to certify a case. He said that he has yet to find a passive judge in Maryland, and especially in the federal system, who will sit there and say, "I'll just let the plaintiffs do whatever they want. I'll just certify the class and see what happens later." Typically it is a meritorious case that gets certified. In the G&G case, by the time it reached

the point of certification of the defendant class, the issue had been briefed and extensively argued before the court. Mr. Gordon added that it would be helpful if Maryland had a Fed. R. Civ. P. 23(f) type of statute.

Mr. Laws asked whether plaintiffs are choosing Maryland over the federal forum because of the lack of interlocutory appeals.

Mr. Gordon said that there are many reasons why cases are filed in state court rather than federal court and vice versa. He said that the availability of an interlocutory appeal has never entered into his decision-making process. The only times in federal court that he had seen Fed. R. Civ. P. 23(f) petitions occurred when the plaintiffs were challenging the denial of class certifications. Both the 9th Circuit and the 4th Circuit reversed and certified the plaintiff class in those cases. The Federal interlocutory appeal Rule goes both ways because it is not pro-plaintiff or pro-defendant.

Judge Nazarian asked Mr. Gordon whether the notice to opt out that was sent to the defendant class members indicated that the defendant would be subject to the judgment unless they send notice to the court saying that they do not want to be a defendant.

Mr. Gordon explained that the opt-out notice was sent regarding the settlement. The notice indicated that the

defendants are agreeing to a settlement unless they decide to opt out. He added that in the G&G case, Judge Rubin held multiple hearings because there were defendants continually coming forward saying that they never received notice. In every instance in which a defendant came forward to say that it did not receive the notice, Judge Rubin allowed it to opt out of the settlement agreement.

Judge Nazarian asked whether the first notice that was sent to the defendant class was the notice to opt out of the settlement agreement. Mr. Gordon said that it was not.

The Chair asked Mr. Gordon if a defendant is able to opt out of the class. Mr. Gordon replied that it depends on the type of class action that is filed. Rule 2-231 (b)(3) requires that there be an opt-out component.

Mr. Sullivan said that the notice sent to the defendants says, “If you opt out of the agreement, you will not be included in the settlement. However, you will remain a member of the mandatory defendant litigation class that the court certified.” He added that it leaves the defendant with the choice to accept the settlement as a member of the defendant class or to not accept the settlement and remain in the defendant class.

Judge Nazarian said that there is a difference between this situation and a (b)(3) plaintiff class. If you’re in a (b)(3)

plaintiff class and you opt out, you don’t receive a remedy but you can still bring your lawsuit.

Mr. Gordon said that Judge Rubin chose to certify the class under (b)(1) as a mandatory class because it was his judgment that if he certified the class under (b)(3), all of the defendants would opt out.

Judge Nazarian inquired as to whether subsection (b)(1) allows for a defendant to opt out.

Mr. Gordon said that certification under (b)(1) may or may not provide an option to opt out of the class. In the *G&G Towing* case, Judge Rubin decided to make the defendant class a mandatory class but provided in his order specifically that anyone could intervene in the class with its own counsel. The defendants also were given the opportunity to object to the certification of the class from the beginning.

Senator Cassilly inquired as to whether the notices to opt-in or opt-out are served on the defendants by certified mail, return receipt requested.

Mr. Gordon said that the defendants were served in a variety of ways. Most of the notices were personally served, while others were mailed.

Senator Cassilly said what you avoid in the end is the filing fee for that defendant. By going this route, what the plaintiff avoids is that it names all the defendants, gets the

summonses issued at the state's expense and serves all 500 of them.

Mr. Gordon said that in the G&G case, he could have filed 575 individual cases or one case with 575 defendants. However, he thought it was more manageable to use the defendant class vehicle and it was up to the court to manage the case effectively. The class action Rule puts in the court's purview a lot of discretion with how to manage the action.

Senator Cassilly said when a defendant is replying to a summons, there is a protocol in his office and there is a timeline for responding. There is no protocol to respond to the postcard notices that were sent in the *G&G Towing* case. He expressed concern on behalf of the defendants.

Mr. Carbine observed that the initial notice that was sent to the defendants was a postcard. Mr. Gordon responded that this statement is not completely accurate.

Judge Nazarian said that before the Committee gets into a discussion on whether the first notice was a postcard, he wanted to know whether the initial notice came at the time the defendant class was certified.

Mr. Gordon replied in the negative. He said that when they brought the defendant class into the case, Judge Rubin wanted to send an additional notice that was not required under the Rule. That is where the postcards came in.

Judge Nazarian asked whether the defendant class that was alleged in the complaint was a (b)(1) class or a (b)(3) class. Mr. Gordon replied that the complaint alleged the defendant class was a (b)(1) class. He explained that the settlement class was a (b)(3) class. He said that he went through full discovery on the defendant class action and Judge Rubin ultimately certified the defendant class under (b)(1). The settlement was under (b)(3), which created another defendant class.

The Chair said the issue before the Committee is not what happened in the G&G case, but what possibly could happen.

Judge Nazarian inquired as to whether the defendants who opted out of the (b)(3) settlement agreement are stuck as members of the (b)(1) defendant class.

Mr. Gordon responded that he was unsure since the case is still ongoing. He added that some of the defendants who opted out of the settlement became intervenors with their own counsel. However, it is unclear whether they remain members of the (b)(1) defendant class. That issue has not yet been litigated.

Judge Nazarian asked Mr. Gordon what he believed the intervenors' status was. Mr. Gordon replied that in his opinion, the intervenors are a part of the defendant class.

Judge Nazarian asked what was the first notice that was sent out. Mr. Gordon said the first notice was a postcard that

Judge Rubin required to be sent when the plaintiffs filed for the defendant class. He added that the Rules do not require that a notice is sent out at the beginning of the case. However, in the G&G case, Judge Rubin required a postcard to be sent to the members of the defendant class. A website was also set up that contained all the pleadings in the case and connected users to the defendant class counsel.

Judge Nazarian said that there is a difference between plaintiff side and defendant side classes. Members of a plaintiff class have rights that are being pursued by someone who purports to represent them. The court is overseeing that process and, at some point, the court makes a decision on whether there is a class. On the defendant class side, someone has to answer the complaint, conduct discovery, and decide what to do. He added that becoming aware that you are a part of a mandatory (b)(1) defendant class strikes him as different than being a member of a mandatory (b)(1) or (b)(3) plaintiff class. He inquired as to how the defendant class is supposed to work.

Mr. Gordon said that his suggestion would be for the Committee to add a specific provision in the Rule on defendant class notice. The provision would require that the defendants be served with a notice in accordance with Rule 2-121. Mr. Gordon added that there is a similar notice requirement in the confessed judgment Rules.

Judge Bryant said that confessed judgment cases are different because, in those cases, there already is an agreement that if the defendant does not fulfill its obligation, judgment will be entered against it. Mr. Gordon said that the two instances are analogous in that they are both filed against the defendant without the defendant's knowledge. Judge Bryant responded that the defendant would know of the confessed judgment because the defendant would be aware that it did not fulfill its obligation. In that instance, the defendant would know that it is a matter of time before a judgment is sought.

Judge Nazarian expressed concern that the membership of the defendant class is only as good as the information the plaintiff has on file. He said that there may be a class of (b)(1) defendants, which is going to include everyone that is similarly situated, who may not have any idea that they are in the class. In the meantime, the plaintiff would be filing motions regarding class certifications and issues that bear on the defendants' ultimate liability and their opportunities to participate and raise defenses. He added that he was struggling with the idea of removing the defendant class device, but was also struggling to see how the Rule will function as is.

Mr. Gordon reiterated that the defendant class Rule can work if the Committee adds a provision requiring that the defendants be served with notice in accordance with Rule 2-121.

Judge Nazarian responded that even if the Rule required the Plaintiff to serve the defendants pursuant to Rule 2-121, only defendants known to the Plaintiff at that time would be served. He said that the defendant class device works when there are defendants who want to be included in a class. For example, a group of insurers may want to be in a defendant class in a reverse class action.

Judge Nazarian asked Mr. Gordon how a property owner who is in his mandatory (b)(1) class is supposed to get notice if the scope of the notice that is served pursuant to Rule 2-121 is only as good as the information the Plaintiff has. Mr. Gordon said that if the defendant is not served pursuant to Rule 2-121, it would not be bound by anything that happens in the class action. The defendant would have to be served with a notice that the case is pending in order to be bound.

Judge Nazarian clarified that Mr. Gordon's view is that the (b)(1) class would only contain defendants that had been served. Mr. Gordon replied in the affirmative. He commented that this would be a reasonable middle ground.

The Chair asked Mr. Gordon whether every member of the defendant class is served with the complaint or the notice. Mr. Gordon said that in his case, every member of the class was served with the notice. However, the complaint and all other information were posted online. The parties who came into his

office were also given thumb drives containing the pleadings. He added that the website created for the defendant class members is still active and accessible.

The Chair invited questions from the Committee for Mr. Gordon.

Judge Nazarian inquired as to whether defendant class actions have worked successfully in the federal system in cases other than when the defendants want to be in a class.

Mr. Gordon answered in the affirmative. He said there is a case from the 10th Circuit that discusses due process rights of defendant class members and being served with a notice. The case involved a company whose shareholders allegedly received fraudulent payments. The mandatory defendant class vehicle was used to go after those shareholders. The shareholders did not agree to be a part of the defendant class. The question was, are there any additional due process requirements with respect to defendant classes versus plaintiff classes? The Court in the 10th Circuit said "no." It held that, even in an instance where the defendants are unaware of the class, they are still bound.

Mr. Gordon said that he is suggesting in Maryland that a provision be added to the Rule requiring that service of the notice be done in the same manner as a complaint is served. He would have to provide the court with an affidavit of service for each defendant class member.

Judge Nazarian asked Mr. Gordon what happens if he finds out after the settlement that there is another parking lot owner. That person would be in a defendant class after settlement occurred. That defendant's choice is either to participate in the settlement or be back to litigating the (b)(1) class. Mr. Gordon said that in the context of the G&G Towing case, that parking lot owner would not be a part of the settlement.

Judge Nazarian said that the property owner would remain a member of the (b)(1) defendant class that was certified without having received notice. Mr. Gordon said that might be the outcome. However, that issue has not been litigated in the *G&G Towing* case because the plaintiffs had a finite group of defendant class members. The plaintiffs knew who the defendant class members were because they were provided the contracts that were entered into by the towing company. The contracts were the basis for the defendant class membership.

The Chair invited Mr. Robinson to address the Committee.

Mr. Robinson said that he does not have a stake in the *G&G Towing* case but was invited to speak at the meeting. Mr. Robinson explained that he attempted to bring a defendant class action once in Harford County, but the case settled on an individual basis. Mr. Robinson stated that he had conducted an informal survey of other plaintiff class action attorneys,

inquiring as to whether any of them had successfully brought a defendant class action. The attorneys indicated that they attempted to bring defendant class actions, but the process was too complicated.

Mr. Robinson commented that, regarding attorneys' fees, Mr. Ulrich's affidavit stated that his client paid a portion of the bill, and the rest of the fee was spread out among the remaining 500 defendants.

Mr. Robinson commented that there is a statute that confers jurisdiction on the circuit courts for class actions. The statute doesn't specifically say "defendant class actions" or "plaintiff class actions." It refers to a class of claims.

Mr. Robinson said that in the Circuit Court for Baltimore City, he filed a motion to certify a class of defendants who had foreclosures pending against them by a now-defunct mortgage company. He said that the mortgage company used a robo-signer who signed 2,000 affidavits daily attesting to the facts contained in those affidavits. The defendants asked the court to certify them as a class under (b)(2) and to dismiss all of the foreclosure cases. At the hearing on the motion, the mortgage company represented to the court that it would voluntarily dismiss all of the foreclosure cases. Consequently, there was no adjudication of the motion requesting certification of the defendant class. However, Mr. Robinson said that there

are unique circumstances where he could see a group of defendants wanting to be certified as a class.

Mr. Robinson expressed concern about the language of the proposed Rule change because the plain language appears to indicate that only a plaintiff can file for a class action. He said that the Rule omits counter-plaintiffs or cross-plaintiffs. He said that he has brought class actions as a counter-plaintiff and has seen cases involving cross-plaintiffs.

The Chair said that he recalls at least one foreclosure case where the property owner filed a counterclaim and tried to certify a class of all the foreclosing banks.

Mr. Robinson said that he has filed countercomplaints in foreclosure actions, and he usually brings in the servicer.

Mr. Robinson said that the last point he wanted to address is the discussion regarding federal versus state class actions. He observed that in the last fifteen years, the federal courts passed a statute broadening federal jurisdiction over class actions. He said most class actions end up in federal court. Mr. Robinson said that every class action case he had filed was removed to federal court. The reality is that the circuit courts rarely see these cases.

Mr. Robinson reiterated that his biggest concern was that the language of the proposed amendment fails to take into consideration the option of a counter-plaintiff class action.

He said that he believes counter-plaintiff actions are appropriate in certain circumstances.

The Chair asked whether a counter-plaintiff is still considered a plaintiff. Mr. Robinson said that he believes so, but he is concerned that a party may argue that under the plain language of the Rule, a counter-plaintiff class action is precluded.

The Chair said that it would take a motion to amend or reject the Subcommittee's recommendation.

Judge Nazarian moved to reject the Subcommittee's proposal. The motion was seconded.

Mr. Frederick said he would like to be heard on the motion. He said that he had a client who was personally involved in the *G&G Towing* case. His client initially received a postcard. Then in April of 2017, his client received a letter from a law firm in Reston, Virginia. The letter indicated that in November of 2016 his client was added to a class of defendants and that James Ulwick was named as lead counsel. The letter simply said to "put your counsel on notice."

Mr. Frederick said that ultimately he received an offer to resolve the matter for his client for a very low number, which was five times less than what his client would have paid in attorney's fees. The offer put his client in a position where he would be a fool if he did not take it.

Mr. Frederick said that one day he was talking with a friend and realized that they were both representing clients in the case. They both received the same postcard notice. There was no semblance of due process involved in the way the case proceeded. The defendants received an order indicating that everything had to go through Mr. Ulwick, who was the lead attorney for the class representative.

Mr. Frederick said that it is his understanding that Mr. Ulwick discounted his fees in the case. He said that putting himself in Mr. Ulwick's shoes, it would be a bad day if he appeared in court on behalf of a named defendant and was selected as the lead attorney for a (b)(1) class. That is not something an attorney bargains for when their client engages them in a case like this.

Mr. Frederick said that he thinks the proposed amendments to Rule 2-231 are appropriate. The foreclosure case that involved the robo-signing of affidavits was filed against certain servicers who were banks. The party could simply name one bank and the rest of the banks would be added. There was no need to create a defendant class. He said that he cannot come up with a scenario that works when the defendants do not want to be in a class. He said that he respects Mr. Gordon and Mr. Robinson, and having litigated with both of them, he knows they play fair and are great attorneys. However, from the

defendants' perspective, there's nothing resembling justice. Now that a case like this has happened, it will be a template for future cases. Mr. Gordon mentioned that he already has another defendant class action case pending. Mr. Frederick said that when his client found out in April of 2017 that so much happened in the case in November of 2016, his client didn't have a level playing field. That is why he strongly supports the Subcommittee's proposal.

Mr. Carbine said that he represents as many plaintiffs as he does defendants. There are policy decisions that drive the mechanics of a plaintiff's class action. Those mechanics do not work for the defendant's class. As Mr. Robinson and Mr. Gordon have pointed out, in defendant class actions, no summons or complaint is served, there are no certificates of service to the pleadings filed, and the defendants may or may not know who the other defendants are. He said he has been involved in cases that have many defendants where all named parties received service. Defendants in large, complex cases organize themselves. Plaintiffs only have to file one case, not five hundred cases. If the plaintiffs have the names and addresses of all the defendants, then that information should be put on the complaint, and all the defendants should be served with process. There are so many rights that all litigants have that

are taken away from members of the defendant class that there should not be a defendant class device.

Mr. Marcus said that there were a number of nuances in the *G&G Towing* case that he wanted to address. He said that he represented a landowner in Montgomery County. His client had a management company who was responsible for overseeing the property. The management company was the intermediary and his client was named in the defendant class. However, his client was never served with papers. Instead, his client received the postcard notice, which looks like the regular junk mail that businesses receive. The notice did not indicate that his client had been sued and that a complaint had been filed against it.

Mr. Marcus pointed out that if there was a list of landowners that would have been parties to the case, having the opportunity to say that there's a website or something out there, you can figure it out. Maybe if your name appeared on the postcard, the defendant would then know that there is something they should do.

Mr. Marcus said that when he received Mr. Gordon's letter to the Committee it was late in the day yesterday. He forwarded the letter to Mr. Ulwick because the letter seemed to contain many representations about Mr. Ulwick's involvement in the case. Mr. Marcus said that he did not speak with Mr. Ulwick but Mr. Ulwick sent him a brief note this morning. The note commented

on the award of attorney's fees that were made. An award of attorney's fees is not the same as payment of attorney's fees. The $400,000 in attorney's fees that were awarded to Mr. Ulwick's firm were to be paid by all of the defendants who were responsible for making contributions. In his note, Mr. Ulwick made a point that the court also approved a one-third contingent fee to plaintiff's counsel, which amounted to more than 2 million dollars. That award was based on a contingent fee agreement. Mr. Ulwick's fees were not contingent on anything, and his firm had not agreed to participate in the case as lead counsel.

Mr. Marcus said that he has been involved in a number of class actions, usually on the defense side. He said that the plaintiffs could always propose to the trial judge that notice be sent to the defendants by providing the defendants with copies of the complaint. That way, the plaintiffs can fend off the argument that due process had not been satisfied.

Mr. Marcus continued that he understands that it was easier for plaintiffs' counsel in the G&G Towing case to send the postcard than to send a copy of the complaint with a summons. However, the timing of the certification and the type of notice that was sent made it almost impossible for the defendants to have an opportunity to be heard on an objection to the certification. The postcard simply gave the defendants the

option to be in the settlement class or remain in the defendant class. For many landowners the choice was simple. He added that he respects Judge Nazarian's motion to reject the Subcommittee's proposal but he moves in favor of the proposal.

Mr. Zollicoffer said that the reason why he seconded Judge Nazarian's motion is that he believes the proposal is too sweeping. He said he believes there are some cases where the defendant class device may work well. For example, a defendant class could work where a party is seeking injunctive relief.

The Chair asked Mr. Zollicoffer if he would extend the defendant class device to declaratory actions where damages are sought. Mr. Zollicoffer answered in the negative. He said that he would only extend the device to injunctive relief.

Judge Nazarian said that his motion was in part parliamentary. Since the proposal came from the Subcommittee, without a motion on the proposal the Committee would not have had the current discussion. Part of his concern is whether there is a sample size problem or a structural problem. Everything that has happened in the *G&G Towing* case raises serious questions that have to be answered. He said that he cannot tell if those problems are a function of human error in executing the device or a function of the device being fundamentally flawed in the first place. He said that Mr. Carbine and the Subcommittee have studied this issue more than

he has. However, he has defended class actions where it was appropriate for a plaintiff class. He worked with insurance carriers who wanted to file under (b)(1). He said that he struggles with the idea of eliminating a device that has existed in the federal courts for years and may have advantages.

Mr. Carbine said that if the Committee ultimately rejects the proposal, the possibility that someone may abuse the Rule is not eliminated. He said that when you take the words of the Rule and apply it to defendant classes, there is a structural defect that cannot be cured.

Mr. Frederick said that he understands the concern expressed by Judge Nazarian. He said that he recalls when thirty thousand asbestos cases were in the Circuit Court for Baltimore City. Those cases were consolidated for trial on liability because the consolidation Rule enabled an efficient and effective means of handling the cases. There are other devices available to creative lawyers and a creative judiciary to proceed with cases without running the risk of subjecting another party to what happened in the *G&G Towing* case.

Senator Cassilly said that he is in favor of the Rule change. He added that when the Federal Rule was first created, it was difficult to add ten thousand defendants to one case. With advancements in computer technology, it is now much easier to add a large number of defendants to a case. He commented

that too often the courts are used to set very broad public policy rather than focusing on individual cases. The Rule change is necessary to place the courts back in the position where they should be, which is resolving disputes between groups of discreet parties.

Ms. Arthur stated that she was present on behalf of the MSBA and that the MSBA does not have a position on this issue.

Judge Nazarian pointed out that the distinction between Maryland's courts and the Federal courts is that in Maryland, there is no Fed. R. Civ. P. 23(f) type of appellate check on the certification of a class. He said that he would recommend to Senator Cassilly that perhaps the legislature could take up that issue. The Committee previously discussed the issue and realized that they could not address that by Rule.

The Chair invited comments on Judge Nazarian’s motion to reject the Subcommittee’s proposal. The motion failed with two members in favor. There being no additional motions, the Rule was approved as presented.

Agenda Item 5. Consideration of proposed amendments to Rule 3-123 (Process – By Whom Served).

Judge Bryant presented Rule 3-123 Process – By Whom Served, for consideration.

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 100 - COMMENCEMENT OF ACTION AND PROCESS

AMEND Rule 3-123 by conforming the Rule to an amendment to Code, Real Property Article, § 8-401, as follows:

RULE 3-123. PROCESS--BY WHOM SERVED

(a) Generally

Service of process may be made by a sheriff or, except as otherwise provided in this Rule, by a competent private person, 18 years of age or older, including an attorney of record, but not by a party to the action.

(b) Sheriff

(1) All process requiring execution other than delivery, mailing, or publication shall be executed by the sheriff of the county where execution takes place, unless the court orders otherwise and notwithstanding subsection (b)(2).

(2) Upon a request from a plaintiff in an action to repossess nonresidential property under Code, Real Property Article, § 8-401, service of process on a tenant may be directed to any person authorized to serve process under section (a), in addition to the service required under subsection (b)(1).

(c) Elisor

When the sheriff is a party to or interested in an action so as to be disqualified from serving or executing process, the court, on application of any interested party, may appoint an elisor to

serve or execute the process. The appointment shall be in writing, signed by a judge, and filed with the clerk issuing the process. The elisor has the same power as the sheriff to serve or execute the process for which the elisor was appointed and is entitled to the same fees.

Source: This Rule is derived as follows:
Section (a) is derived from former M.D.R. 104 b 1 and h 2 and 116 a.
Section (b) is derived, in part, from former M.D.R. 116 a and is new, in part.
Section (c) is derived from former M.D.R. 117 a and b.

Rule 3-123 was accompanied by the following Reporter's note.

REPORTER'S NOTE

An amendment to Code, Real Property Article, § 8-401, became effective on October 1, 2018. This amendment allows a plaintiff to request service of process by a "person authorized under the Maryland Rules to serve process" in an action for repossession of nonresidential property. This is in addition to service by sheriff, which remains a requirement for an action to proceed.

Proposed amendments to Rule 3-123 include a new subsection (b)(2) that permits, in an action for repossession of nonresidential property, service by a person authorized under section (a).

In effect, service of process must be made by the sheriff of the appropriate county or municipality, but a plaintiff may elect, in addition to service by sheriff, to attempt service of process by a competent private person, 18 years of age or older,

including an attorney of record, so long as the person is not a party to the action.

Judge Bryant said that the General Assembly amended Code, Real Property Article, § 8-401 to allow private process servers for the repossession of commercial property cases. The amendment to Rule 3-123 was proposed to allow plaintiff requests for service of process by a private process server.

The Chair said that language was added to subsection (b)(1), which reads "and notwithstanding subsection (b)(2)." Subsection (b)(2) allows the plaintiff to use a private process server other than a sheriff. The Chair inquired as to what is gained by allowing the plaintiff to use a private process server.

Judge Price said that the sheriff will go to the property once and post to the property if no one is there. In those instances, the plaintiff would not be able to obtain a money judgment against the defendant.

Judge Mosley said that in Anne Arundel County, the bench is split with regard to service of process for money judgments. Some judges say that there needs to be service done by the sheriffs, other judges say that there can be any service. The case law is split on that issue.

The Chair said that he understood that point. He invited comments on the proposal. There being no motion to amend or disapprove the proposed amendment to Rule 3-123, it was approved as presented.

Senator Cassilly added that the legislation had been sponsored by the late Senator Norman.

Agenda Item 6. Consideration of proposed amendments to Rule 16-207 (Problem Solving Court Programs).

The Chair presented Rule 16-207 Problem Solving Court Programs, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 – COURT ADMINISTRATION

CHAPTER 200 – GENERAL PROVISIONS – CIRCUIT AND DISTRICT COURTS

AMEND Rule 16-207 to revise the procedure for approval of a problem-solving court program, as follows:

Rule 16-207. PROBLEM SOLVING COURT PROGRAMS

(a) Definition

(1) Generally

Except as provided in subsection (a)(2) of this Rule, "problem-solving court program" means a specialized court docket or program that addresses matters under a

court's jurisdiction through a multi-disciplinary and integrated approach incorporating collaboration by the court with other governmental entities, community organizations, and parties.

(2) Exceptions

(A) The mere fact that a court may receive evidence or reports from an educational, health, rehabilitation, or social service agency or may refer a person before the court to such an agency as a condition of probation or other dispositional option does not make the proceeding a problem-solving court program.

(B) Juvenile court truancy programs specifically authorized by statute do not constitute problem-solving court programs within the meaning of this Rule.

(b) Applicability

This Rule applies in its entirety to problem-solving court programs submitted for approval on or after ~~July 1, 2016~~ [Date], 2019. Sections (a), (e), (f), and (g) of this Rule apply also to problem-solving court programs in existence on ~~July 1, 2016~~ [Date], 2019.

(c) Submission of Plan

After initial consultation with the Office of Problem-Solving Courts and any officials whose participation in the programs will be required, the County Administrative Judge of a circuit court or a District Administrative Judge of the District Court may prepare and submit to the ~~State Court Administrator~~ Office of Problem-Solving Courts a detailed plan for a problem-solving court program consistent with the protocols and requirements in an Administrative Order of the Chief Judge of the Court of Appeals.

Committee note: Examples of officials to be consulted, depending on the nature of the proposed program, include individuals in the Office of the State's Attorney, Office of the Public Defender; Department of Juvenile Services; health, addiction, and education agencies; the Division of Parole and Probation; and the Department of Human Services.

(d) Approval of Plan

After review of the plan and consultation with such other judicial entities as the State Court Administrator may direct, ~~the State Court Administrator~~ the Office of Problem-Solving Courts shall submit the plan, together with any comments and a recommendation, ~~to the Judicial Council for review by the Council and~~ to the State Court Administrator. The State Court Administrator shall review the materials and make a recommendation to the Chief Judge of the Court of Appeals. The program shall not be implemented until it is approved by order of the Chief Judge of the Court of Appeals.

(e) Acceptance of Participant into Program

(1) Written Agreement Required

As a condition of acceptance into a program and after the advice of an attorney, if any, a prospective participant shall execute a written agreement that sets forth:

(A) the requirements of the program;

(B) the protocols of the program, including protocols concerning the authority of the judge to initiate, permit, and consider ex parte communications pursuant to Rule 18-102.9 of the Maryland Code of Judicial Conduct;

(C) the range of sanctions that may be imposed while the participant is in the program, if any; and

(D) any rights waived by the participant, including rights under Rule 4-215 or Code, Courts Article, § 3-8A-20.

Committee note: The written agreement shall be in addition to any advisements that are required under Rule 4-215 or Code, Courts Article, § 3-8A-20, if applicable.

(2) Examination on the Record

The court may not accept the prospective participant into the program until, after examining the prospective participant on the record, the court determines and announces on the record that the prospective participant understands the agreement and knowingly and voluntarily enters into the agreement.

(3) Agreement to be Made Part of the Record

A copy of the agreement shall be made part of the record.

(f) Immediate Sanctions; Loss of Liberty or Termination from Program

If permitted by the program and in accordance with the protocols of the program, the court, for good cause, may impose an immediate sanction on a participant, except that if the participant is considered for the imposition of a sanction involving the loss of liberty or termination from the program, the participant shall be afforded notice, an opportunity to be heard, and the right to be represented by an attorney before the court makes its decision. If a hearing is required by section (f) of this Rule and the participant is not represented by an attorney, the court shall comply with Rule

4-215 in a criminal action or Code, Courts Article, § 3-8A-20 in a delinquency action before holding the hearing.

Committee note: In considering whether a judge should be disqualified pursuant to Rule 18-102.11 of the Maryland Code of Judicial Conduct from post-termination proceedings involving a participant who has been terminated from a problem-solving court program, the judge should be sensitive to any exposure to ex parte communications or inadmissible information that the judge may have received while the participant was in the program.

(g) Credit for Incarceration Time Served

If a participant is terminated from a program, any period of time during which the participant was incarcerated as a sanction during participation in the program shall be credited against any sentence imposed or directed to be executed in the action.

Source: This Rule is derived from former Rule 16-206 (2016).

Rule 16-207 was accompanied by the following Reporter's note.

REPORTER'S NOTE

The State Court Administrator has requested that Rule 16-207 be amended to streamline the process for approval of a new problem-solving court program. Under the proposed revised procedure, the plan for a new program is submitted to the Office of Problem-Solving Courts, which will review the plan in consultation with such other judicial entities as the State Court Administrator may direct. Currently, the Specialty Courts and Dockets Committee of

> the Judicial Council reviews the plans, and it is anticipated that this entity will continue in its consultative role, but without the involvement of the full Judicial Council. The Office of Problem-Solving Courts will then submit the plan, together with any comments and a recommendation, to the State Court Administrator. The State Court Administrator will review the materials and provide a recommendation to the Chief Judge of the Court of Appeals. The revised Rule retains the current prohibition against implementation of a program until it has been approved by Order of the Chief Judge of the Court of Appeals.

The Chair said that Item 6 was requested by the Administrative Office of the Courts. The amendment clarifies that plans for problem-solving court programs must first be submitted to the Office of Problem Solving Courts, rather than to the Administrative Office of the Courts directly. The Chair asked Ms. Harris whether she had anything to add.

Ms. Harris said that the proposed change provides clarity and provides for a faster process.

The Chair invited comments on the proposed revision in Rule 16-207. There being no motion to amend or disapprove the proposed amendment to Rule 16-207, it was approved as presented.

Agenda Item 7. Consideration of proposed amendments to Rule 19-738 (Discipline on Conviction of Crime).

Mr. Frederick presented Rule 19-738 Discipline on Conviction of Crime, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

CHAPTER 700 – DISCIPLINE, INACTIVE STATUS, RESIGNATION

AMEND Rule 19-738 by adding previously deleted language to section (b), by adding language to section (g), and by revising language in section (i), as follows:

Rule 19-738. DISCIPLINE ON CONVICTION OF CRIME

(a) Definition

In this Rule, "conviction" includes a judgment of conviction entered upon acceptance by the court of a plea of nolo contendere.

(b) Duty of Attorney

An attorney charged with a serious crime in this State or any other jurisdiction shall promptly inform Bar Counsel in writing of (1) the filing of the charge, (2) any finding or verdict of guilty on such charge, ~~and~~ (3) the entry of a judgment of conviction on such charge, and (4) the final disposition of the charge in each court that exercises jurisdiction over the charge.

Cross reference: Rule 19-701 (l)
.

(c) Petition Upon Conviction

(1) Generally

Upon receiving and verifying information from any source that an attorney has been convicted of a serious crime, Bar Counsel may file a Petition for Disciplinary or Remedial Action pursuant to Rule 19-721 (a)(2). The petition may be filed whether an appeal or any other post-conviction proceeding is pending.

(2) Contents

The petition shall allege the fact of the conviction and include a request that the attorney be suspended immediately from the practice of law. A certified copy of the judgment of conviction shall be attached to the petition and shall be prima facie evidence of the fact that the attorney was convicted of the crime charged.

(d) Temporary Suspension

Upon filing of the petition pursuant to section (c) of this Rule, the Court of Appeals shall issue an order requiring the attorney to show cause within 15 days from the date of the order why the attorney should not be suspended immediately from the practice of law until the further order of the Court of Appeals. If, after consideration of the petition and the answer to the order to show cause, the Court of Appeals determines that the attorney has been convicted of a serious crime, the Court may enter an order suspending the attorney from the practice of law until final disposition of the disciplinary or remedial action. The Court of Appeals shall vacate the order and terminate the suspension if the conviction is reversed or vacated.

Cross reference: Rule 19-742.

(e) Petition When Imposition of Sentence is Delayed

(1) Generally

Upon receiving and verifying information from any source that an attorney has been found guilty of a serious crime but that sentencing has been delayed for a period of more than 30 days, Bar Counsel may file a Petition for Interim Disciplinary or Remedial Action. The petition may be filed whether or not a motion for new trial or other relief is pending.

(2) Contents

The petition shall allege the finding of guilt and the delay in sentencing and request that the attorney be suspended immediately from the practice of law pending the imposition of sentence and entry of a judgment of conviction. Bar Counsel shall attach to the petition a certified copy of the docket reflecting the finding of guilt, which shall be prima facie evidence that the attorney was found guilty of the crime charged.

(3) Interim Temporary Suspension

Upon the filing of the petition, the Court of Appeals shall issue an order requiring the attorney to show cause within the time specified in the order why the attorney should not be suspended immediately from the practice of law, on an interim basis, until further order of the Court of Appeals. If, after consideration of the petition and any answer to the order to show cause, the Court of Appeals determines that the attorney was found guilty of a serious crime but that sentencing has been delayed for a period of more than 30 days, the Court may enter an order suspending the attorney from the practice of law on an interim basis

pending further action by the trial court and further order of the Court of Appeals.

(4) Entry of Judgment of Conviction or Order for New Trial

Upon the imposition of sentence and entry of a judgment of conviction or upon the granting of a new trial by the trial court, Bar Counsel shall inform the Court of Appeals and attach a certified copy of the judgment of conviction or order granting a new trial. If a judgment of conviction was entered, Bar Counsel may file a petition under section (c) of this Rule. The Court shall then proceed in accordance with section (d) of this Rule but may order that any interim suspension remain in effect pending disposition of the new petition. If the trial court has vacated the finding of guilt and granted a new trial, or if the attorney received probation before judgment, the Court of Appeals shall dismiss the petition for interim suspension and terminate any interim suspension that has been ordered.

(f) Statement of Charges

If the Court of Appeals denies a petition filed under section (c) of this Rule, Bar Counsel may file a Statement of Charges under Rule 19-718.

(g) Further Proceedings

When a petition filed pursuant to section (c) of this Rule alleges the conviction of a serious crime and the attorney denies the conviction <u>or intends to present evidence in support of a disposition other than disbarment</u>, the Court of Appeals may enter an order designating a judge pursuant to Rule 19-722 to hold a hearing in accordance with Rule 19-727.

(1) No Appeal of Conviction

If the attorney does not appeal the conviction, the hearing shall be held within a reasonable time after the time for appeal has expired.

(2) Appeal of Conviction

If the attorney appeals the conviction, the hearing shall be delayed, except as provided in section (h) of this Rule, until the completion of appellate review.

(A) If, after completion of appellate review, the conviction is reversed or vacated, the judge to whom the action is assigned shall either dismiss the petition or hear the action on the basis of evidence other than the conviction.

(B) If, after the completion of appellate review, the conviction is not reversed or vacated, the hearing shall be held within a reasonable time after the mandate is issued.

(3) Effect of Incarceration

If the attorney is incarcerated as a result of the conviction, the hearing shall be delayed until the termination of incarceration unless the attorney requests an earlier hearing and makes all arrangements (including financial arrangements) to attend the hearing or waives the right to attend.

(h) Right to Earlier Hearing

If the hearing on the petition has been delayed under subsection (g)(2) of this Rule and the attorney has been suspended from the practice of law under section (d) of this Rule, the attorney may request that the judge to whom the action is assigned hold an earlier hearing, at which the

conviction shall be considered a final judgment.

(i) Conclusive Effect of Final Conviction

In any proceeding under this Chapter, a final judgment of any court of record convicting an attorney of a crime, whether the conviction resulted from acceptance by the court of a plea of guilty or nolo contendere, or a verdict after trial, is conclusive evidence of the attorney's guilt of that crime. As used in this Rule, “final judgment” means a judgment as to which all rights to direct appellate review have been exhausted. The introduction of the judgment does not preclude the Commission or Bar Counsel from introducing additional evidence or the attorney from introducing evidence or otherwise showing cause why ~~no discipline~~ a disposition other than disbarment should be ~~imposed~~ entered.

(j) Duties of Clerk of Court of Appeals

The applicable provisions of Rule 19-761 apply when an order is entered under this Rule.

Source: This Rule is derived from former Rule 16-771 (2016).

Rule 19-738 was accompanied by the following Reporter’s note.

REPORTER’S NOTE

Changes to Rule 19-738 are proposed that add previously deleted language back into section (b) and that address dispositions other than disbarment.

At the request of Bar Counsel, amendments are made to sections (g) and (i)

to reference “a disposition other than disbarment.”

Under the change to section (g), if Bar Counsel learns that an attorney who has been convicted of a serious crime intends to present evidence in support of a disposition other than disbarment, Bar Counsel may file a petition with the Court of Appeals, and the Court may enter an order designating a judge to hold a hearing.

Under section (i), if a final judgment demonstrating an attorney’s conviction of a crime is introduced at a proceeding, the final judgment constitutes conclusive evidence of guilt. The introduction of the final judgment, however, does not preclude the attorney from submitting evidence or otherwise showing cause why a disposition other than disbarment should be entered.

At the same time that changes to sections (g) and (i) were considered by the Attorneys and Judges Subcommittee, the issue of language previously deleted from section (b) was raised.

In 2013, the Rules Committee voted to amend section (b) as follows:

~~(a)~~ (b) Duty of Attorney ~~Charged~~

An attorney charged with a serious crime in this State or any other jurisdiction shall promptly inform Bar Counsel in writing of ~~the criminal charge~~ (1) the filing of the charge, (2) any finding or verdict of guilty on such charge, and (3) the entry of a judgment of conviction on such charge. ~~Thereafter, the attorney shall promptly notify Bar Counsel of the final disposition of the charge in each court that exercises jurisdiction over the charge.~~

After consideration, the Subcommittee believes the re-addition of language

requiring prompt disclosure of "the final disposition of the charge in each court that exercises jurisdiction over the charge," located at new subsection (b)(4), is appropriate.

Mr. Frederick said that the proposed Rule change emanates from a 4-3 decision Court of Appeals decision in *Attorney Grievance Commission vs. Walter Lloyd Blair*. Mr. Blair was an attorney charged in Federal Court with fourteen violations of various statutes. Most of the charges were for laundering drug money, taking the money himself, and opening fake accounts to siphon off some of the money. Mr. Blair subsequently appealed and was exonerated on one of the fourteen charges but convicted on the remaining thirteen charges.

Mr. Frederick said that the Court of Appeals had very little trouble determining that Mr. Blair should be disbarred. The Court spent fifteen pages explaining why. One of the issues that was raised is that Mr. Blair wanted an opportunity to be heard with regard to mitigation. The majority opinion notes that neither Mr. Blair nor his lawyer could explain in detail any of the mitigating factors that the Court of Appeals has used. There are thirteen mitigating factors. Instead, what was argued before the Court of Appeals was that Mr. Blair had really learned a lot, he was 68 years old, he can serve the community,

he’s thought about his actions while in jail, and he’s ready to do good.

In the concurring and dissenting opinion, Judge Harrell took the position that Mr. Blair and his attorney failed to bring up the mitigating factors because they were blindsided in the well of the Court. They did not know to be prepared to articulate a specific proffer of relevant mitigation evidence they might seek to offer at an evidentiary hearing. The Court of Appeals does not take testimony and make findings of fact. It reviews the record made at the hearing before a circuit court judge. Judge Harrell in his opinion said that the process must be fair. If a lawyer is asking the Court for a disposition less than disbarment, the lawyer should have a hearing before a circuit court judge, so that the lawyer has an opportunity to be heard and so that a record can be made. That is the moving point behind the Rule change.

The Chair invited comments on the Subcommittee’s recommendation. There being no motion to amend or disapprove the proposed amendments to Rule 19-738, they were approved as presented.

Agenda Item 8. Consideration of proposed amendments to Rule 11-121 (Court Records - Confidentiality).

The Reporter presented Rule 11-121 Court Records - Confidentiality, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 11 – JUVENILE CAUSES

CHAPTER 100 – GENERAL PROVISIONS

AMEND Rule 11-121 (a) to revise an internal reference, as follows:

Rule 11-121. COURT RECORDS—CONFIDENTIALITY

(a) Sealing of Records

Files and records of the court in juvenile proceedings, including the docket entries and indices, are confidential and shall not be open to inspection except by order of the court or as otherwise expressly provided by law. On termination of the court's juvenile jurisdiction, the filed and records shall be sealed pursuant to Section 3-828 (c) of the Courts Article, and all index references shall be marked "sealed." If a hearing is open to the public pursuant to the Code, Courts Article ~~§3-812~~ §3-8A-13 (f), the name of the respondent and the date, time, and location of the hearing are not confidential.

(b) Unsealing of Records

Sealed files and records of the court in juvenile proceedings may be unsealed and inspected by order of the court.

Cross reference: For confidentiality in appellate proceedings, see Rule 8-121 (Appeals from Courts Exercising Juvenile Jurisdiction--Confidentiality).

Source: This Rule is derived from former Rule 921.

Rule 11-121 was accompanied by the following Reporter's note.

REPORTER'S NOTE

> The Committee has been advised that the reference to Code, Courts Article §3-812 in Rule 11-121 (a) is obsolete. Currently, Code, Courts Article §3-812 governs CINA proceedings, which are not open to the public. The proposed amendment to the Rule updates the reference to Code, Courts Article §3-8A-13 (f), which applies to hearings in certain juvenile proceedings that are open to the public.

The Reporter said that she received an email from the Clerk of a circuit court advising her of an obsolete reference in Rule 11-121 (a). The proposed amendment updates the obsolete reference to Code, Courts Article §3-812 to the correct reference to Code, Courts Article §3-8A-13 (f). This is a housekeeping amendment.

The Chair invited comments to the proposed amendment and a motion to approve the amendment. The motion was made and seconded, and the amendment to Rule 11-121 passed by a majority vote.

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