COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 of the Judiciary Education and Conference Center, 2011 Commerce Park Drive, Annapolis, Maryland on October 10, 2014.

Members present:

Hon. Alan M. Wilner, Chair
Hon. Robert A. Zarnoch, Vice Chair

A. Gillis Allen, II, Esq.
James E. Carbine, Esq.
Christopher R. Dunn, Esq.
Hon. Angela M. Eaves
Hon. JoAnn M. Ellinghaus-Jones
Alvin I. Frederick, Esq.
Hon. Joseph H. H. Kaplan
Derrick William Lowe, Esq., Clerk
Bruce L. Marcus, Esq.
Hon. Danielle M. Mosley
Scott G. Patterson, Esq.
Hon. W. Michel Pierson
Hon. Paula A. Price
Hon. Julia B. Weatherly
Robert Zarbin, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Mary G. Bodley, Esq., Assistant Reporter
Gregory Hilton, Clerk, Court of Special Appeals
Hon. Larnzell Martin, Jr., Circuit Court for Prince George's County
Hon. Deborah S. Eyler, Court of Special Appeals
Hon. Ann Sundt, Circuit Court for Montgomery County
Kim Doan, Esq., Circuit Court for Anne Arundel County
Debra Gardner, Esq., Legal Director, Public Justice Center
Brian L. Zavin, Esq., Office of the Public Defender
Connie Kratovil-Lavelle, Esq., Director, Child and Family Services, Administrative Office of the Courts
Julia Bernhardt, Esq., Assistant Attorney General
Kathleen Wherthey, Esq., Administrative Office of the Courts

The Chair convened the meeting. He announced that the 186th Report of the Rules Committee, which consists of 16 categories of Rules, totaling about 265 pages, had been filed with the Court

of Appeals on September 26, 2014. The comment period expires on November 17, 2014. One category of the 16 had been submitted as an emergency. This consisted of two MDEC Rules. The Court held a hearing on those two Rules on October 2, 2014 and adopted them effective October 14, 2014, which is when MDEC becomes effective in Anne Arundel County.

One of the Rules, Rule 20-102, Application of Title to Courts and Actions, sets October 14, 2014 as the start date. The other, Rule 20-204.1, Electronic Issuance of Original Process - Civil, had been approved by the Rules Committee last month. It sets forth the procedure for what happens when a pleading that requires service of process is electronically filed. Those Rules will apply to filings in the Anne Arundel County trial courts starting October 14, 2014 and will also apply to the two appellate courts in any appeals coming out of Anne Arundel County on or after that date.

The Chair told the Committee that the first agenda item to be discussed would be Agenda Item 2.

Agenda Item 2. Consideration of proposed amendments to Rules 16-1008 (Conversion of Paper Records) and 16-1008.1 (Access to Electronic Records)

The Chair presented Rules 16-1008, Conversion of Paper Records, and 16-1008.1, Access to Electronic Records, for the Committee's consideration.

As presented to the Committee, these Rules were numbered 16-908 and 16-908.1. Upon approval by the Court of Part 1 of the Committee's 178th Report, the Rules will be in Chapter 900 of Title 16, and thus will be numbered 16-908 and 16-908.1. Until then, however, they will remain in Chapter 1000 and will remain numbered 16-1008 and 16-1008.1. The discussion, therefore, will refer to the Rules by their current numbers.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 1000 - ACCESS TO COURT RECORDS

Rule 16-1008. ~~ELECTRONIC RECORDS AND RETRIEVAL~~ CONVERSION OF PAPER RECORDS

(a) In General

~~(1) Subject to the conditions stated in this Rule, a court record that is kept in electronic form is open to inspection to the same extent that the record would be open to inspection in paper form.~~

~~(2)~~ Subject to the ~~other provisions of this Rule, the~~ Rules in this Title and Title 20, ~~and any other~~ to other applicable law ~~or any~~ and to administrative orders of the Chief Judge of the Court of Appeals, a custodian, court, or other judicial agency, for the purpose of providing public access to court records in electronic form, is authorized but not required:

~~(A)~~ (1) to convert paper court records into electronic court records;

~~(B)~~ (2) to create new electronic records, databases, programs, or computer systems;

~~(C) to provide computer terminals or~~

~~other equipment for use by the public;~~

~~(D)~~ (3) to create the ability to inspect or copy court records through remote access; or

~~(E)~~ (4) to convert, supplement, modify, or replace an existing electronic storage or retrieval system.

~~(3) (A)~~ (b) Limiting Access to Court Records

~~Subject to the other provisions of this Rule, a~~ A custodian may limit access to court records in electronic form to the manner, form, and program that the electronic system used by the custodian, without modification, is capable of providing.

(c) Facilitating Access to Court Records

~~Subject to the Rules in Title 20, if~~ If a custodian, court, or other judicial agency converts paper court records into electronic court records or otherwise creates new electronic records, databases, or computer systems, it shall, to the extent practicable, design those records, databases, or systems to facilitate access to court records that are open to inspection under the Rules in this Chapter.

~~(B) (i) Subject to subsection (a)(3)(B)(ii) of this Rule and except for identifying information relating to law enforcement officers, other public officials or employees acting in their official capacity, and expert witnesses, a custodian shall prevent remote access to the name, address, telephone number, date of birth, e-mail address, and place of employment of a victim or nonparty witness in (1) a criminal action, (2) a juvenile delinquency action under Title 3, Subtitle 8A of the Courts Article, (3) an action under Title 4, Subtitle 5 of the Family Law Article (domestic violence), or (4) an action under Title 3, Subtitle 15 of the Courts Article (peace order).~~

~~(ii) A person who files or otherwise causes to be placed in a court record identifying information relating to a witness shall give the custodian written or electronic notice~~ as to ~~whether the identifying information is not subject to remote access under Rule 1-322.1, Rule 20-201, or subsection (a)(3)(B)(i) of this Rule. Except as may be provided by federal law, in the absence of such notice, a custodian is not liable for allowing remote access to the information.~~

~~(4) Subject to subsection (a)(3)(B) of this Rule and procedures and conditions established by administrative order of the Chief Judge of the Court of Appeals, a person may view and copy electronic court records that are open to inspection under the Rules in this Chapter:~~

~~(A) at computer terminals that a court or other judicial agency makes available for public use at the court or other judicial agency; or~~

~~(B) by remote access that the court or other judicial agency makes available through dial-up modem, web site access, or other technology.~~

~~(b)~~ (d) Current Programs Providing Electronic Access to Databases

Any electronic access to a database of court records that is provided by a court or other judicial agency and is in effect on October 1, 2004 may continue in effect, subject to review by the Technology Oversight Board for consistency with the Rules in this Chapter. After review, the Board may make or direct any changes that it concludes are necessary to make the electronic access consistent with the Rules in this Chapter.

~~(c)~~ (e) New Requests for Electronic Access to or Information from Databases

(1) A person who desires to obtain electronic access to or information from a database of court records to which electronic

access is not then immediately and automatically available shall submit to the Office of Communications and Public Affairs a written ~~application~~ request that describes the court records to which access is desired and the proposed method of achieving that access.

(2) The Office of Communications and Public Affairs shall review the ~~application~~ request and may consult the Judicial Information Systems. Without undue delay and, unless impracticable, within 30 days after receipt of the ~~application~~ request, the Office of Communications and Public Affairs shall take one of the following actions:

(A) It shall approve a ~~application if it determines that the application does not request access to court records not subject to inspection under the Rules in this Chapter or Title 20 and will not impose a significant fiscal, personnel, or operational burden on any court or judicial agency. The approval may be conditioned on the applicant's paying or reimbursing the court or agency for any additional expense that may be incurred in implementing the application.~~ request that seeks access to court records subject to inspection under the Rules in this chapter or Title 20 and will not directly or indirectly impose significant fiscal or operational burdens on any court or judicial agency;

(B) It shall ~~If the Office of Communications and Public Affairs is unable to make the findings provided for in subsection (c)(2)(A) of this Rule, it shall inform the applicant and:~~

~~(i) deny the application;~~

~~(ii) offer to confer with the applicant about amendments to the application that would meet the concerns of the Office of Communications and Public Affairs; or~~

~~(iii) if the applicant requests, refer the application to the Technology Oversight Board for its review.~~ conditionally approve a request that seeks access to court

records subject to inspection under the Rules in this Chapter or Title 20 but will directly or indirectly impose significant and reasonably calculable fiscal [or operational] burdens on a court or judicial agency on condition of the requestor's prepayment in full of all additional expenses reasonably incurred as a result of the approval.

(C) ~~If the application is referred to the Technology Oversight Board, the Board shall determine whether approval of the application would be likely to permit access to court records or information not subject to inspection under the Rules in this Chapter, create any undue burden on a court, other judicial agency, or the judicial system as a whole, or create undue disparity in the ability of other courts or judicial agencies to provide equivalent access to court records. In making those determinations, the Board shall consider, to the extent relevant:~~ It shall deny the request and state the reason for the denial if:

(i) the requester fails or refuses to satisfy a condition imposed under subsection (e)(2)(B) of this Rule;

(ii) the request seeks access to court records not subject to inspection under the Rules in this Chapter or Title 20; or

(iii) the request directly or indirectly imposes a significant but not reasonably calculable fiscal or operational burden on any court or judicial agency.

(3) Upon receipt of a denial, the requester may ask for a conference with the Office of Communications and Public Affairs to address any basis for denial. If, after a conference the matter is not resolved, the requester may ask for referral of the request (or any proposed but rejected amendment to the request) to the Technology Oversight Board for its review.

(4) Upon referral to the Technology Oversight Board, the Board shall consider each of the Office of Communications and

Public Affairs' stated grounds for denial of the request (and any previously proposed but rejected amendment thereof), and also consider, to the extent relevant thereto:

~~(i)~~ (A) whether the data processing system, operational system, electronic filing system, or manual or electronic storage and retrieval system used by or planned for the court or judicial agency that maintains the records can currently provide the access requested in the manner requested and in conformance with Rules ~~16-1001 through 16-1007~~ 16-901 through 16-907, and, if not, ~~what~~ any changes or effort ~~would be~~ required to ~~make~~ enable those systems ~~capable of providing~~ to provide that access;

~~(ii)~~ (B) whether any changes to the data processing, operational electronic filing, or storage or retrieval systems used by or planned for other courts or judicial agencies in the State that would be required in order to avoid undue disparity in the ability of those courts or agencies to provide equivalent access to court records maintained by them;

~~(iii)~~ (C) any other fiscal, personnel, or operational impact of the proposed program on the court or judicial agency or on the State judicial system as a whole;

~~(iv)~~ (D) whether there is a substantial possibility that information retrieved through the program may be used for any fraudulent or other unlawful purpose or may result in the dissemination of inaccurate or misleading information concerning court records or individuals who are the subject of court records and, if so, whether there are any safeguards to prevent misuse of disseminated information and the dissemination of inaccurate or misleading information; and

~~(v)~~ (E) any other consideration that the Technology Oversight Board finds relevant.

~~(D)~~ (5) ~~If, upon~~ Upon consideration of the factors set forth in subsection ~~(c)(2)(C)~~ (e)(4) of this Rule, and without undue delay, the Technology Oversight Board ~~concludes that the proposal would create (i) an undue fiscal, personnel, or operational burden on a court, other judicial agency, or the judicial system as a whole, or (ii) an undue disparity in the ability of other courts or judicial agencies to provide equivalent access to judicial records, the Board shall inform the Office of Communications and Public Affairs and the applicant in writing of its conclusions. The Office of Communications and Public Affairs and the applicant may then discuss amendments to the application to meet the concerns of the Board, including changes in the scope or method of the requested access and arrangements to bear directly or reimburse the appropriate agency for any expense that may be incurred in providing the requested access and meeting other conditions that may be attached to approval of the application. The applicant may amend the application to reflect any agreed changes. The application, as amended, shall be submitted to the Technology Oversight Board for further consideration.~~ shall inform the Office of Communications and Public Affairs and the requester that the request should be:

(A) approved, because it complies with the requirements of subsection (e)(2)(A) of this Rule;

(B) conditionally approved, because it complies with the requirements of subsection (e)(2)(B) of this Rule and the requester has agreed to comply with the conditions established by the Board; or

(C) denied under subsection (e)(2)(C) of this Rule.

(6) Upon receiving a denial by the Board, the requester is not barred from resubmitting to the Office of Communications and Public Affairs an amended request that addresses the Board's stated grounds for denial.

Source: This Rule is new.

Rule 16-1008 was accompanied by the following Reporter's note.

> Rule 16-908, which currently is pending before the Court of Appeals in Part 1 of the 178th Report, is derived from current Rule 16-1008. The Judiciary's Technology Oversight Board has requested changes to the Rule. With the addition of the proposed changes, the Rule becomes very lengthy and, as a matter of style, is divided into two Rules.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 1000 - ACCESS TO COURT RECORDS

Rule 16-1008.1. ACCESS TO ELECTRONIC RECORDS

(a) In General

Subject to the other Rules in this Title and in Title 20 and other applicable law, a court record that is kept in electronic form is open to inspection to the same extent that the record would be open to inspection in paper form.

(b) Denial of Remote Access

(1) Restricted Information

A custodian shall take reasonable steps to prevent remote access to restricted information, as defined in Rule 20-101 (s), that the custodian is on notice is included in a court record.

(2) Certain Identifying Information

(A) In General

Except as provided in subsection (b)(2)(B), a custodian shall prevent remote access to the name, address, telephone number, date of birth, e-mail address, and place of employment of a victim or nonparty witness in:

(i) a criminal action,

(ii) a juvenile delinquency action under Title 3, Subtitle 8A of the Courts Article,

(iii) an action under Title 4, Subtitle 5 of the Family Law Article (domestic violence), or

(iv) an action under Title 3, Subtitle 15 of the Courts Article (peace order).

(B) Exception

Identifying information relating to law enforcement officers, other public officials or employees acting in their official capacity, and expert witnesses, may be remotely accessible.

(C) Notice to Custodian

A person who files or otherwise causes placement in a court record of identifying information relating to a witness shall give the custodian written or electronic notice as to whether or not the identifying information is subject to remote access under this Rule, Rule 1-322.1, Rule 20-201, or other applicable law. Except as federal law provides, in the absence of such notice a custodian is not liable for allowing remote access to the information.

(c) Availability of Computer Terminals

Clerks shall make available computer terminals at convenient places in the courthouses that the public may use free of charge in order to access court records and parts of court records that are open to inspection, including court records as to

which remote access is otherwise prohibited. To the extent authorized by administrative order of the Chief Judge of the Court of Appeals, computer terminals may be made available at other facilities for that purpose.

Source: This Rule is new.

Rule 16-1008.1 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 16-1008.

The Chair explained that the amendments to Rules 16-1008 and 16-1008.1 had been recommended by the Technology Oversight Board. Most of the changes are stylistic and for clarification. Some of them are required by MDEC. Rule 16-1008, Electronic Records and Retrieval, the current Rule, is very long and addresses two different topics. One is the conversion of paper records to electronic records and the creation of new electronic records. The other topic is access to electronic records. Rule 16-1008 was part of the Access Rules that were adopted in 2004, long before MDEC was on the scene. Since the Technology Oversight Board had suggested many amendments to the Rule, the Chair had split the Rule up into two Rules. As amended, Rule 16-1008 addresses the conversion of records, and Rule 16-1008.1 addresses access to electronic records. Ms. Wherthey of the Administrative Office of the Courts ("AOC") was one of the primary people behind these proposed changes.

Ms. Wherthey said that she did not have any comment, because

the Chair had explained the proposed changes very well. She noted that in the 10 years since Rule 16-1008 went into effect, she and her colleagues had discovered that some refinements to the Rule were necessary. She expressed her approval of the current drafts of Rules 16-1008 and 16-1008.1. The Reporter commented that Ms. Wherthey had sent an e-mail directed to how the current drafts are written. The Reporter asked if Ms. Wherthey had any suggestions for change to the two Rules. Ms. Wherthey responded that she had pointed out a typographical error.

The Reporter observed that Ms. Wherthey had drawn attention to the words "or operational" which appeared in subsection (e)(2)(B) of Rule 16-1008 in brackets. The Chair noted that the brackets needed to be removed, because the word "operational" is in other places in the Rule, and it should have been in subsection (e)(2)(B) also. In subsection (e)(4)(B), in the fourth line, the word "that" should be deleted. It is a typographical error. In subsection (e)(5)(B), there is a typographical error. What appears as "thwe" should be the word "the."

By consensus, the Committee approved Rule 16-1008 as amended and 16-1008.1 as presented.

Agenda Item 1. Consideration of proposed amendments to Rules 20-201 (Requirements for Electronic Filing) and 20-202 (Effective Date of Filing)

The Chair presented Rules 20-201, Requirements for Electronic Filing, and 20-202, Effective Date of Filing, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 20 - ELECTRONIC FILING AND CASE MANAGEMENT

CHAPTER 200 - FILING AND SERVICE

AMEND Rule 20-201 (i)(2) to add certain provisions concerning requests for the waiver of prepayment of fees and the docketing of submissions in MDEC, as follows:

Rule 20-201. REQUIREMENTS FOR ELECTRONIC FILING

. . .

(i) Fee

(1) Generally

A submission shall be accompanied, in a manner allowed by the published policies and procedures adopted by the State Court Administrator, by any fee required to be paid in connection with the filing.

(2) Waiver

(A) A filer who (i) desires to file electronically a submission that requires a prepaid fee, (ii) has not previously obtained and had docketed a waiver of prepayment of the fee, and (iii) seeks a waiver of such prepayment, shall file a request for a waiver pursuant to Rule 1-325.

(B) The request shall be accompanied by (i) the documents required by Rule 1-325, (ii) the submission for which a waiver of the prepaid fee is requested, and (iii) a proposed order granting the request.

(C) No fee shall be charged for the filing of the waiver request.

(D) The clerk shall docket the request for waiver ~~but not the submission requiring a prepaid fee and shall transmit the request, with the accompanying documents, to a judge~~. If the clerk waives prepayment of the prepaid fee pursuant to Rule 1-325 (d), the clerk shall also docket the attached submission. If prepayment is not waived pursuant to Rule 1-325 (d), the clerk shall not docket the submission but shall transmit the request, the submission, and any accompanying documents to a judge for consideration of the request under Rule 1-325 (e). The judge shall act on the request promptly.

(E) (i) If the judge waives prepayment in full, the clerk shall docket the submission, which shall be deemed to have been filed on the date that the request for waiver was filed.

(ii) If the judge denies the request in whole or in part, the judge, in the order, shall specify a time, not exceeding 30 days, for payment of the fee, subject to extension, on request of the party, for one additional period not exceeding 30 days. The clerk shall promptly notify the filer of the order but shall not docket the submission unless the fee is paid within the time allowed.

(iii) If the fee is paid within that time, the submission shall be docketed and deemed to have been filed on the date [the fee or non-waived part of the fee is paid] [the order specifying the time for payment was entered] [the request for waiver was docketed]. If the fee is not paid within that time, the submission shall be deemed to have been withdrawn, and the case shall be closed.

~~(F) If the judge denies the waiver in whole or in part, the clerk shall notify the filer but shall not docket the submission until the fee or non-waived part of the fee, is paid.~~

Source: This Rule is new.

Rule 20-201 was accompanied by the following Reporter's note.

> Amendments to Rules 20-201 (i)(2) and 20-202 are proposed as additional conforming amendments to implement in MDEC the proposed revisions to Rule 1-325 contained in Category 10 of the 186th Report of the Rules Committee.
>
> In addition to providing a detailed workflow in the MDEC system for requests for the waiver of prepayment of fees, the proposals address (1) the time allowed for the party to pay the fee when a prepayment waiver is denied in whole or in part and (2) the filing date of a submission after a prepayment waiver has been granted or, if it was denied, the fee has been paid.

MARYLAND RULES OF PROCEDURE

TITLE 20 - ELECTRONIC FILING AND CASE MANAGEMENT

CHAPTER 200 - FILING AND SERVICE

AMEND Rule 20-202 to add a reference to Rule 20-201 (i), as follows:

Rule 20-202. EFFECTIVE DATE OF FILING

> The MDEC system shall record the date and time an electronically filed submission is received by the MDEC system. Subject to Rules 20-201(i) and 20-203, the date recorded shall be the effective date of filing and shall serve as the docket date of the

submission filed.

Source: This Rule is new.

Rule 20-202 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 20-201 (i)(2).

The Chair explained that Rules 20-201 and 20-202 are two MDEC Rules that are intended to make requests for the waiver of prepayment of prepaid costs under MDEC consistent with the changes to Rules 1-325 and 1-325.1, Waiver of Costs Due to Indigence, which the Committee had previously approved and is now pending in the Court of Appeals in the 186th Report. Assuming that the Committee approves these two Rules, the intent is to submit them to the Court as a Supplement to the 186th Report, so that if the Court approves the recommendations to Rule 1-325 made by the Committee, it will also be able to consider these two MDEC Rules. These two Rules would be able to take effect at the same time as the amendments to Rules 1-325 and 1-325.1.

The Chair told the Committee that Ms. Pamela Harris, the State Court Administrator, would like to implement these proposed Title 20 Rules, or at least the content of them, on October 14, 2014 in Anne Arundel County. The Legal Office of the AOC has concluded that she can do that, because the content of these Title 20 Rules is not inconsistent with current Rule 1-325. Some changes have been made to the Rule, which make the procedure a little easier and clarifies a number of issues, but the Legal

Office of the AOC has determined that there is no substantive inconsistency between the Title 20 Rules and current Rule 1-325.

The Chair pointed out that the process will be essentially as follows. If the filer seeks a waiver of prepayment of the prepaid costs, not a waiver of the costs themselves, he or she will file with the submission a request for a waiver. That is the current procedure. This is provided for in Rule 20-201 (i)(2)(A). If, under revised Rule 1-325, the clerk is authorized to waive prepayment without a court order, which is allowed if one of the approved legal services agencies is representing the filer, the clerk will do what the clerk does now, which is to waive prepayment without a court order and then docket the request, the waiver, and the submission.

The Chair added that if, under Rule 1-325, a court order is necessary, the clerk will immediately send the request and the submission to a judge, who will make the decision (which they do now). What is new in Rule 20-202 is that the judge must do this promptly and not hold the request and the submission. If the judge waives prepayment, the clerk will docket the request, the order, and the submission, which will deemed to be filed on the date that the request was filed. This is provided for in Rule 20-201 (i)(2)(E)(i). If a judge denies the waiver, the order denying the waiver has to provide a period of time, not exceeding 30 days, within which the fee must be paid. The reason for this is to avoid the request for a waiver just sitting indefinitely.

The Chair said that if the fee is paid within that time, the

submission will be docketed. There are three options, which are in brackets in subsection (i)(2)(E)(iii) of Rule 20-201, as to whether there will be a relation back: (1) no relation back; the submission will be docketed and deemed filed when the fee is paid, (2) relation back to the date that the order was issued, or (3) relation back fully to the time when the request for a waiver was filed. The Committee has to resolve which of these three options should apply, unless someone can suggest another one. If the fee is not paid within the time allotted in the order, the submission will be deemed to be withdrawn, and the case closed. This assumes that the fee is for an initial complaint; otherwise, the case cannot be closed.

The Chair noted that Rule 20-202 simply has a conforming change. The initial question for the Committee is whether anyone has any comments or questions about Rule 20-201. What should be done with the relation-back issue? Judge Weatherly said that as a circuit court judge, she is always looking at the Differentiated Case Management time standards. For the purposes of the time standards, it would be easier to use the date that the fee was actually paid. The one-year time limit would start from that date. It is anticipated that this would not be lingering around for three or four months. It could linger for six weeks.

The Chair said that this issue had been discussed with Pamela Ortiz, Esq., who heads the Access to Justice Department of the Judiciary, formerly the Access to Justice Commission. Ms.

Ortiz would like the date in Rule 20-201 to be the date the request for waiver was docketed. This would avoid statute of limitations issues.

Mr. Carbine suggested that the date in Rule 20-201 should be the date the request for waiver was docketed. This is the only date that is under the control of the filer. Mr. Carbine said that he would not like to see a filer's case dismissed on the grounds of the statute of limitations, because of activities beyond the filer's control. Mr. Carbine moved that the date in Rule 20-201 should be the third option in subsection (i)(2)(E)(iii), which was the date the request for waiver was docketed. The motion was seconded, and it passed with one opposed. The Reporter said that as a matter of style, Rule 20-201 should clarify that the case Is closed if the unpaid fee is a fee required for the filing of an initial complaint. By consensus, the Committee agreed with the Reporter's suggestion.

By consensus, the Committee approved Rule 20-201 with the choice of the date that the submission was deemed to have been filed as the date the request for waiver was docketed.

Agenda Item 3. Consideration of proposed amendments to Rule 5-803 (Hearsay Exceptions: Unavailability of Declarant Not Required)

Judge Weatherly presented Rule 5-803, Hearsay Exceptions: Unavailability of Declarant Not Required, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 800 - HEARSAY

AMEND Rule 5-803 to add a new subsection (b)(8)(A)(iv) regarding the admissibility of reports made pursuant to a certain statute pertaining to abuse of a child or vulnerable adult, to add a Committee note following subsection (b)(8)(A)(iv), and to make stylistic changes, as follows:

Rule 5-803. HEARSAY EXCEPTIONS: UNAVAILABILITY OF DECLARANT NOT REQUIRED

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

(b) Other Exceptions

(1) Present Sense Impression

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited Utterance

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the

declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for Purposes of Medical Diagnosis or Treatment

Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

(5) Recorded Recollection

See Rule 5-802.1 (e) for recorded recollection.

(6) Records of Regularly Conducted Business Activity

A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness. In this paragraph, "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Cross reference: Rule 5-902 (b).

Committee note: Public records specifically excluded from the public records exceptions in subsection (b)(8) of this Rule may not be admitted pursuant to this exception.

(7) Absence of Entry in Records Kept in Accordance with Subsection (b)(6)

Unless the circumstances indicate a lack of trustworthiness, evidence that a diligent search disclosed that a matter is not included in the memoranda, reports, records, or data compilations kept in accordance with subsection (b)(6), when offered to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind about which a memorandum, report, record, or data compilation was regularly made and preserved.

(8) Public Records and Reports

(A) Except as otherwise provided in this paragraph, a memorandum, report, record, statement, or data compilation made by a public agency setting forth

(i) the activities of the agency;

(ii) matters observed pursuant to a duty imposed by law, as to which matters there was a duty to report; or

(iii) in civil actions and when offered against the State in criminal actions, factual findings resulting from an investigation made pursuant to authority granted by law.

(iv) in a final protective order hearing conducted pursuant to Code, Family Law Article, §4-506, factual findings reported to a court pursuant to Code, Family Law Article, §4-505 provided that the parties have had a fair opportunity to review the report.

Committee note: If necessary, a continuance may be granted in order to provide the parties a fair opportunity to review the report and to prepare for the hearing.

(B) A record offered pursuant to paragraph (A) may be excluded if the source of information or the method or circumstance of the preparation of the record indicate that the record or the information in the record lacks trustworthiness.

(C) A record of matters observed by a law enforcement person is not admissible under this paragraph when offered against an accused in a criminal action.

(D) This paragraph does not supersede specific statutory provisions regarding the admissibility of particular public records.

Committee note: This section does not mandate following the interpretation of the term "factual findings" set forth in *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988). See *Ellsworth v. Sherne Lingerie, Inc.*, 303 Md. 581 (1985).

(9) Records of Vital Statistics

Except as otherwise provided by statute, records or data compilations of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

Cross reference: See Code, Health General Article, §4-223 (inadmissibility of certain information when paternity is contested) and §5-311 (admissibility of medical examiner's reports).

(10) Absence of Public Record or Entry

Unless the circumstances indicate a lack of trustworthiness, evidence in the form of testimony or a certification in accordance with Rule 5-902 that a diligent search has failed to disclose a record, report, statement, or data compilation made by a public agency, or an entry therein, when offered to prove the absence of such a record or entry or the nonoccurrence or nonexistence of a matter about which a record was regularly made and preserved by the public agency.

(11) Records of Religious Organizations

Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, Baptismal, and Similar Certificates

Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records

Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones or the like.

(14) Records of Documents Affecting an Interest in Property

The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and a statute authorizes the recording of documents of that kind in that office.

(15) Statements in Documents Affecting an Interest in Property

A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant

to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document or the circumstances otherwise indicate lack of trustworthiness.

(16) Statements in Ancient Documents

Statements in a document in existence twenty years or more, the authenticity of which is established, unless the circumstances indicate lack of trustworthiness.

(17) Market Reports and Published Compilations

Market quotations, tabulations, lists, directories, and other published compilations, generally used and reasonably relied upon by the public or by persons in particular occupations.

(18) Learned Treatises

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in a published treatise, periodical, or pamphlet on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation Concerning Personal or Family History

Reputation, prior to the controversy before the court, among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, or other similar fact of personal or family history.

(20) Reputation Concerning Boundaries or General History

(A) Reputation in a community, prior to the controversy before the court, as to boundaries of, interests in, or customs affecting lands in the community.

(B) Reputation as to events of general history important to the community, state, or nation where the historical events occurred.

(21) Reputation as to Character

Reputation of a person's character among associates or in the community.

(22) [Vacant].- There is no subsection 22.

(23) Judgment as to Personal, Family, or General History, or Boundaries

Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the matter would be provable by evidence of reputation under subsections (19) or (20).

(24) Other Exceptions

Under exceptional circumstances, the following are not excluded by the hearsay rule: A statement not specifically covered by any of the hearsay exceptions listed in this Rule or in Rule 5-804, but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with

a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

Committee note: The residual exception provided by Rule 5-803 (b)(24) does not contemplate an unfettered exercise of judicial discretion, but it does provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 5-102.

It is intended that the residual hearsay exception will be used very rarely, and only in exceptional circumstances. The Committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rules 5-803 and 5-804 (b). The residual exception is not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by amendments to the Rule itself. It is intended that in any case in which evidence is sought to be admitted under this subsection, the trial judge will exercise no less care, reflection, and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

Source: This Rule is derived as follows:
Section (a) is derived from F.R.Ev. 801 (d)(2).
Section (b) is derived from F.R.Ev. 803.

Rule 5-803 was accompanied by the following Reporter's note.

Code, Family Law Article, §4-505 (e) requires the court and the local department of social services to take certain actions if, during a temporary protective order

hearing, the court finds reasonable grounds to believe that a child or a vulnerable adult has been abused. Specifically, the court must forward to the local department a copy of the petition and temporary protective order, and the local department must investigate the alleged abuse and send to the court a copy of the report of its investigation by the date of the final protective order hearing. The statute is silent regarding the admissibility of the report and its contents.

The Civil Law and Procedure Committee of the Maryland Judicial Conference studied the admissibility of these reports in trial courts across the State and conducted a survey of trial judges at the 2011 Maryland Judicial Conference. The survey disclosed that the reports are admitted under widely different standards of admissibility. For example, at least one court admits the reports based on the assumption that the statutory authority calling for referral to the local department necessarily implies that the report should be admitted, while in other courts admissibility may depend upon whether the parties object or whether the author of the report is present for cross-examination.

The Family/Domestic Subcommittee of the Rules Committee, members of the Evidence Subcommittee, and consultants reviewed the results of the survey and a research memorandum prepared by the Judiciary's Executive Director of Legal Affairs and Special Assistant to the Director. The memorandum analyzes the applicable evidentiary rules and case law. It concludes that the rules of evidence should apply to the reports, and that a party should be permitted to object to the admission of the report on the basis of the evidentiary rules.

After discussing this issue at several meetings and considering various options, the Family/Domestic Subcommittee recommends amending Rule 5-803 by adding a new subsection (b)(8)(A)(iv) to provide that otherwise inadmissible facts in the report are admissible only after the parties have

had an opportunity to review the report.

> The Subcommittee also recommends the addition of a Committee note stating that a continuance may be granted if necessary to provide the parties a fair opportunity to review the report and prepare for the hearing. The continuance may be required because the parties often see the report for the first time at the hearing, and they may need time to refute any factual inaccuracies and to otherwise prepare for the hearing in light of the report.

Judge Weatherly told the Committee that when a petition for a protective order is filed alleging that there has been an abuse of a minor child or a vulnerable adult, Code, Family Law Article, §4-505 requires that the court order a Department of Social Services ("DSS") investigation. If the court issues a temporary protective order, the court schedules a hearing on a final protective order, to be held within seven days. In the interim, the alleged abuser is told to leave the home. The case is brought back into court very quickly. When the cases are referred out to the DSS, they do a very quick investigation, because they do not have much time in some jurisdictions. It is almost impossible to do the investigation in seven days. They do the best they can to submit a report to the court that provides what their fact-finding and conclusions are.

Judge Weatherly said that in Prince George's County, the DSS report comes to the court in a sealed, confidential envelope that is held in the Family Support Services Office. The reports are not in the court file initially, although they ultimately get

there. The envelope is sealed with tape. The reports very rarely come in before the trial date. The defendant may have been served only one or two days before then. Judge Weatherly remarked that she always asks the defendant if he or she has had an opportunity to read the DSS report. She gives the defendant a copy of the report, and then the copy is collected at the end of the case, so that it is not disseminated everywhere.

Judge Weatherly noted that a letter from the Honorable J. Barry Hughes, of the Circuit Court for Carroll County, had been included in the meeting materials as well as other materials pertaining to the issue of how the DSS reports should be handled. (See Appendix 1). One question is whether the author of the report has to be in court to support admission of the report. Some representatives of DSS had attended the meeting of the Family and Domestic Subcommittee. They were concerned that, as with many agencies, they are so understaffed that the idea that their staff would have to sit at the courthouse for a substantial part of the day waiting for a judge to call the case would remove a number of workers from doing other investigations.

Judge Weatherly commented that one question about this is how the reports get into evidence. Some judges were sharing the reports, and some judges were not. A new subsection (b)(8)(iv) is proposed to be added to Rule 5-803. It states that, in a final protective order hearing conducted pursuant to Code, Family Law Article, §4-506, the factual findings can be reported to the court without the author being in court, provided that the

parties have had a fair opportunity to review the report. A Committee note has been added, because of the difficulty in having the hearing in seven days. The respondent needs an opportunity to be heard. On the other hand, the parties probably will get the report the day of the hearing, and a continuance may need to be granted to provide them a fair opportunity to review the report. They may want to challenge some of the findings in the report. They may want to bring in a witness or get an attorney.

Judge Weatherly remarked that the Subcommittee was very mindful that the intent was not to have Child Protective Services staff spend all of their time sitting in court. In the District Court, it would be particularly hard to tell in advance which case is going to be called. If a continuance is granted, the parties might elect to subpoena the author of the report. The Committee note was a compromise on how to handle this. Judge Weatherly was satisfied that it seemed like it was the best that could be done. She asked the District Court judges who were present for their opinion on the changes to Rule 5-803.

Judge Price said that she liked the proposed changes to the Rule and expressed the view that it was very workable. Judge Mosley commented that the worst case scenario is that the hearing is not held the day it was scheduled but may be held two days later. In her courtroom, the DSS workers are there, but they sit for a long time, or the case is postponed to be able to get the social workers in. The proposed changes to Rule 5-803 simplify

the process. Judge Weatherly observed that it was fortunate that Judge Eaves, who is a member of the Committee, has been the voice of domestic violence issues for the courts and families. Judge Eaves expressed the opinion that Rule 5-803 was very workable. It is important to make sure that the parties have an opportunity to review the report and the chance to challenge it.

The Chair commented that as he read Rule 5-803, the report is not made admissible. It is merely an exception to the hearsay rule. There could be objections on other grounds. In terms of summonsing the author, will the parties know who is writing this report prior to the time that is submitted, so that they could summons the author? Judge Mosley responded that the parties have already spoken with the author.

The Chair said that this issue had come up in the context of the DSS reports that the statute requires. However, it became connected with a broader issue that came out of *Sumpter v. Sumpter*, 436 Md. 74 (2013), which addressed child custody evaluation reports. The Subcommittee tried to look at it in a broader context. The issue in the case will be discussed later in the meeting, when Agenda Item 4 is reached. There are all kinds of reports that are done by government agencies, by the Department of Juvenile Services in juvenile cases, and by the Department of Health and Mental Hygiene in both child custody and juvenile cases that contain a large amount of very sensitive information. Who can see these reports? Does the judge get a copy before the hearing? To what extent are the parties allowed

to see the reports prior to the hearing? The Committee note does not solve the issue for these other contexts in which these kinds of reports are required or permitted by law to come into different kinds of cases.

The Reporter remarked that the Chair had observed that it should be clarified that the Committee note after subsection (b)(8)(A)(iv) in Rule 5-803 only applies to that subsection. She suggested that the Committee note should read: "If necessary, a continuance of a final protective order hearing may be granted in order...". This makes clear that the Committee note relates back to subsection (b)(8)(A)(iv) only and not to everything that came before. By consensus, the Committee approved this change.

By consensus, the Committee approved Rule 5-803 as amended.

Agenda Item 5. Consideration of proposed amendments to Rules 8-503 (Style and Form of Briefs) and 8-112 (Form of Court Papers)

The Vice Chair presented Rules 8-503, Style and Form of Briefs; 8-112, Form of Court Papers; 8-207, Expedited Appeal; 8-303, Petition for Writ of Certiorari - Procedure; 8-511, Amicus Curiae; 8-603, Motion to Dismiss Appeal; and 8-605, Reconsideration, for the Committee's consideration.

MEMORANDUM

TO	:	Members of the Rules Committee
FROM	:	Sandra F. Haines, Esq., Reporter
DATE	:	October 9, 2014
SUBJECT	:	Agenda Item 5 - "Word Counts, etc."

The Appellate Subcommittee recommends that word counts replace page counts in the Rules in Title 8. The proposed amendments to Rules 8-503 and 8-112 are based on the Subcommittee's review of different versions of a sample brief in the Court of Special Appeals, containing approximately 273 words per page. There are some math and "rounding" errors in the proposed amendments that will be corrected if the Rules Committee recommends a page limit to word limit conversion that is based on 273 words per page.

When word limits were included in the Federal Rules of Appellate Procedure in 2005, the word limits were based on an estimate of 280 words per page. Based on a federal study of appellate briefs, it now appears that an estimate of 250 words per page is more accurate. Amendments to the Federal Rules that use the 250 words per page estimate have now been proposed. See the attached Committee note to the proposed amendment to Fed. R. App. P. 28.1.

The number of pages specified for each page limit currently in Title 8 of the Maryland Rules is one of the following: 50, 35, 25, 15, or 10. If the Rules Committee were to recommend word limits in lieu of page limits, the corresponding word limits would be:

Pages currently allowed	Word Count @ 250 words per page	Word Count @ 280 words per page
50	12,500	14,000
35	8,750	9,800
25	6,250	7,000
15	3,750	4,200
10	2,500	2,800

Five Title 8 Rules in addition to the Rules in the meeting materials contain page limits. Attached for the Committee's consideration are amendments to Rules 8-207, 8-303 8-511, 8-603, and 8-605 showing how those Rules would read if page limits were replaced by word limits of 250 or 280 words per page.

Also attached are revised amendments to Rule 8-503, with page limits replaced by word limits of 250 or 280 words per page.

Additionally, for the Committee's reference as it considers the proposed amendments to Rule 8-112 is a page from an appellate brief, double spaced, in 13 pt. Times New Roman font.

SFH:cdc

MARYLAND RULES OF PROCEDURE

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

CHAPTER 500 - RECORD EXTRACT, BRIEFS, AND ARGUMENT

AMEND Rule 8-503 (d) and (e) to specify word count limitations in briefs in lieu of page limitations, to add a new section (g) requiring a certain Certification of Word Count and Compliance with Rule 8-112, and to

make a stylistic change, as follows:

Rule 8-503. STYLE AND FORM OF BRIEFS

. . .

(d) Length

(1) Principal Briefs of Parties

Except as otherwise provided in section (e) of this Rule or with permission of the Court, the principal brief of an appellant or appellee shall not exceed ~~35 pages~~ [8,750] [9,800] words in the Court of Special Appeals or ~~50 pages~~ [12,500] [14,000] words in the Court of Appeals. This limitation does not apply to (A) the table of contents and citations required by Rule 8-504 (a)(1); (B) the citation and text required by Rule 8-504 (a)(8); ~~or~~ (C) a motion to dismiss and argument supporting or opposing the motion; or (D) the Certification of Word Count and Compliance with Rule 8-112 required under section (g) of this Rule.

(2) Motion to Dismiss

Except with permission of the Court, any portion of a party's brief pertaining to a motion to dismiss shall not exceed an additional ~~ten pages~~ [2,500] [2,800] words in the Court of Special Appeals or ~~25 pages~~ [6,250] [7,000] words in the Court of Appeals. Any reply brief filed by the appellant shall not exceed ~~15 pages~~ [3,750] [4,200] words in the Court of Special Appeals or ~~25 pages~~ [6,250] [7,000] words in the Court of Appeals.

(3) Reply Brief

Any reply brief filed by the appellant shall not exceed ~~15 pages~~ [3,750] [4,200] words in the Court of Special Appeals or ~~25 pages~~ [6,250] [7,000] words in the Court of Appeals.

(4) Amicus Curiae Brief

Except with the permission of the Court, an amicus curiae brief:

(A) if filed in the Court of Special Appeals, shall not exceed ~~15 pages~~ [3,750] [4,200] words; and

(B) if filed in the Court of Appeals, shall not exceed ~~25 pages~~ [6,250] [7,000] words, except that an amicus curiae brief supporting or opposing a petition for certiorari or other extraordinary writ shall not exceed ~~15 pages~~ [3,750] [4,200] words.

(e) Briefs of Cross-appellant and Cross-appellee

In cases involving cross-appeals, the brief filed by the appellee/cross-appellant shall have a back and cover the color of an appellee's brief and shall not exceed ~~50 pages~~ [12,500] [14,000] words. The responsive brief filed by the appellant/ cross-appellee shall have a back and cover the color of a reply brief and shall not exceed (1) ~~50 pages~~ [12,500] [14,000] words in the Court of Appeals or (2) in the Court of Special Appeals (A) ~~35 pages~~ [8,750] [9,800] words if no reply to the appellee's answer is included or (B) ~~50 pages~~ [12,500] [14,000] words if a reply is included.

(f) Incorporation by Reference

In a case involving more than one appellant or appellee, any appellant or appellee may adopt by reference any part of the brief of another.

(g) Certification of Word Count and Compliance with Rule 8-112

(1) Requirement

A brief shall include a Certification of Word Count and Compliance with Rule 8-112 substantially in the form set forth in subsection (g)(2) of this Rule. The party or amicus curiae providing the certification may rely on the word count of the word-processing system used to prepare the brief.

(2) Form

A Certification of Word Count and Compliance with Rule 8-112 shall be signed by the individual making the certification and shall be substantially in the following form:

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains _____ words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

~~(g)~~ (h) Effect of Noncompliance

For noncompliance with this Rule, the appellate court may dismiss the appeal or make any other appropriate order with respect to the case, including an order that an improperly prepared brief be reproduced at the expense of the attorney for the party for whom the brief was filed.

Source: This Rule is derived as follows:
Section (a) is derived from former Rules 831 a and 1031 a.
Section (b) is derived from former Rules 831 a and 1031 a.
Section (c) is derived from former Rules 831 a and 1031 a.
Section (d) is in part derived from Rule 831 b and 1031 b and in part new.
Section (e) is new.
Section (f) is derived from ~~FRAP~~ Fed. R. App. P. 28 (i).
Section (g) is new and is derived in part from Fed. R. App. P. 32.
Section ~~(g)~~ (h) is derived from former Rules 831 g and 1031 f.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 200 - OBTAINING REVIEW IN COURT OF SPECIAL APPEALS

AMEND Rule 8-207 (b) to specify word count limitations in lieu of page limitations, as follows:

Rule 8-207. EXPEDITED APPEAL

. . .

(b) By Election of Parties

. . .

(4) Appellant's Brief

The appellant shall file a brief within 15 days after the filing of the agreed statement required by subsection (b)(2) of this Rule. The brief need not include statement of facts, shall be limited to two issues, and shall not exceed ~~ten pages~~ [2,500] [2,800] words in length. Otherwise, the brief shall conform to the requirements of Rule 8-504. The appellant shall attach the agreed statement of the case as an appendix to the brief.

(5) Appellee's Brief

The appellee shall file a brief within 15 days after the filing of the appellant's brief. The brief shall not exceed ~~ten pages~~ [2,500] [2,800] words in length and shall otherwise conform to the requirements of Rule 8-504.

(6) Reply Brief

A reply brief may be filed only with permission of the Court.

(7) Briefs in Cross-appeals

An appellee who is also a cross-appellant shall include in the brief filed under subsection (b)(5) of this Rule the issue and argument on the cross-appeal as well as the response to the brief of the appellant. The combined brief shall not exceed ~~15 pages~~ [3,700] [4,200] words in length. Within ten days after the filing of an appellee/cross-appellant's brief, the appellant/ cross-appellee shall file a brief, not exceeding ~~ten pages~~ [2,500] [2,800] words in length, in response to the issues and argument raised on the cross-appeal.

. . .

MARYLAND RULES OF PROCEDURE

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

CHAPTER 300 - OBTAINING APPELLATE REVIEW IN COURT OF APPEALS

AMEND Rule 8-303 to specify a word count limitation in lieu of a page limitation, as follows:

Rule 8-303. PETITION FOR WRIT OF CERTIORARI - PROCEDURE

. . .

(b) Petition

(1) Contents

The petition shall present accurately, briefly, and clearly whatever is essential to a ready and adequate understanding of the points requiring

consideration. Except with the permission of the Court of Appeals, a petition shall not exceed ~~15 pages~~ [3,700] [4,200] words. It shall contain the following information:

. . .

MARYLAND RULES OF PROCEDURE

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

CHAPTER 500 - RECORD EXTRACT, BRIEFS, AND ARGUMENT

AMEND Rule 8-511 to specify a word count limitation in lieu of a page limitation, as follows:

Rule 8-511. AMICUS CURIAE

. . .

(f) Appellee's Reply Brief

Within ten days after the filing of an amicus curiae brief that is not substantially in support of the position of the appellee, the appellee may file a reply brief limited to the issues in the amicus curiae brief that are not substantially in support of the appellee's position and are not fairly covered in the appellant's principal brief. Any such reply brief shall not exceed ~~15 pages~~ [3,700] [4,200] words.

. . .

MARYLAND RULES OF PROCEDURE

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

CHAPTER 600 - DISPOSITION

AMEND Rule 8-603 to specify word count limitations in lieu of page limitations, as follows:

Rule 8-603. MOTION TO DISMISS APPEAL

. . .

(f) Separate Oral Argument

(1) Not Unless Directed by the Court

Oral argument on a motion to dismiss will not be held in advance of argument on the merits unless directed by order of the Court.

(2) Briefs

If the Court directs oral argument on a motion to dismiss in advance of argument on the merits, the parties, with permission of the Court, may file briefs in support of or in opposition to the motion. Not later than one day before the date assigned for argument (A) an original shall be filed with the Clerk together with three copies in the Court of Special Appeals or seven copies in the Court of Appeals, and (B) a copy shall be delivered to other parties. Unless otherwise ordered by the Court, the briefs shall not exceed ~~ten pages~~ [2,500] [2,800] words in the Court of Special Appeals or ~~25 pages~~ [6,250] [7,000] words in the Court of Appeals.

(3) Time; Number of Counsel

Unless otherwise ordered by the Court, separate oral argument on a motion to dismiss is restricted to 15 minutes for each side, and only one attorney may argue for

each side.

Source: This Rule is derived from former Rules 1036, 1037, 836, and 837.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 600 - DISPOSITION

AMEND Rule 8-605 (b) to specify a word count limitation in lieu of a page limitation, as follows:

Rule 8-605. RECONSIDERATION

. . .

(b) Length

A motion or response filed pursuant to this Rule shall not exceed ~~15 pages~~ [3,700] [4,200] words.

. . .

The Reporter noted that a later version of the Rules had been e-mailed to the Committee the previous day, and paper copies had been distributed. The Vice Chair told the Committee that a memorandum from the Reporter dated October 9, 2014 had been distributed, explaining the proposed changes to Rules 8-503 and 8-112. The proposal stemmed from a suggestion by a judge of the Court of Appeals. The proposed Rules are tied to page limits of

documents. In the Court of Special Appeals, the limit for briefs is 35 pages, and in the Court of Appeals, it is 50 pages. Most judges have had the experience of seeing briefs that are jammed full with as many words as possible, including footnotes everywhere, so that the brief is no more than 35 pages. These briefs are difficult to read. The current proposal would eliminate these kinds of problems. Cramming words into a footnote would not work if there is a word limit. This would avoid game-playing.

The Vice Chair said that one of the issues is what kind of word count to use. A number of jurisdictions use a word limit. The Federal Rules of Appellate Procedure have a 14,000-word count. As pointed out in the Reporter's memorandum, the 14,000-word limit had been adopted under the premise that it was equivalent to 250 words a page for a 50-page brief. If 250 is multiplied by 50, it does not equal 14,000; it adds up to 12,500. This was belatedly realized by those in the federal system, and there is a movement now to change the federal rule to make the limit 12,500.

The Chair pointed out that the comment period for this proposed change ends in February. The Vice Chair remarked that the memorandum by the Reporter notes that this is the direction that the Committee might consider. If the federal rule is going to be changed, maybe the same change should be made to the Maryland Rules. He said that Julia Bernhardt, Esq., an Assistant Attorney General, was at the meeting. The Vice Chair had spoken

with Ms. Bernhardt before the meeting. Initially, the proposed change to Rule 8-112 was a 13-point font, but Ms. Bernhardt had told the Vice Chair that the federal rules provide for a 14-point font.

Ms. Bernhardt remarked that she had tested a number of the briefs in the Office of the Attorney General to see what the actual word counts were for documents of 15 and 35 pages, and most had 280 words with a 13-point font. The federal documents have 250 words per page with a 14-point font. Is the goal to shorten the briefs? The Vice Chair commented that he had a much different view of this when he was an attorney as opposed to his view as a judge.

The Chair said that some comments about the proposed change to the federal rules, including Fed. R. App. P. 28.1, Cross-Appeals, and Fed. R. App. P. 32, Form of Briefs, Appendices, and Other Papers, had been received. One of the comments came from the Honorable Frank H. Easterbrook, of the Seventh Circuit, who was opposed to the change in the federal rules. His view was that the calculation of the number of words in briefs was not a mistake. According to Judge Easterbrook, when the change was proposed, the drafters looked at the commercially printed 50-page briefs that had been filed in the U.S. Supreme Court, and this is how they came up with a word count of 280 per page. This has utterly no relevance to briefs filed in the U.S. Courts of Appeal, which are 30 pages and do not have to be commercially printed. The amount of 14,000 words that was in the 1998 rule

change had no relevance to what the rule was for, which was the U.S. Courts of Appeal. If the amount of 14,000 words is divided by 30 pages, it comes to over 400 words per page. It is not 280 words or 250 words.

Ms. Bernhardt commented that she had counted the words per page in some briefs, and for a 50-page brief, she counted 15,133; 13,977; and 13,903. The Chair pointed out that it would depend on the font. It depends on whether the words are in footnotes, which are single-spaced and sometimes are printed in smaller type. It depends on what font is being used and the size of the font. If a 14-point font is being used instead of a 13-point or 12-point font, it would make a difference. Just counting the words in a group of briefs that are using different fonts and different line-spacing will make a huge difference in the counts.

Ms. Bernhardt noted that in her office, the briefs are all the same. Their average is roughly 14,000 words. If 250 words are used instead of a page count, the briefs will be shorter. The Chair pointed out that another standard is used in the federal system. They have three options in the federal appellate courts. The principal limit on a brief is 30 pages, but the rules provide that if this amount is exceeded, the brief is acceptable if it does not contain more than 14,000 words or 1,300 lines.

The Chair suggested that there were three questions for the Committee to determine. The first is whether any change should be made at all from the sole standard of page limits. If the

answer is "no" the discussion would end. The second question was whether, if a change is to be made, should it be only a change to a word count as opposed to the number of lines. The Appellate Subcommittee had never considered that issue. The third question is what the limit should be if the Committee opts only for a word limit.

Mr. Zarbin asked why attorneys should be given a choice of the type of font. One size font should be chosen, so that no games can be played, and the size of the font for footnotes should also be chosen. The Chair pointed out that this was the recommendation of the Subcommittee. Mr. Zarbin remarked that obviously some attorneys are playing games with the page count, which is why the Court of Appeals is concerned. Some attorneys are changing font sizes to cram more words onto the page. If the Court would like the change, the Rules Committee is able to help.

The Chair remarked that he had had a discussion the previous day with the Honorable Peter B. Krauser, Chief Judge of the Court of Special Appeals and Greg Hilton, Esq., Clerk of the Court of Special Appeals, who was present at the meeting. Mr. Hilton had expressed a concern about *pro se* briefs, which is a problem in the Court of Special Appeals. About one-quarter of the cases in that court involve *pro se* briefs. The question was whether there should be an exemption from the word count, so that only the page limit would apply to *pro se* briefs that are typed as opposed to written on a computer.

Mr. Hilton explained that there are some typewriters in the

prisons. Handwritten briefs are a different matter altogether. Most of the unrepresented parties are sophisticated enough to use a computer. The exception would be for typewritten briefs. The Court of Special Appeals may get five or 10 briefs a year from individuals who are not prisoners and who type their briefs. Doing word counts on a typewritten document is burdensome. Because there are so few of them, it is not a major problem.

The Reporter asked Mr. Hilton whether an explanation could be added that if a rule requires that a document would have 8,750 words, then a *pro se* person would have 35 pages if the Committee were to recommend a word count. Would it work if the conversion would be put into Rule 8-503, rather than put it into every rule that is relevant? Mr. Hilton responded that he had done a survey of other States that have a rule pertaining to documents produced on a computer and documents produced on a typewriter. The typewriter rule applies only to self-represented persons. If the brief is typed on a computer, it can contain up to 8,750 words, or if it is typed on a typewriter, it can be up to 35 pages long.

The Reporter asked whether the pages should be exactly equivalent to the word count computations. Mr. Hilton replied that there should be two separate rules for preparing a brief. If the party is unrepresented, he or she gets the choice of which rule to follow. For example, in North Carolina, the person is allowed the greater of 35 pages or 8,750 words. The Chair remarked that this should not be permitted for everyone in Maryland. Mr. Hilton noted that making it a choice for the

unrepresented party of either 35 pages if the brief is typed or 8,750 words if it is computer-written would be sufficient.

The Reporter expressed the concern that page counts appear in many Rules, and she preferred not to have page count references and word count references in all of those Rules. Mr. Hilton commented that one suggestion would be to include language in a Title 8 Rule that provides for a general exemption for unrepresented parties. The other Rules would remain as is. The Reporter said she wanted to make sure that Mr. Hilton and Chief Judge Krauser were not unhappy with the page counts that currently exist. Mr. Hilton noted that most *pro se* litigants do not even reach the 35-page limit.

Judge Eyler remarked that a few years ago, the Court of Special Appeals adopted the Times New Roman, 13-point font for all of their opinions, with footnotes using the same size font. In the situation being discussed, this seems to make sense. A font should be adopted for all documents, and the footnotes should not be in a smaller font, because they are difficult to read. She added that she was especially in favor of eliminating 1.5 spacing between lines in favor of double-spacing, because the 1.5 spacing is exceptionally difficult to read.

Mr. Hilton commented that it had just occurred to him that the 13-point font on Microsoft Word is not an automatic selection. The automatic selection is either 12-point or 14-point. Someone can change to 13-point, but it is not automatic. A consideration would be that someone might not know that it is

not automatic. The Reporter said that the way Rule 8-112 is drafted, the size has to be at least 13, so using 14 would be acceptable.

Mr. Zavin told the Committee that he was from the Office of the Public Defender (OPD). The OPD supports the position of the Attorney General concerning word count, which was 14,000 words for 50 pages and 10,000 words for 35 pages. Mr. Zavin said that he also wondered if the concern was that litigants are squeezing too much into the brief. If there is a mandatory word count and a mandatory font size, why is it necessary to mandate Times New Roman font? At that point, no one will get in any more words than any one else. There is some sentiment that Times New Roman is not necessarily the best font to use. The U.S. Supreme Court uses Century Schoolbook, which may be easier to read. If the concern is just squeezing too many words into a brief, then mandating the word count and font size would take care of that problem. It would not be necessary to stifle creativity in using different fonts.

The Chair commented that one aspect of the numbers that he had noticed was that the 14,000-word count in a 50-page brief is not the equivalent of 10,000 words in a 35-page brief. With 14,000 words, it is 280 words per page for a 50-page brief, and it is 285 words per page with a 10,000-word brief. The Subcommittee took note of a study that Mr. Hilton had done on briefs in the Court of Special Appeals. The actual average came out to 273 words per page. This produces odd numbers, so it was

rounded up to 10,000 words, which allows 450 words more for a Court of Special Appeals brief than the average. The numbers are arbitrary. The 14,000 number came out of nowhere. Ms. Bernhardt said that she came up with 10,587 words when she looked at the briefs in her office.

Mr. Hilton noted that in his informal survey, most states allow 8,750 words in a 35-page brief. When he did his study, he had not been concerned about the number of words per page. He wanted to get a rough idea of the number of words in 35 pages. The briefs he had looked at had not included any footnotes. There is some dispute as to whether footnotes are valuable, which is an issue for the judges to consider. The 8,750 figure in a 35-page brief comes out fairly consistently among the states. The Chair said that the number can be set if it is an average number of words per page and then it can be multiplied by 10, 15, 25, 35, and 50 as the amount of pages for briefs. It is arbitrary. If 250 is too low and 280 is too high, a number in between can be chosen as long as it is a number that ends in a zero to avoid amounts in decimals. This is a policy choice. No jurisdiction has a count of lower than 250 words per page, and none has higher than 280.

Mr. Carbine remarked that he approved of the idea of a word count. Regarding the briefs filed by *pro se* litigators and the Reporter's comments about the number of Rules that would be impacted, it may be better to continue using page limits. Page numbers have been used since the invention of the printing press.

Using page numbers works, and everyone understands it. Mr. Carbine added that since he is not a judge, he was not familiar with the game-playing involved with page limits, but as an advocate, he could not imagine anyone wanting to file a brief that a judge would have trouble reading. The Chair responded that many people do file briefs that are difficult to read. In the Court of Special Appeals, the problem is the volume of cases and the number of briefs judges have to read. His experience in that court is the same as that of Judge Eyler and Mr. Hilton. Most briefs filed in that court are not even close to 35 pages long. The briefs in criminal cases are usually not more than 20 pages.

The Chair said that the attorneys in the Office of the Public Defender and the Office of the Attorney General are experienced in appellate practice, and they know how to write a brief. There is at least a suspicion that attorneys who practice in the Court of Appeals, especially the ones in large law firms get paid by the size of the brief, and the briefs are often 50 pages long. Ms. Bernhardt added that the briefs often have 1½ inch spacing. The Chair pointed out that some of the briefs are full of footnotes that take up 2/3 of the page just to stretch the briefs out. The request to change to word counts in briefs came from a judge on the Court of Appeals. They do not like the page limits. Some of the briefs are unreadable, and litigants are not being given a fair consideration, because the judges get tired of reading the briefs so crammed with words. This is why

the appellate courts around the country are changing to word counts.

Judge Price asked whether the word count would make the briefs easier to read if the font and the spacing are not changed. The Chair responded that the Subcommittee wants to do both. They preferred Times New Roman font, 13-point type, and double-spacing. Judge Price asked whether that would take care of the word count. The Chair answered that it would not solve the problem in footnotes if they are allowed to be single-spaced.

Judge Price commented that Judge Eyler had stated that the footnotes have to be in the same type as the brief. Judge Eyler said that the footnotes are not double-spaced, but they are in the same font. Mr. Hilton added that this is the way that current Rule 8-112 reads. The difference is that currently 1½ inch spacing is allowed. Times New Roman, 13-point font allows a large number of words. With two spaces per line, there will be fewer words in a 35-page brief. Another consideration is that MDEC will be instituted in the future, and reading on a computer screen is different than reading on paper. It seems obvious that wider line-spacing would make it easier to read items on a computer screen.

The Chair said that the Subcommittee had considered all of this to eliminate the jamming of words by using fonts that allow it. Mr. Hilton remarked that if the Committee's decision is not to use a word count, he would recommend using a uniform font, type-spaced margins, and line-spacing, because this will largely

eliminate the cramming of words into briefs.

Ms. Gardner told the Committee that she was from the Public Justice Center. She expressed the view that the proposed changes are an excellent idea. If the Court of Appeals does mandate double-spacing and a particular font and font size without changing the word count, it will shorten the briefs. She said that she supported the 14,000- and 8,750-word count proposal. She had a suggestion for the Committee to consider, which was to permit, if not mandate, duplex printing on both sides of the page. The Chair asked what the federal procedure was, and Mr. Hilton replied that he believed that the federal procedure was to mandate printing on only one side of the page. The Vice Chair remarked that in the Court of Special Appeals, some briefs are on both sides of the page. Mr. Hilton noted that Rule 8-112 does not prohibit duplex printing. Mr. Zarbin added that it saves paper. He guessed that the large law firms probably charge their clients per page, and this may be why they do not like using double sides.

The Chair remarked that it was always amazing to him that in most criminal cases, the briefs are exactly the way that they should be. They get the point across, they are succinct, and they do not take up any more space than they need to. Some private attorneys do an excellent job getting right to the point without using a large number of pages in the briefs. Many of the attorneys in the larger firms produce briefs that are unnecessarily long. The Vice Chair commented that this sometimes

happens when the OPD assigns a case to a private law firm. It is not the OPD turning in the massive briefs.

Judge Eyler said that she wished to speak in defense of large law firms. The Offices of the OPD and the Attorney General write these briefs day in and day out. They know when to limit their issues and to edit out what is unnecessary. Most of the private attorneys are not in appellate courts that often. The attorneys are very intelligent and able to make good arguments, but they do not have the level of experience to know how to limit the briefs. This leads to many of the very lengthy briefs. The attorneys are afraid to leave anything out. The best briefs are the ones that are carefully edited. Judge Eyler had never seen a brief where a litigant asks for additional pages and where there was anything else that could not have been in the original number of pages. She is in favor of the word count and the standard font. This will force people to edit briefs in a way that they are not doing now, and it will make the briefs easier to read.

The Chair noted that if the amount of words chosen is 14,000, the 8,750-word amount cannot be used. The two amounts are not comparable, because there are five different page-size briefs. Whatever the word count is going to be, it has to be comparable for all five. Using an average word amount per page results in comparability. Ten pages will contain 2,500 or 2,800 words. The amounts cannot vary. Ms. Bernhardt asked if the margins would be changed in the Court of Special Appeals. The Criminal Appeals Division in the Attorney General's Office uses

1½ inch margins. If this is changed to 1-inch, it may not be consistent with the number of words per page. The Reporter asked what the margins are now. Ms. Bernhardt answered that civil briefs have 1-inch margins, but the criminal briefs have 1 1/4-inch margins. The Chair said that if 14,000 words will be standard for a Court of Appeals brief, that is 280 words a page. There should be the same equivalent for a 35-page brief. Ms. Bernhardt said that she was pointing out that the standard cannot be the average page in the Court of Special Appeals, if larger margins are going to be used.

Mr. Patterson remarked that he had argued a case in front of the Court of Appeals. Fortunately, the Assistant Attorney General wrote the brief, and Mr. Patterson had not had to worry about the page numbers. On the issue of page numbers vs. word numbers, it would be easier for appellate judges to count the 35 pages than to count the number of words in a brief. The Chair responded that the judges would not have to, because the proposed Rule captures the concept that the filer of the brief has to certify the number of words. The Reporter added that the filer can rely on the word count in the computer program system that he or she is using. The Vice Chair noted that once e-filing is permitted, the computer in the clerk's office will not be able to check the number of words.

Mr. Hilton commented that he had spoken with other appellate court clerks around the country, and one of their hallmarks is relying on appellate counsel to object. In the recent past, Mr.

Hilton's office checked very closely for this, but it is incumbent upon the opposing party to bring failures to abide by the procedures and Rules to the court's attention by way of filing a relevant motion. Mr. Hilton said that he suspected that in the end, most attorneys are not going to try to violate this Rule. There is still the possibility of filing a motion to extend the word count if necessary. Some courts in the country take the position that word counts cannot be extended, but the Court of Special Appeals has been somewhat lenient. Not many requests to extend the word count are filed.

The Vice Chair suggested that the Committee first decide whether to approve a word count in lieu of a page limit without specifying the number of words. The Chair noted that the Subcommittee's recommendation was to change from a page limit to a word limit in briefs. Mr. Zarbin asked if this would be qualified by choosing a font and size. The Vice Chair replied affirmatively, noting that step one is to decide if there should be a word count in lieu of a page limit. It would take a motion to oppose this. No motion was forthcoming. The Vice Chair said that the next item would be for the Committee to decide what the word count should be. One proposal is the word count of 14,000 and 10,000. The October 9, 2014 memorandum by the Reporter pointed out the possibility of Fed. R. App. P. 32 using 250 words per page. Using this amount in Maryland would reduce the amount to 12,500 words per page in the Court of Appeals briefs and 8,750 for the Court of Special Appeals briefs. The Vice Chair asked

the Committee if they were in favor of limits of 14,000 and 10,000 words as originally proposed by the Subcommittee. The Reporter noted that the 14,000-word count is not comparable to the 10,000 one. It should be mathematically correct. The Vice Chair expressed the view that it is cleaner than trying to come up with something else.

The Chair commented that if a count of 14,000 words is going to be the standard, it will track all of the other page amounts of 35, 25, 15, and 10. This is based on 280 words a page. If this amount is chosen, then all of the other numbers of pages would be multiplied by 280. If the Committee prefers a number other than 280, that number would be multiplied by the number of pages in the document. Judge Weatherly asked if the 280-word amount is the standard for the current word processing. The Reporter answered that it is the current federal standard. Ms. Bernhardt noted that the format of the federal appellate courts is not like that of the U.S. Supreme Court, because the federal appellate courts require a lower number of pages.

Judge Mosley asked which word count is easier for judges to read. Is it 280, 250, or 275 words per page? Is the idea to make the change so that judges can better understand the briefs and legal arguments and make sound decisions? The Chair said that the Subcommittee had looked at briefs of the Court of Special appeals and had rounded up. A 35-page brief came to 9,556 words. The Reporter added that the actual number of words per page was 273. The Chair noted that the amount was rounded up

to 10,000, which makes it out of sync with the 14,000 amount. Mr. Hilton noted that the number, whether it is 280 or 250 words per page, is a way of achieving comparability. It is not intended to be a precise method of calculation. The Chair agreed that it is merely a comparability. Ms. Bernhardt expressed the opinion that it does not affect readability, which is affected by the font and the margins.

Mr. Zarbin suggested that the word count be 265 words per page. The Chair pointed out that the number should end in a zero. Mr. Zarbin then proposed a count of 260 words per page. It is between 280 and 250, and it adds up to 13,000 words. He said that it was a motion. The motion was seconded, and it carried by a majority.

The Vice Chair told the Committee that there was also a provision in Rule 8-503 for a certification of the word count. He asked if anyone had an objection to this in section (g), and none was forthcoming. He pointed out that the Reporter in her memorandum had asked about extending the same word count to such items as motions and other filings with the court. The Rules that would be affected are designated in the memorandum.

The Reporter explained that in the Title 8 Rules, whenever a page limit is specified, the calculation will be done using the 260-word amount to determine the number of words. Ms. Cathy Cox, the Committee's administrative assistant, did a word search of all of Title 8 of the Rules of Procedure to find every rule that has a page requirement. Title 7 page requirements will not be

considered at this time.

The Vice Chair asked if anyone objected to the proposed changes to Rules 8-207, 8-303, 8-511, 8-603, and 8-605, which would use a word count of 260 words per page, and none was forthcoming.

By consensus, the Committee approved the changes to Rules 8-207, 8-303, 8-511, 8-603, and 8-605.

The Vice Chair drew the Committee's attention to section (c) of Rule 8-112, which covers format issues. The existing Rule pertaining to 13-point type was not being changed, but the Rule specifies that the font has to be Times New Roman, and eliminates the ability of the court to specify a large number of other fonts. The issue is whether this should be uniform. Should it be Times New Roman font for everything? The Reporter remarked that the Subcommittee had looked at many different fonts, and they had decided that Times New Roman was very readable. The choice was between this and Courier font, but the decision was to use Times New Roman in terms of readability. The Vice Chair asked if anyone opposed the change, and no one objected.

By consensus, the Committee approved designating Times New Roman as the only font to be used in briefs.

The Vice Chair pointed out that section (d) of Rule 8-112 addressed margins of court papers. The margins at the top and bottom of the page should be not less than 1 inch. This had been proposed by Mr. Hilton. Mr. Hilton explained that the reason for making the format of briefs as uniform as possible was because

the clerks review the briefs to determine if they comply with the Rules. A 1-inch margin is easy to read, easy to see, and it is uniform. He and the others in his office rarely have problems with this. Sometimes the margin is expanded to 1 1/4 inches. Occasionally, someone filing a brief will cheat on the inside or outside. The Reporter noted that section (d) of Rule 8-112 specifies that the margin shall be not less than one inch, so that if the Office of the Attorney General would like to continue with margins of 1 1/4, it is acceptable.

The Vice Chair pointed out one last issue for the Committee to consider. On page 1 of Rule 8-112, the Reporter had posed a query to the Committee as to whether changes should be made to the procedures for typewritten papers. There are many reasons not to make a change. The Reporter commented that she had spoken with Mr. Hilton, and it appeared that it would be a good idea to put the page numbers in mathematically. If page numbers are being limited in all of the other Rules, even though it is unlikely that the *pro se* litigant is going to turn in a very lengthy brief, the page limits for the handwritten and typed papers should still be capped out.

The Reporter said that she would add to Rule 8-112 language that would provide that if someone is a *pro se* litigant filing a typed or handwritten document, and the word limit ordinarily in the Title 8 Rules would be _____, then the document would have to be no more than 35 pages. She would do this for each of the five different options, either 50 pages, 35 pages, 25 pages, 15 pages,

or 10 pages. This would make it clear that the word limits correspond to the page limitations for the *pro se* litigants.

Judge Ellinghaus-Jones asked whether allowing *pro se* litigants to file a limited number of words could result in an access to justice issue. The Reporter pointed out that this is no different than the way Rule 8-112 reads now. Judge Ellinghaus-Jones remarked that if the person is writing the brief in crayon, he or she may only get a certain number of words on a page. The Chair said that the same problem exists under the current Rule. The Reporter added that the *pro se* litigant is allowed only 35 pages currently, which would be difficult if the person files the brief written in crayon. Judge Eyler asked whether the 1.5 spacing between lines had been eliminated. The Vice Chair responded that it is included in subsection (c)(2) of Rule 8-112. The change is from 1.5 spacing between lines to double-spacing. This is one of the best changes being made.

By consensus, the Committee approved the changes to Rule 8-112 as amended.

Agenda Item 4. Consideration of proposed new Rule 9-205.3 (Custody and Visitation-Related Assessments)

Judge Weatherly presented Rule 9-205.3, Custody and Visitation-Related Assessments, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

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

ADD new Rule 9-205.3, as follows:

Rule 9-205.3. CUSTODY AND VISITATION-RELATED ASSESSMENTS

(a) Applicability

This Rule applies to the appointment by a court of an individual to perform an assessment in an action under this Chapter in which child custody or visitation is at issue, regardless of how the assessment is funded. For purposes of this Rule, any of the following is an "assessment": custody evaluation, home study, specific issue evaluation, and mental health evaluation.

(b) Definitions

In this Rule, the following definitions apply:

(1) Child Custody Evaluator

"Child custody evaluator" means a court-appointed investigator who meets the qualifications set forth in section (d) of this Rule.

(2) Custody Evaluation

"Custody evaluation" means a study and analysis of the needs and development of a child who is the subject of an action under this Chapter and of the abilities of the adult parties to care for the child and meet the child's needs.

(3) Home Study

"Home study" means an inspection of a

party's home that focuses upon the safety and suitability of the physical surroundings and living environment for the child. It may be performed by anyone deemed competent by the court.

(4) Mental Health Evaluation

"Mental health evaluation" means an evaluation of an individual's mental health performed by a qualified and licensed mental health care provider, as defined in the Health Occupations Article. A mental health evaluation may include psychological testing.

(5) Specific Issue Evaluation

"Specific issue evaluation" means a targeted investigation into a specific issue raised by a party, the child's attorney, or the court affecting the safety, health, or welfare of the child. It may be performed by anyone deemed competent by the court.

Committee note: For example, when the specific issue raised is a problem with alcohol consumption by a party, the court may appoint a person with expertise in alcoholism to perform the specific issue evaluation.

(6) State

"State" includes the District of Columbia.

(c) Authority

(1) On motion of any party or child's counsel, or on its own initiative, the court may order an assessment to aid the court in evaluating the health, safety, welfare, or best interests of a child in a contested custody or visitation case[, consistent with the court's authority under Rules 5-706 and 16-204 (a)(3)].

(2) The court may not order an assessment to be paid for by a party or the parties without giving the parties notice and an opportunity to object.

(d) Qualifications of Child Custody Evaluator

(1) Education

A child custody evaluator shall be:

(A) a physician licensed in any State who is board certified in psychiatry or has completed a psychiatry residency;

(B) a psychologist licensed in any State;

(C) a marriage and family therapist licensed in any State; or

(D) a social worker - clinical licensed in any State.

(2) Training and Experience

In addition to complying with the continuing requirements of his or her field, a child custody evaluator shall have training or experience in observing or performing custody evaluations, and shall have current knowledge of the following areas:

(A) domestic violence;

(B) child neglect and abuse of any type;

(C) family conflict and dynamics;

(D) child and adult development; and

(E) impact of divorce and separation on children and adults.

(3) Waiver of Requirements

The court may waive any of the required qualifications for an individual who has been performing custody evaluations on a regular basis under the auspices of a Maryland court prior to [effective date of this Rule] and is in the process of obtaining the qualifications set forth in subsection (d)(1) of this Rule.

(e) Custody Evaluator Lists and Selection

(1) Custody Evaluator Lists

An individual who seeks appointment as a custody evaluator shall submit an application to the family support services coordinator of the circuit court for each county in which the individual seeks appointment. If the applicant meets the qualifications required in section (d) of this Rule, the applicant's name shall be placed on a list of qualified individuals. In designating a custody evaluator, the court is not required to choose at random or in any particular order from among the qualified evaluators on its lists. The court should endeavor to use the services of as many qualified persons as practicable, but the court may consider, in light of the issues and circumstances presented by the action or the parties, any special training, background, experience, expertise, or temperament of the available prospective designees. The family support services coordinator shall maintain the list and, upon request, make the list and the information submitted by each individual on the list available to the public.

(2) Selection of Custody Evaluator

(A) By the Parties

The parties, by agreement, may employ a custody evaluator. The parties may jointly request the court to enter a consent order approving the agreement. The court shall enter the order if it finds that the custody evaluator has the qualifications set forth in section (d) of this Rule.

(B) By the Court

An appointment of a custody evaluator may be made by the court from the list maintained by the family support services coordinator. An individual appointed by the court to serve as a custody evaluator shall meet the qualifications set forth in section (d) of this Rule.

(f) Order of Appointment

An order appointing an individual to perform an assessment shall include:

(1) the name, business address, and telephone number of the individual being appointed;

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

(3) a description of the task or tasks the individual being appointed is to undertake;

(4) a provision concerning payment of any fee, expense, or charge, including a statement of any hourly rate that will be charged and, if applicable, a time estimate for the assessment;

(5) the term of the appointment and any deadlines pertaining to the submission of reports to the parties and the court, including the dates of any pre-trial conferences associated with the furnishing of reports;

(6) any restrictions upon the copying and distribution of reports, whether pursuant to this Rule or by agreement of the parties;

(7) whether a written report or a transcript of an oral report on the record is required; and

(8) any other provisions the court deems necessary.

(g) Removal or Resignation of Individual Appointed to Perform an Assessment

(1) Removal

The court may remove a person appointed to perform an assessment upon a showing of good cause.

(2) Resignation

An individual appointed to perform an assessment may resign the appointment only upon a showing of good cause, notice to the parties and an opportunity to be heard, and approval of the court.

(h) Description of Custody Evaluation

(1) Generally

(A) Mandatory Provisions

Subject to any protective order of the court, a custody evaluation shall include:

(i) a review of the relevant court records pertaining to the litigation;

(ii) an interview of each party;

(iii) an interview of the child, unless the custody evaluator determines and explains that by reason of age, disability, or lack of maturity, the child lacks capacity to be interviewed;

(iv) a review of any relevant educational, medical, and legal records pertaining to the child;

(v) observations of the child with each party, whenever possible in that party's household;

(vi) factual findings about the needs of the child and the capacity of each party to meet the child's needs; and

(vii) a custody and visitation recommendation based upon an analysis of the facts found or, if such a recommendation cannot be made, an explanation of why these tasks were not performed.

(B) Optional Provisions

A custody evaluation may, at the discretion of the custody evaluator, include:

(i) contact with collateral sources of information;

(ii) a review of additional records;

(iii) employment verification;

(iv) an interview of any other person residing in the household; and, subject to the court's approval after notice and an opportunity to object, if any additional costs are to be assessed:

(v) a mental health evaluation;

(vi) consultation with other experts to develop information that is beyond the scope of the evaluator's practice or area of expertise; and

(vii) an investigation into any other relevant information about the child's needs.

(2) Report of Custody Evaluation

A written report of a custody evaluation may be prepared. The parties shall be given access to the report of a custody evaluation, as follows:

(A) Access by Oral Report on the Record

The custody evaluator may present the custody evaluation report orally to the parties at a pretrial conference to be held at least 45 days before the scheduled trial date. If custody and access have not been settled at the conference, a transcript of the report shall be provided to the parties with no costs assessed.

(B) Access by Written Report Prepared by the Custody Evaluator

The custody evaluator may prepare a written report of the custody evaluation. An

oral report on the record by a custody evaluator that can be transcribed later is a written report. The parties shall have access to the written report, which shall be furnished to the parties at least 30 days before the scheduled trial date. The court may shorten or extend the time for good cause shown. A party may copy the report but shall not make additional copies or disseminate the report other than to experts, except as permitted by the court.

(3) Report of Home Study Evaluation or Specific Issue Evaluation

As soon as practicable after completion of the assessment, unless a date is specified in the order of appointment, and unless waived by the parties, a home study evaluator or a specific issue evaluator shall prepare the written report of the assessment and furnish it to the parties. A party may copy the report but shall not make additional copies or disseminate the report other than to experts, except as permitted by the court.

(4) Report of Mental Health Evaluation

As soon as practicable after completion of a mental health evaluation, unless a date is specified in the order of appointment, the mental health care provider shall prepare a written report and make it available to the parties solely for use in that case. A party may copy the report but shall not make additional copies or disseminate the report other than to experts, except as permitted by the court.

(5) Court Access to Written Report

(A) Advanced Access to Written Report by Court

Except as otherwise provided by this Rule, the court may receive access to a report by an individual appointed to perform an assessment only if the report has been admitted into evidence at a hearing or trial in the case.

(B) Advance Access to Report by Stipulation of the Parties

The parties may agree that the court may receive and read the individual's report in advance of the hearing or trial.

(C) Access to Report by Settlement Judge

A settlement judge shall have access to the report.

(i) Discovery

(1) Generally

Except as provided below for an assessor who is a court employee, an individual appointed to perform an assessment under this Rule is subject to the Maryland Civil Discovery Rules to the same extent as any other expert witness.

(2) Assessor who is a Court Employee

An assessor who is a court employee is subject to the Maryland Civil Discovery Rules with the following limitations:

(A) Mandatory Disclosure of Documents

Without the necessity of a subpoena or request, an assessor who is a court employee shall give to the parties a list of all documents reviewed in connection with the assessment.

(B) Limited Deposition

Unless leave of court is obtained, any deposition of an assessor who is a court employee shall (i) be held at the courthouse where the action is pending or other court approved location; (ii) take place following the date on which an oral or written report is presented to the parties; and (iii) not exceed two hours, with the time to be divided equally between the parties.

(j) Testimony at Hearing

(1) Court May Call Witness

The court or a party may call an individual appointed to perform an assessment as a witness at a hearing or trial in the case.

(2) Stipulation to Waive Direct Examination of Assessor

The parties may stipulate to the admission into evidence of the report of an individual appointed to perform an assessment, waive direct examination of the individual, and proceed only with cross-examination of the individual.

(3) Stipulation to Allow Report to be Admitted into Evidence Without Testimony of the Assessor

The parties may stipulate to the admission into evidence of the report and waive the presence of the assessor.

(k) Fees

(1) Fee Schedules

Subject to the approval of the Chief Judge of the Court of Appeals, the county administrative judge of each circuit court shall develop and adopt maximum fee schedules for custody evaluations. In developing the fee schedules, the county administrative judge shall take into account the availability of qualified individuals willing to provide custody evaluation services and the ability of litigants to pay for those services. A custody evaluator selected and appointed by the court may not charge or accept a fee for custody evaluation services in that action in excess of the fee allowed by the applicable schedule. Violation of this subsection shall be cause for removal from all lists maintained pursuant to subsection (e)(1) of this Rule.

(2) Allocation of Fees and Expenses

As permitted by law, the court may

order the parties or a party to pay the reasonable and necessary costs incurred by an individual appointed to perform an assessment in the case. The court may fairly allocate the reasonable and necessary costs of the assessment between or among the parties. In the event of the removal or resignation of an assessor, the court may consider the extent to which any fees already paid to the assessor should be returned.
Source: This Rule is new.

Rule 9-205.3 was accompanied by the following Reporter's note.

> The Custody Subcommittee of the Judicial Conference's Family Law Committee drafted a proposed Rule governing custody evaluations and other assessments of children in family law cases. The Subcommittee had learned from custody evaluators around the State that the ways custody evaluations are ordered, performed, reported, and used vary tremendously throughout the State, leading to some confusion. The Rule was drafted to provide greater uniformity and to set basic standards for custody evaluators and evaluations. The Rule was approved by the Conference of Circuit Judges. The Family and Domestic Subcommittee of the Rules Committee prepared a revised version of the Rule, based on the Custody Subcommittee's draft.
>
> Proposed new Rule 9-205.3 addresses several areas of concern. The Rule specifies what information is to be included in a custody evaluation, and it affords the parties notice and an opportunity to object to being required to pay for a court-ordered custody evaluation. The Rule also addresses access to reports prepared by a custody evaluator, limitations on dissemination of such reports, fee schedules, and payment of related costs of the assessments.

Judge Weatherly told the Committee that Rule 9-205.3 is a new Rule. Earlier in the meeting, domestic violence cases had

been discussed. In custody cases, depending upon the jurisdiction and the availability of the kind of services, circuit court judges may order a home study, a custody evaluation, or a psychological evaluation to be done. Some jurisdictions are not using them. They are done by a variety of people, including social workers and psychologists. There was a request to have a Rule that explains what the various assessments are and who is qualified to produce them. The most difficult aspect of this is to put in a Rule what happens to the report. Does it come to the court? Does the judge read it? Does the report's author have to be at the hearing and be available for depositions at attorneys' offices? The qualifications of the person making the report was an issue.

Judge Weatherly said that another major issue in the jurisdictions that have these reports available to judges was the availability of the report to the litigant and to the attorney. *Sumpter v. Sumpter*, 427 Md. 668 (2012), 436 Md. 74 (2013) was a case where the report had not been available much before the hearing, and the attorney had not had enough time to look at the report. There have been drastic changes in family courts. In almost all jurisdictions, in 85% of the cases, one party is self-represented. Even in the trials that take one to three days, a high percentage have one party self-represented.

Judge Weatherly remarked that the ability of both parties to access this report in advance has been a concern. In most courts around the State, there were stories of people not parties to the

case who were able to get the reports. The courts were concerned that photocopies of the reports could have been scanned and put on Facebook. This also impacts children, when parents need psychological evaluations, such as for bipolar disease or schizophrenia. It could also be for anger management or for repercussions of abuse. Sometimes it is children who have significant mental health issues that may impact single parents' ability to deal with them. These reports may have very sensitive information.

Judge Weatherly noted that the accessibility of litigants and parties to the reports is a major issue. In Prince George's County, the attorney can get a copy of the report by sending $5 to the court. A *pro se* party can come in to the courthouse and read the report but is not sent a copy. There are different views as to what the content of the report should be and whether it matters if it is a home study done by a social worker or a psychological evaluation done by a psychologist or a psychiatrist.

Judge Weatherly said that what is done with the report and how it comes to the court and whether the author has to be present in court were the issues to determine. Judge Eyler had headed a committee that has been working on this, and she had expressed her concern that it get resolved as soon as possible. The Honorable Ann Sundt, a retired Montgomery County Circuit Court judge, who had been a family coordinating judge for Montgomery County; the Honorable Larnzell Martin, Jr., a judge of

the Circuit Court for Prince George's County who handles family matters; and Connie Kratovil-Lavelle, Esq., Executive Director of Family Administration for the Administrative Office of the Courts, were present at the meeting.

Judge Eyler said that she wanted to give the Committee some of the background leading to the proposed Rule. The project began in 2009. She had been a member of the Family Law Committee of the Judiciary and was the chair of the Custody Subcommittee. The impetus for Rule 9-205.3 was that there had been complaints that some custody evaluations were not being done well because the evaluators were not well-qualified. The general consensus was that there was confusion about custody evaluations. Custody evaluations varied from one jurisdiction to another. There was no consistency at all and no guiding procedures.

Judge Eyler noted that the Custody Subcommittee decided to start the ball rolling by looking at this topic. In 2009, they convened a town hall meeting to which they invited their family services coordinator, custody evaluators, attorneys, and judges to share ideas about what was going on with custody evaluations. Much beneficial information had been exchanged. Aspects of custody evaluations that had been revealed at the meeting were troubling, not so much about how the evaluations were being performed and whether they were being competently performed, but mostly about the trial procedures relating to custody evaluations.

Judge Eyler noted that in some counties, when a custody

evaluation would be performed, neither party was allowed to call the custody evaluator as a witness when the case went to trial. The report would come in on its own without the evaluator there to be examined. There were also many problems with access to the report. Some counties did not allow anyone access. Some counties allowed access if the party was represented by counsel but not if the party was *pro se*. Some counties allowed parties to come in to look at the report and copy it.

Judge Eyler commented that in some counties, it is routine for deposition notices to be filed for custody evaluators but not in other counties. In some situations, the judges will get the custody evaluation report and read it before the trial. In other situations that is not the case. The trial goes forward, the custody evaluator testifies, the report is moved into evidence, and at that point, the judge will read the report. Especially in situations where the custody evaluator does not come to court, the concern is that the trial judge is reading the report, which has detailed and sensitive information in it. It is hard for the judge who reads this damaging information not to be unduly influenced by it.

Judge Eyler pointed out that the reason that she and her colleagues were concerned about all of this was because a custody evaluator who is appointed by the court really is an expert witness – a court-appointed expert. Rule 5-706, Court Appointed Experts, does not allow a judge to obtain a report or read it in advance. Rule 9-205.3 would ensure that the parties do receive

the report, and it would ensure that the parties can cross-examine the witness, who must be called to testify, and that the opportunity for cross-examination exists.

Judge Eyler pointed out that there already was a case on point, *Denningham v. Denningham*, 49 Md. App. 328 (1981) authored by the Chair when he was on the Court of Special Appeals. The case had held that it is a due process violation when a party to a custody dispute is not allowed to have the report and is not allowed to cross-examine. The witness who wrote the report was not allowed to testify and was not allowed to be cross-examined. That 1981 opinion stated: "Statements contained in a custody investigation report have no special indicia of reliability. They are generally not under oath and often emanate from people having overt or covert bias. In many instances, the statements represent subjective feelings and perceptions rather than objective observations or empirical data. Their usefulness to the court only is as strong as their reliability, and that requires that they be subject to challenge in essentially the same manner as any other critical evidence."

Judge Eyler noted that the holding in *Denningham* was that due process had been violated, because the parties should have been given the opportunity to have access and knowledge of what the report contained in advance and to cross-examine the investigator. This was established law in 1981, and yet what the Custody Subcommittee had been finding in the meeting that they had held was that this was not happening in the real world.

Judge Eyler remarked that the Custody Subcommittee had been very concerned with the loss of an opportunity or not being given an opportunity to cross-examine the author of the report. If the mechanism that is followed is that the report goes to the judge, and the judge reads it, the report either is (1) considered by the judge without the judge even saying so, which is a huge problem in and of itself, because then the judge could be making a decision based on non-evidence, or (2) the judge puts the report into evidence with the author not in court, and there is no opportunity to cross-examine the author of that report. This is a significant due process problem. Everyone recognizes how central cross-examination is in fact-finding, and in this situation, that opportunity does not exist. The cross-examination that parties are entitled to has to be effective, and if they do not have access to the report in advance and in some timely manner in advance, it is difficult to effectively cross-examine. The *Sumpter* case is a great example of this.

Judge Eyler said that the group that headed up the town hall meeting was a subset of the Custody Subcommittee. They were: Judge Sundt; Cynthia Callahan, now a judge on the Circuit Court of Montgomery County, who was an attorney at that time; Ms. Kratovil-Lavelle, who had been the reporter and also participated; Judge Martin; Judge Emory A. Plitt, Jr.; and Judge Eyler. The smaller group was formed to be able more easily to draft a rule than a bigger group could do. They held a town hall meeting, then followed up with many more meetings and drafted the

proposed rule. It was presented to the full Custody Subcommittee, which approved it. It then was presented to the full Family Law Committee, which voted in favor of it. It was presented to the Conference of Circuit Judges, which voted in favor of it.

Judge Eyler told the Committee that she would explain the essentials of Rule 9-205.3. The drafters had tried to keep in mind that, on one hand, it is important to preserve due process rights, but on the other hand, expediency can be a problem. The cases cannot sit around indefinitely. There are also problems with limited resources. The drafters tried to address these problems in the Rule. They defined the various types of assessments, including custody evaluations, home studies, and specific-issue investigations, so that everyone is in agreement as to what those are.

Judge Eyler remarked that especially with custody evaluations, Rule 9-205.3 explains what must be included. One of the components is a recommendation based upon an analysis of the facts, or if the evaluator cannot do that, an explanation as to why. There are not many mandated portions of the evaluation, but some are necessary to a balanced evaluation, including interviews of the parents and of the child. The Rule establishes qualifications for evaluators based on their experience, education, etc. The Rule provides a process for the selection of custody evaluators or for other evaluators, either by the court making a selection, or by the parties making a selection and then

having the court approve it.

Judge Eyler noted that Rule 9-205.3 was then considered by the Family and Domestic Subcommittee of the Rules Committee. To better the Rule, changes were made, one of which was that the parties have an opportunity to object to an appointment on the basis of cost. The Rule requires preparation of a report by the evaluator. The report can either be an oral report that is then put on the record and is transcribed so that it ends up in writing, or it can be a written report.

This originated in Harford County and then was adopted in Montgomery County. Those counties have a settlement procedure whereby the custody evaluator will come in and on the record orally give his or her report. This is then tied in with a settlement conference, because at that point, the parties have been informed and will now hear what the evaluator is going to recommend. They are likely to be motivated to resolve the case. This procedure has been very successful. It is important to make sure that Rule 9-205.3 allows for this procedure. Custody evaluations can facilitate settlement.

Judge Eyler commented that Rule 9-205.3 contains limitations, which were elaborated on at the Family and Domestic Subcommittee meeting to address serious problems that Judge Weatherly had referred to. It is important that irresponsible litigants not be able to post sensitive piece of information on social media. The Rule allows for the parties to get copies of the report, but it limits to whom copies may be distributed. The

order that is issued by the court can refer to this limitation, and there is the prospect of contempt sanctions for someone who violates the order. The Rule strikes a balance between the right to have access to the report in advance and the right of privacy, so that the report is not disseminated widely.

Judge Eyler pointed out that Rule 9-205.3 clarifies in section (i) that the Maryland Civil Discovery Rules apply. In an effort to take care of a problem that has been referred to over and over again, which is that custody evaluators, especially those who are working for the court, have limited time, an exception was made for depositions, so that depositions can be noted and taken. However, they must take place at the courthouse, at a location set by the court that is convenient for the evaluator. The depositions are limited to two hours. The evaluator has to provide a list of documents he or she has collected beforehand so that the parties know what the evaluator already looked at. The hope is that eventually those depositions can be taken by video, and evaluators can testify by video.

Judge Eyler said that she had not mentioned some of the more controversial parts of Rule 9-205.3. She and her colleagues were concerned that a judge will read the report in advance and then not go into the trial with a neutral perspective. Her policy is not to read an evaluation report unless it is central to the issues on appeal, because the reports have all kinds of details, some of which are highly prejudicial and may not even be relevant. The way that Rule 9-205.3 is drafted, the standard

operating procedure is that the judge does not have access to the report before the hearing or trial, except if it is a settlement judge whose function is to try to settle the case, or if the parties agree that the judge can have access to the report before the hearing or trial. The evaluation reports now have to include the recommendation for custody and visitation.

Judge Eyler remarked that what she had heard from the judges who do read the reports in advance was that when there are *pro se* litigants, and the judge has just been given the case that morning, the reports often help the judges by giving them some context. They find out who the parties are and what they do. Parties can agree that the judge can read the report in advance. The parties can also agree that the judge can read a part of the report in advance. For example, the judge could read the part of the report relating to background information, but not the part containing the evaluator's recommendations.

Judge Eyler noted that at trial, there is a range of possibilities as to what happens. The usual procedure is that the custody evaluator would come to court and testify. There would be the right to cross-examination regardless of whether the evaluator is called by the court or by the parties, and the report can come in as something that shows what the custody evaluator did and clarify the information that the evaluator had relied upon. Or the parties can stipulate that the report will come in by itself, and the custody evaluator does not need to be in court. Another possibility is that the parties can stipulate

that the report will come in as the direct testimony of the custody evaluator, but the parties have a right to cross-examine, which obviously means that the evaluator must be in court for cross-examination.

Judge Eyler observed that there were aspects of Rule 9-205.3 that she had not referred to in any detail. Basically, the goal was to establish a rule that protects the right of cross-examination, which is a central due process right. The *Sumpter* case, which took five years to resolve, came up with a middle ground. The case did not get into the constitutional issue, and it turned out it did not have to. The process that was used in Baltimore City did allow, by leave of court, for the parties to get very limited access to this report in advance. The lack of full access was an egregious error, and there was a presumption of harm. A footnote in the case suggested that if the court had reached the constitutional issue, it probably would have found some due process problem.

Judge Eyler said that what she had found interesting about this was that part of the reason the court gave for why this access is so important is that a party needs time to prepare in order to cross-examine witnesses. In *Sumpter*, the evaluator was present and was available for cross-examination. The problem was that the parties did not have the report in enough time to be prepared. The hope is that the access issues, the cross-examination issues, and the fair trial issues, are resolved to create a fair process.

Judge Eyler commented that at the town hall meeting, they had heard complaints from people in the community that they did not get a fair consideration when they were a party to these kinds of cases. A huge problem exists with perception of the lack of fairness. This is critical. People need to know that when they come into court, they will be getting a fair consideration. One of the problems with custody evaluation reports read in advance is that someone who has been criticized in the report may find out that the judge read it in advance before listening to the person testify. If the recommendations in the report go against the person, he or she may not feel that the judge gave him or her a fair consideration. The Rule is trying to address actual procedural problems and the perception of unfairness that often accompanies custody cases.

Judge Weatherly said that she was in the role of the adversary, although she was just as anxious as her colleagues to see a rule in place. She expressed her respect for her colleagues and all of the people who had worked so hard on Rule 9-205.3. She explained that she was concerned about the Rule in some respects. She had no problem with the qualifications in section (d) of Rule 9-205.3. She was concerned about subsection (h)(5) and sections (i) and (j).

Judge Weatherly noted that currently in Prince George's County, a home study that is done by a social worker costs $600. Assuming the parties have equal income, the court would order them to divide that cost. A psychologist would do the home study

only if there were real mental health issues involved. A psychologist cannot be chosen randomly. At one time, social workers were in-house employees, and the psychologists were outside employees. The psychologist would cost $2,000, which the parties would have to split. Currently, most of the social workers and all of the psychologists are paneled. The reason is that the county does not want to pay their health insurance and pensions.

Judge Weatherly said that she was in agreement that parties should have access to the evaluator's report. Judge Eyler had correctly stated that it is a balance. Even if the party is self-represented, the party has to have access to the report to know whether he or she needs to bring witnesses to court and whether to get an attorney. Judge Weatherly noted that she had some concerns about the reports being disseminated. In the balance of access to the report vs. protecting sensitive information, after the *Sumpter* case, there is no question that access is key. Reports will be handed out, and everyone involved will have the same access.

Judge Weatherly referred to the report. On their own parties can and often do seek out renowned psychologists to do the evaluation, and they can cost as much as $10,000. The psychologists spend a great amount of time on the reports interviewing every relative possible, sometimes more than once. Most of the evaluations available around the State do not purport to do this. Many counties offer none of these services. In some

cases, the court orders the evaluation. In Prince George's County, if the court determines that the parties are indigent, the court pays for the evaluations. Judge Weatherly and her colleagues did not feel that it was appropriate that wealthy people would get these kind of services, but a single parent in a custody dispute who was not well off would not be able to afford that. If the court finds that a party is indigent, and the party is represented by the Legal Aid Bureau or a pro bono attorney or even if the party is self-represented and asks for a waiver, the court pays for the evaluation. The judges do not order them unless they feel that the evaluations are necessary.

Judge Weatherly remarked that in cases where the parties have paid for the evaluation, they would have an opportunity to look at the report before the hearing or trial. The Rule permits the parties to agree. If someone finds something unfavorable in the report, he or she will not stipulate. The idea that the parties may agree may not work where there are *pro se* litigants, who often do not have much communication with each other before the trial. Often *pro se* parties do not stipulate, except sometimes in the courtroom when the judge asks the parties if they agree. The party will have to come to court.

Judge Weatherly said that subsection (j)(1) provides that the court or a party may call the author as a witness. It should provide that the court shall have the witness available. The judge cannot tell the parties to pay $2,000 and have the report available, then one party does not agree that the judge can read

it, so the report is thrown out. In order for the judge to have access to the report, the evaluator will have to come to court. The judge would not be able to rely on the parties. It is possible that the parties or the attorneys would agree that the evaluator does not have to come to court, because they do not have any problem with the report. However, the reality is that the author of the report will have to be in court. Judge Weatherly explained that she was concerned with the language in subsection (j)(1).

Judge Price asked who is going to pay for the evaluation. Judge Weatherly responded that this is the big question. Baltimore City has some in-house staff who are generally available. In Prince George's County, the social workers and psychologists are not asked to come to court. If the evaluator interviews the parties and also has to come to court, there is a higher price for that.

Mr. Zarbin inquired whether in place of making the parties stipulate, there would have to be an objection to the report coming in. The report would come in unless within a certain amount of days before the hearing, a party files an objection. The evaluator would not need to be brought in every time. Judge Weatherly responded that this would be her preference. The parties should be told that they can subpoena the evaluator or simply tell the court that they would like the evaluator in court. Mr. Zarbin remarked that it would be similar to what happens in a criminal case when there are laboratory results that

would be admitted unless an objection is filed.

Judge Price noted that it is not really an objection, because if the court orders it, it will be done. If the party would like the author of the report to come to court, the party would have to request it. Judge Weatherly said that one of her other concerns was that in her county, the social workers and psychologists are private, paneled people. Under Rule 9-205.3, the evaluator would be required to come to an attorney's office wherever the attorney has noted a deposition. The Rule does not provide who pays for the evaluator's time there. Judge Weatherly commented that her preference was that with respect to the discovery part of the Rule in section (i), it should provide that if the evaluator is not a court employee, the party requesting the deposition must pay for the evaluator's time at the deposition. Judge Weatherly suggested that section (j) should provide that the court may consider the court-ordered written report. The parties may subpoena the evaluator to attend the hearing and be available for cross-examination.

Judge Weatherly suggested that in section (k), a party who brings in a non-court-appointed assessor to the hearing should have to pay for the fees. In Prince George's County, they had heard from litigants that it is not known how much a best interest attorney is going to cost. The judges have tried to set limits on the fees regardless of the amount of time. They have also done this for the psychologists and the social workers who are paid a set fee. There is a balance to this. They have to

decide if it is worth their time. Prince George's County is now short on social workers, because they are reluctant to sign up based on what they would be paid. The court pays if the parties are determined indigent, but often the parties can afford to pay.

Judge Weatherly remarked that it really bothers her if the costs for a family are $50,000 to $100,000 to litigate the case. They may have depleted retirement accounts and their savings. Judge Weatherly said that she is very driven by costs. If every assessor is going to have to come to court, the costs can be calculated. This is the cost for a psychological evaluation or a home study. Every year the number of people who qualify for fee waivers goes up.

Judge Weatherly said that she was concerned that *pro se* parties who were not aware would have to pay the higher fee, so that the social worker or psychologist can come to court. Parties should have the opportunity to request that the assessor come to court. In Prince George's County, a party who would like the social worker or psychologist to come to court can subpoena him or her, and the court will make sure that the person is there. If he or she is one of the county's paneled evaluators, the county requires that the person gets paid.

Judge Weatherly commented that much of what she had said had been discussed at the Family and Domestic Subcommittee meeting. She expressed the view that parts of Rule 9-205.3 are excellent. She was mindful, however, that there are many places in the State where none of these services is available.

Judge Sundt said that she understood what Judge Weatherly had discussed. The drafters of Rule 9-205.3 had tried not to micro-manage in the individual jurisdictions but rather to respond to what they had perceived as a large variation in the process. To the extent that the Rule provides guidance, it really does help. She clarified that Montgomery County does have in house assessors. They are part of the court's budget and are all licensed clinical social workers. Every custody case is ordered to go through this process. The difference is that people can elect out. The wealthier people in Montgomery County can choose their own psychologist or social worker. The process is available for everyone.

Judge Sundt noted that the other reason that this is helpful is that some evaluators are located in the courthouse. When Judge Sundt has a custody case, she can tell the court evaluator to be in court at a certain time. The person can be finished in court in 45 minutes. If the parties stipulated to the report, it may only take 25 minutes. The evaluator goes back to work in the courthouse and is not sitting in the courtroom all day, because he or she comes in as the judge's witness. It is a court-ordered evaluation. If the parties elect out and bring in their evaluator, Judge Sundt will accommodate them. She is very respectful of the time spent by the court staff.

Judge Sundt commented that Judge Eyler had touched on the fact that the evaluators are present at the settlement conference. The vast majority of the cases settle then. The

person who hears what the evaluator is going to say, which may be something that the person has lied about or not acknowledged, may not want the evidence to come out in court.

Judge Sundt said that her last point was about dissemination of reports. The Rules cannot be written because of dysfunction. There will always be people who are egregious in their behavior. These are the high-conflict cases. These are the people who are on the losing side, and who try to take everyone involved down with them. When these people disseminate information in Christmas cards, no rule can be written to stop them. The best Rule 9-205.3 can do is to provide a framework that does not encourage this behavior. It provides that if this happens, there will be consequences. The balancing and the general structure of the Rule are so important.

Judge Eaves asked Judge Weatherly if she had suggested that when the report comes in, and the custody evaluator testifies, there may be two time frames for making a request. One is that if the person does not want the report to come in, an objection should be made by a certain deadline, and if the person would like the evaluator to be present, the person has to make that request by a certain deadline. Judge Weatherly responded that something can be put into the scheduling order for domestic cases. Judge Eaves inquired whether some language should be added to Rule 9-205.3. Judge Weatherly answered that her idea was to do this in the scheduling order. The Rule could provide the deadline for when the objection or request has to be made.

Mr. Dunn remarked that as to someone filing an objection to the report, Judge Price had made the point that it is not an objection to the report, it is a request that the author of the report come in. Judge Pierson pointed out that someone may have an objection to the report, but he or she does not necessarily want the evaluator to come in. Judge Weatherly said that she preferred that the court has access to the report. Judge Price remarked that the person should not have the right to object to the report, but he or she should have the right to have the author come in. Judge Pierson noted that someone may wish to object to the report on an evidentiary basis, such as hearsay grounds. Requesting the author to come to court and objecting to the report are two separate issues.

The Chair pointed out that the evaluator is treated as an expert witness, because he or she is making recommendations, even if the report is largely fact-based. The report may have hearsay in it. However, since the court is ordering a report, it might be a good idea to have the author there to be cross-examined. Are the reports not routinely admissible now? Judge Eyler answered negatively. It is like any other expert witness who writes a report. The report does not just come into evidence on its own. It is the product of a person who conducted an evaluation. The person testifies about the evaluation. Judge Weatherly observed that the report is delivered to her with the file. The Chair asked what the basis of the of the objection would be if the court has ordered the report, and the author is

there and subject to examination and cross-examination.

Judge Sundt remarked that Judge Eyler had raised this issue, but this is one way of addressing the situation where someone wants to have one part of a report excised. This question had been raised, but it is not part of Rule 9-205.3 at the moment. There is no ability to object to the report. Judge Sundt and her colleagues had been worried about what happens if both sides want to read the report, and it is negative for both. No one would ask for the report to come in, but the court has ordered it. The court may think that the report is very interesting.

Judge Eyler noted that the court can always call for a custody evaluation on its own. Judge Sundt remarked that some judges routinely do that. These are the judges' reports. Every now and then, there may be a really poor evaluator. Generally, the judges recognize them fairly quickly. Most of the reports are helpful. They are based on what the parties have told the evaluator. This involves children, who may have no voice other than their input to the evaluator who reports what he or she has heard. The evaluators generally do not do a psychological analysis; they simply just give the facts. It is not usually an elaborate description. Those who want that have to hire the professionals with the best reputations.

Judge Eyler noted that the presumption that the report simply comes in on its own unless there is an objection to it or a request that the evaluator must be in court is possibly workable. Her concern was the great number of *pro se* litigants.

What is being discussed is guarding the right to cross-examination. The procedure for the *pro se* litigants to object and ask for the evaluator would have to be very simple. It is difficult to put the burden on them. For cross-examination rights, it is safer to keep the burden as it usually is, which is that the witness has to come forward and be at the hearing unless the parties agree otherwise.

Judge Weatherly commented that there are two chances to object. One would be an objection to the scheduling order. The parties also come into a settlement conference with the judge. The report is available then. The settlement judge can confirm that if a party would like the author of the report to come to the hearing, the party would need to make the request. The Family Division would have a form with a place on it to request the presence of the social worker or psychologist who did the report.

Judge Pierson asked if notice would be required. Mr. Zarbin noted that this is what happens in civil drug cases. The State's Attorney sends out a notice stating that a certain piece of evidence is going to be admitted unless an objection is filed. Judge Weatherly said that the same procedure happens in mediated custody cases in her county. The cases in her county are very *pro se*-driven. She remarked that she understood that there is a balance, but if there is a way that every one of the authors could be brought in without the need for stipulations, which are difficult for *pro se* litigants, it might be beneficial. However,

there is a significant cost for the authors of the reports to come to the hearing.

The Chair pointed out that two different approaches had been suggested. One was that the judge does not get the report in advance of the hearing the report does not come into evidence unless there is a stipulation that it can. The other approach was that the report can come in unless someone demands the presence of the author subject to examination. Is it a distinction without a difference between these two options? Judge Weatherly answered that the difference is who needs to show up for the hearing. The Chair noted that without a stipulation, the report is going to come in unless someone objects and wants the author there. The person objecting would have the duty then to subpoena or summon the author. The Reporter asked if the author would be called as an adverse witness. The Chair answered that it is the court's witness, so the witness may not necessarily be adverse. The witness may not provide the testimony that the person calling him or her would like.

Mr. Marcus remarked that this entire process revolves around the introduction of expert testimony. If the person is an expert, the testimony of the expert does not necessarily apply to the truth of the facts. The facts are simply what served to inform the expert on what his or her ultimate opinion is. Theoretically, the chance is that the trial judge is not going to accept the underlying facts as having been proven or being the truth, but rather, as the ultimate opinion that the expert

renders.

Mr. Marcus said that some of the reports that he had seen read like a tabloid. He was not sure that the Rule could do this, but this could be likened to expert testimony which is what is relied upon and what the facts are that the expert developed. In examination or on its own, the court may not accept the facts as being true. However, the court may accept the opinion as to what the recommendation was. Judge Weatherly commented that this is why the access part of this becomes so critical. Someone who reads the report and sees damaging testimony would want to bring in witnesses to prove that the testimony is not true. Suddenly, that recommendation would be gone.

Mr. Marcus said that the evaluator could be considered as any other expert, and the court may not treat that person as a fact witness and may not treat that portion of the report that deals with facts that have been identified as being investigatory, but rather treat the evaluator as an expert on an issue. Judge Pierson responded that in Baltimore City, the practical effect of the reports is that they are a study. In some, the expert's opinion is the essence of the report, but in others, the report is a study, and as a practical matter, it saves the judge a great amount of time, because it lays out the facts, so that the judge does not have to listen to find this out.

Mr. Marcus observed that if the report is used as a fact-finder, then the way to address this is in a pretrial order.

There are rules that govern pretrial orders, such as Rule 1-324, Notice of Orders. It may be helpful to add to the order a question asking whether the parties accept the facts from the report at the time the parties submit their pretrial statement. Judge Weatherly pointed out that there are no pretrial statements in family cases.

Judge Pierson said that this is not the part of the procedure that needs correction. What is problematic is the access part and the competency part. The Chair had noted that the reports routinely come in. It is useful to concentrate on how they are coming in. Mr. Marcus commented that it is not so much a high evidentiary hurdle, but rather whether it is necessary to require the author to appear in court. At some point in the pretrial process, it is useful to identify (1) whether there is a legitimate need for the author to come in or (2) whether essentially it can be stipulated that the report can come in. Judge Pierson expressed the view that there is no need to show a reason for the author to come in. A notice can be sent to the parties informing them that if they would like the author to come in, they have to notify the court. It is not a question of giving a reason.

Judge Eyler pointed out that what needed to be fixed in the procedure was the access component, which is evidently not working properly and had been addressed in *Sumpter*. The right to cross-examine is not functioning properly either, but as she stated earlier, what *Sumpter* had said was that access is

necessary to prepare to cross-examine the witness. There are cases that are well established in the Court of Special Appeals holding that someone has the right to cross-examine. The question is where is the burden going to fall. Is the report going to come in unless further steps are taken by one of the parties who wants to be able to cross-examine the investigator, or is the witness there to begin with, so that the right of cross-examination is available, but the parties can opt out?

Mr. Zarbin expressed the view that if a party would like the person to come to court, then that party has the burden of bringing the person in. If the party does not timely request the presence of the author, the party has waived his or her right. In drug cases, the party may have requested that the chemist be in court, but if the request was not timely filed, the judge may postpone the hearing.

Judge Weatherly observed that the tendency is to try to make procedures user-friendly in the family division. They can have a form available. The Chair pointed out that a subpoena form will soon be available. Judge Weatherly remarked that the settlement conference judge knows that the case is not settling, and the parties have access to the report. She thought that the idea was useful that the report itself can provide that if a party would like the author of the report to be at the hearing, the party can request this 10 days in advance. She said she would like to discuss payment of the investigator.

The Chair commented that his question did not pertain to the

value of Rule 9-205.3, which Judge Weatherly had made a good case for, but rather how the Rule is likely to be implemented. He was not certain that this could be dealt with entirely by Rule. It is really the culture and education of judges. The concern that was raised by the Subcommittee was that there will be judges who will get a report in every case, because they do not want to have to decide the case alone. It starts with appointing counsel for the child at the parties' expense. Then there is mediation at the parties' expense. A parent coordinator may be appointed at the parties' expense. Next is the evaluator, who may cost thousands of dollars. The threshold for indigence may be very high in these cases.

The Chair said that he was not objecting to Rule 9-205.3, because these reports are already being made. It is important to create some structure and authority to it. The question is how the Rule can be designed, so that parties do not respond by refusing to bankrupt themselves and simply stop fighting for custody of the child. This is an access to justice issue. The Chair asked the Committee to give some thought as to how judges will implement this.

Judge Weatherly noted that her county is committed to picking up these costs when the parties qualify as indigent. She did not like the idea that people would be encouraged to settle cases to avoid paying the high costs associated with going forward. They feel like this is a limited resource, limited for the parties and limited for the court. A report cannot be done

in every case. There would be no reason to do one in an uncontested case. They do not do a report in every contested case. It may not be necessary. From her experience teaching for the Judicial Institute, she did not have a sense that people are using the cost of these services to bludgeon litigants into not going forward.

Judge Weatherly said that when she tries a case with two self-represented litigants, and there are problems with the litigants having been to jail or living in a home with a relative who just got out of jail, or a litigant has a child who is doing poorly in school or who runs away, Judge Weatherly feels like she is being asked to make a very important decision. It can be very difficult trying to figure out what the facts are. The reports can be a lifeline to a judge. Someone had a chance to talk with the child outside of a courtroom, which is the worst place to interview a child. The children are a little more comfortable to talk in their own home.

Judge Weatherly commented that she does not get the same amount of information in every case. Not all cases involve battling parents. More often than not, these reports are helpful, and the self-represented litigants can be the most helpful. They are the least pretentious. When attorneys frame issues, it takes more time. Judge Martin commented that in the large jurisdictions, the judges are the gatekeepers. It is rare that the case comes into the courtroom, and the trial judge asks why there was no evaluation. There have been cases where no

evaluation was done. Family Divisions exist throughout the State. Gatekeepers are right up front to make certain that there is a discrete determination as to what is needed in a particular case.

Ms. Kratovil-Lavelle referred to the point made about costs. Because of the movement to have more staff custody evaluations, her department, which is the Family Division of the Administrative Office of the Courts, gives grants to circuit courts in some counties for their family divisions to pay for staff evaluators. She was not sure what the budget request would be for the next budget cycle. The tendency is toward having more court-based staff evaluators. As to waivers, the court is supposed to follow income eligibility guidelines. With regard to transcripts and costs, those people who are income-eligible now pay for transcripts. There is a pilot project that started out in Montgomery County. If an agreement is not reached at the pretrial event, her office has been paying for the transcripts, so that the litigants have a written report. Judge Weatherly added that this is the report that goes to the court. Ms. Kratovil-Lavelle noted that Rule 9-205.3 includes a provision that if the parties do not reach an agreement at the pretrial settlement conference, automatically a transcript is prepared at no cost to the parties. Her office has funds budgeted for this. Judge Weatherly said that she did not know of any other county where the assessor comes to the settlement conference, except for Montgomery, Frederick, and Harford Counties. Ms. Kratovil-

Lavelle responded that this is not uniform.

The Chair said that Rule 9-205.3 was the recommendation of the Subcommittee, and it would take a motion to change it. Judge Weatherly suggested that subsections (j)(1) and (2) of the Rule be deleted and replaced with the following language: "The court may consider the court-ordered written report, the parties may subpoena the assessor to attend the hearing and be available for cross-examination, and before the court admits the report, the court may read it." The Chair pointed out that section (j) applies to testimony at hearings, and this would not involve the judge getting the report before the hearing.

Judge Weatherly commented that her suggested language would provide that the assessor would be required to attend the hearing to be available for cross-examination before the court reads the report. Mr. Frederick asked whether the language should be "before the court considers the report." Judge Weatherly responded that the language could be: "before the court considers the court-ordered written report."

The Chair inquired if there was a distinction between the court considering the report and admitting it. The court could consider it without admitting it. Mr. Frederick suggested that the judge could read the proposed document before determining whether or not to allow a witness to look at it unless someone has raised a question about it. It is a separate question between this and actually admitting it into evidence, because once admitted, it becomes part of the record, and the appellate

court can consider it.

Judge Pierson suggested that the language could be: "The court may consider the report as evidence." The Chair asked how it could be considered as evidence if it is not admitted. Judge Pierson explained that the problem with the language: "the court may admit..." was that the court may be the proponent of the report. The Chair asked if it makes any difference who moves the report into admission. Judge Pierson remarked that the court does not move the report. Judge Weatherly added that it is possible that neither side likes what is in the report. The usual assumption is that one is the winner, and one the loser, but this may not be the case.

The Chair noted that Rule 9-205.3 was trying to address this. Judge Eyler had made the point that the judge should not read the report before the trial. Then the question is what happens to the report at trial. Judge Eyler said that the part of the Rule that Judge Weatherly had just referred to addresses what happens at trial. Judge Pierson suggested that in place of the tagline of section (j), which is "Testimony at Hearing," the language could be "Admission of the Report at Hearing." The Chair commented that unless the report is admitted into evidence, the question is whether the judge can rely on it. What happens on an appeal if it is not part of the record? Ms. Bernhardt observed that the report would have to be part of the record to be available to the appellate court. Judge Eyler said that there could be a reason why the report could not be admitted.

Judge Pierson pointed out that one aspect of this that is missing from Judge Weatherly's proposal was that it does not give the parties the right to object to all or part of the report on some ground other than the non-presence of the author of the report. Ms. Bernhardt suggested that the Rule should have a requirement that the author be in court. Judge Weatherly said that her motion was that the court could consider the report without the assessor, who is the author, present. Judge Eyler expressed the opinion that the Rule would have to be drafted so that the report will be admitted notwithstanding the fact that the author is not present, and the admission of the report can be objected to on other grounds.

The Chair suggested that first Rule 9-205.3 expressly permit and provide a procedure for either party to summon the author to testify, and provide, subject to any objection, that the report is admissible. Mr. Zarbin pointed out that Code, Courts Article, §10-1001, pertaining to chemists' reports in drug cases, provides that the reports are admitted unless an objection is filed. The Chair pointed out that this suggests that if someone does object, the report cannot come in. Mr. Zarbin said that if an objection is filed, the chemist has to be cross-examined. Ms. Bernhardt added that the report does not come in. Mr. Zarbin noted that the report would come in as part of the testimony if the chemist is there.

The Chair commented that for drafting purposes, Rule 9-205.3 should provide for the ability of a party to require the author

to be present. If no one asks for the author to be there, could there be some other objection to the report besides the non-presence of the author, or should objections be foreclosed? The right to have the author there should be in the Rule, and the report should be admissible subject to any objection that a party may raise on any ground that is persuasive. The judge could find the report or parts of it unreliable. Mr. Zarbin asked whether this is an argument pertaining to the weight of the evidence rather than an admissibility argument.

The Chair suggested that this is a simple policy issue. What should happen at trial for the evaluator's report to come in? Should it automatically come in unless the author is not there? Should a party be able to object on any ground and the judge rule on it? Judge Eaves observed that if the Rule provides that the report comes in and the author is not present, parties always have a right to attack the weight of what is in the report. If, for example, the issue is the fact that the child is late to school, a party can always bring in a teacher or the school administrator. If the report pertains to some incident involving the child or an alleged crime, a party can always bring in other evidentiary bases to attack whatever is alleged in the report. Judge Eaves expressed the view that it is more the weight of the evidence in the report rather than the admissibility. Judge Weatherly commented that this is the importance of the advance notice, because a party would know about the witness that the other party would like to bring in.

Ms. Bernhardt pointed out that these kinds of reports are in juvenile and Child in Need of Assistance cases, and there is a right to cross-examine the author. There may be language in the Code that could be helpful. Judge Eyler said that the Rules of Evidence are relaxed in most of these hearings. *In re Faith H.*, 409 Md. 625 (2009) pertained to permanency planning and whether the Department of Social Services report would come in on its own. The court said that it could so long as the person objecting had the right to cross-examine the witness.

The Chair hypothesized that a party could say that the evaluator had never spoken with him or her. Rule 9-205.3 requires the evaluator to speak with both sides. Would the allegation that the report was made up be a basis to object to the report? Judge Price responded that there should be the ability to object. Judge Weatherly noted that the court may leave the record open and bring in the social worker, or whoever was the evaluator. The court would then call all the parties and witnesses back to court for the next day. Judge Eyler remarked that this would be a reason for the court to request that the evaluator come to court. The judge can always say that he or she would like the person to come to court. Judge Weatherly pointed out that even if the evaluator works in the courthouse, they do home studies and that means another family has taken the day off work to meet with the evaluator. The evaluators have to be given advance notice.

The Chair said that he assumed from the lack of objection

that the Committee approved of the idea that particularly following a settlement conference, where everyone knows what the evaluator will say, if a party would like the evaluator present in court, that party has to summons him or her, so that a hearing can be scheduled. The next question was whether a party should have the right to object to the report coming in for whatever reason the party has, other than that the author of the report is not there.

Mr. Carbine remarked that he was having difficulty understanding why the usual Rules of Evidence do not apply. There should not be all of these special rules to micro-manage the proceedings.

The Chair told the Committee that Judge Weatherly had made a suggestion for a change to section (j) of Rule 9-205.3. Judge Price asked what the suggested change was. Judge Weatherly said that her suggested language was that the court may admit the report without the author present. The parties have a right to require the author to be present for cross-examination. The parties have to give notice at least 10 days in advance. The report will be admissible subject to any objection other than the fact that the author is unavailable. Judge Weatherly said that this was a motion, which was seconded. The motion carried by a majority.

Judge Weatherly recommended that subsection (i)(2)(B) of Rule 9-205.3 apply to any appointed person, including panel assessors, who are not court employees. The outside assessors

should be under the same limitations as the court employees. Judge Eyler commented that this provision should not apply to every outside assessor. The Chair said that Rule 5-706, Court Appointed Experts, permits depositions to be taken of experts. Judge Weatherly commented that any outside assessor should be available for the same reasons as any assessor who is a court employee.

The Chair asked what change Judge Weatherly was suggesting. She answered that subsection (i)(2)(B) of Rule 9-205.3 would state: "Unless leave of court is obtained, any deposition of an appointed assessor shall ....". The Chair inquired if this would mean that the deposition of any assessor would have to be held at the courthouse. Judge Weatherly clarified that it applied to court-appointed assessors. The Chair pointed out that this could be a private person. Judge Weatherly responded that most of them are private. The Chair reiterated that as the Rule is drafted, the deposition would have to be in the courthouse. Judge Eyler observed that people do not necessarily work in the courthouse, but they are under contract. Judge Weatherly said that they have a memorandum of understanding with these assessors. Judge Eyler added that they are not private employees; they are under some kind of contract.

Judge Sundt suggested that subsection (e)(2)(A) of Rule 9-205.3 could have the language: "the parties may employ an evaluator. The court shall enter an order approving the evaluator." The same distinction was made with parent

coordinators. When Rule 9-205.3 refers to "court-appointed employees," that means someone on the court's list. The Chair noted that not included in the term "court-appointed employee" are the evaluators employed by the parties that the court later approves.

Judge Pierson remarked that when the Style Subcommittee looks at Rule 9-205.3, they should consider the variation in language throughout the Rule when it refers to the individual "designated" and the individual "appointed." He was not sure that it was clear why the various words were used. The Chair said that the Style Subcommittee can clean up the language, but the substance of the Rule should not be changed.

The Chair asked if anyone objected to changing the term "court employee" to the term "court-appointed assessor" in subsection (i)(2)(B). There being no objection, the Committee approved this change by consensus.

Judge Weatherly asked whether under section (k), which pertains to fees, the party has to pay if a party would like to bring in a paneled psychologist or a paneled social worker, but not a court employee, and the party would like the psychologist or social worker at trial. Who pays for it? Subsection (k)(1) provides that the county administrative judge of each circuit court shall develop and adopt maximum fee schedules for custody evaluations. This may be sufficient for the court to state what the fee is and what the cost of the person coming to the deposition and the trial is.

The Chair referred to subsection (k)(2). He suggested that the language "by the court" could be added after the word "appointed" and before the word "to." This would mean the court orders parties to pay the costs only for evaluators appointed by the court and not for those hired by an individual. Judge Weatherly agreed with this suggestion. By consensus, the Committee agreed to make this change.

The Chair suggested that the words "fees and" should be added after the word "necessary" and before the word "costs" in subsection (k)(2). Ms. Kratovil-Lavelle remarked that when the Subcommittee was discussing Rule 9-205.3, they had discussed the issue of "fees" vs. "costs." The thought was that the word "fees" might trigger some idea that the court administrator could set fees. The Chair explained that his question pertained to the fact that subsection (k)(2) allows the court to order who pays the costs. Did the Subcommittee mean fees as well as costs? Judge Weatherly noted that the tagline for section (k) is "Fees," and the tagline for subsection (k)(1) is "Fee Schedules." The Chair said that the tagline of subsection (k)(2) is "Allocation of Fees and Expenses," but the text only refers to "costs." Judge Weatherly asked Ms. Kratovil-Lavelle if her point was that the word "fees" should be avoided. Ms. Kratovil-Lavelle answered that she could not remember the specific discussion at the Subcommittee, but she did recall a discussion about the use of the word "fees," which may trigger some other Rules. The Reporter noted that the discussion was about the statute, Code,

Courts Article, §7-202, which provides that the State Court Administrator shall determine uniform fees and charges for the circuit courts with the approval of the Board of Public Works. The Chair pointed out that those are court costs.

The Chair again referred to the tagline of subsection (k)(2) of Rule 9-205.3, which is "Allocation of Fees and Expenses." Judge Weatherly asked if the term "fees and expenses" could be used in place of the word "costs." The Chair inquired whether the text should reflect the tagline, or whether the tagline should reflect the text. He assumed that this addresses who is going to pay for the assessor. This will be payment of fees and expenses. Judge Eyler remarked that Rule 9-205.2, Parenting Coordination, which Rule 9-205.3 is based on, uses the language "fees and expenses." The Chair suggested that the term "fees and expenses" be used in place of the word "costs." By consensus, the Committee agreed to this suggestion.

The Chair said that if the parties select their own assessor, they can ask the court to approve it, and the court can only approve the selection if the assessor is qualified. What if the parties do not ask the court to approve the selection of the assessor? Can the parties appoint their own assessor who is not qualified under this Rule? Judge Sundt replied that usually the parties do it by a consent order, because the assessor is going to be brought in as a witness. They will ask for an order to be put into place. It is subject to the trial date and scheduling. The Chair inquired whether a privately employed assessor would

come in if he or she is summoned. Judge Sundt replied that a party can contract with a private assessor.

Judge Eyler pointed out that section (d), pertaining to qualifications, applies to all assessors, including private ones. Judge Sundt noted that it applies, because the Rule provides in subsection (e)(2)(A) that the parties have to submit a consent order, and the court has to find that the custody evaluator is qualified. But the parties can pick their local block leader. The Chair responded that Judge Eyler had said that this is not allowed.

Judge Sundt commented that the parties may bring in their own custody evaluator. Judge Eyler noted that subsection (e)(2)(B) applies whether the evaluator is a private person or not. Ms. Bernhardt observed that section (a), Applicability, only applies to the appointment of a custody evaluator by a court. Judge Eyler said that the language in section (a) had been changed to the following: "This Rule applies to the approval and appointment...".

Judge Sundt expressed the view that this is not likely to be a situation that actually arises. It is unlikely that the parties would jointly approve an outside evaluator. The Chair noted that this would not be approval jointly. If a party wants to employ his or her own assessor, who is not qualified according to section (d) of Rule 9-205.3, can the party do this? If the party does this, it is the party's expert. Can he or she testify? Judge Sundt responded that opposing counsel on cross-

examination will discredit the person. The Chair pointed out that the party may feel that the person's qualifications go beyond the qualifications listed in Rule 9-205.3.

Judge Sundt remarked that what is being discussed is either the parties agreeing or appointing one person. The Chair said that he was questioning the language in subsection (e)(2)(A) that read: "The parties, by agreement, may employ a custody evaluator." They can do this if the court finds that the person has the appropriate qualifications. The Chair's question was whether the parties can employ their own custody evaluator and never ask the court for approval. If the parties do this, does the evaluator have to be qualified? Judge Sundt responded that she did not think that the court would have any control over whom the parties select unless the parties ask for court approval. Judge Eyler said that she thought that the parties could select anyone, but whoever is selected would have to have the appropriate qualifications.

Judge Weatherly commented that previously, the practice had been that one parent would take the child to see an evaluator, who would then render an opinion as to the parent's fitness, but the evaluator never saw the other parent. Each parent would ask that the other parent be forced to go to the first parent's evaluator. A psychologist might come in as an adverse witness, but the person is not going to be used for a custody evaluation. The person might be used as to a certain problem of a parent such as alcoholism, or lack of alcoholism. It is not the same thing

as a custody evaluation.

The Chair noted that Rule 9-205.3 applies to a court-appointed assessor. Judge Sundt noted that the opening line of the Rule is "This Rule applies to the appointment by a court" of an assessor. Judge Eyler commented that at the very least, the language should be: "...appointment or approval..". Subsection (e)(2)(A) requires that the person has to meet the qualifications listed in Rule 9-205.3. Should the Rule provide that it applies to all custody evaluations in cases under this title? Judge Mosley expressed the opinion that this may be burdensome. There will always be someone whose qualifications could be questioned. That is a question of credibility and the weighing of the evidence on the part of the court. Judge Eyler added that the court would go through the analysis under Rule 5-706.

The Chair noted that in the Rules where the court appoints, the parties can object. There are many restrictions, because the court is doing the appointing. The parties can do what they want. Parties can choose their own mediator. The Chair said that he thought that Rule 9-205.3 was tracking this. The Rule applies when the court is appointing. Parties can hire their own experts who make an evaluation. The Chair asked if this is the direction that the drafters of the Rule were going in. Judge Eyler replied affirmatively. The Chair said that if the language of section (a) is changed to: "This Rule applies to the appointment or approval by a court," it still requires the court's approbation. Judge Eyler agreed that the beginning

language of section (a) could be changed to that. By consensus, the Committee approved this change.

Mr. Marcus asked if a comment could be added that states that Rule 9-205.3 is not limited to custody evaluators appointed by the court. Judge Sundt remarked that the American Psychological Association (APA) has its own entire set of standards for custody evaluators. The standards are much harder to meet than what the courts usually impose. If a psychologist comes in to do a court evaluation and is qualified by the APA, their credentials more than encompass the standards used by the court. If the parties choose the local minister as the evaluator, that would be at the parties' risk. Judge Eyler noted that Rule 5-706 (d) provides that the Rule does not limit the parties in calling expert witnesses of their own selection.

The Chair said that section (c) of Rule 9-205, Mediation of Child Custody and Visitation Disputes, read: "To be eligible for designation as a mediator by the court, the individual shall....". This was the section pertaining to qualifications, so these apply only to court-designated mediators. Judge Sundt remarked that there is no problem with the parties selecting their own evaluators, but if they seek the court's approval, the evaluators have to meet the qualifications in Rule 9-205.3 (d).

The Reporter asked for a review of the changes made to Rule 9-205.3. The first change was to admit the assessor's report without the assessor present, but the parties have a right to require 10 days ahead of time that the assessor be present, and

the report is admissible subject to any other objection that might arise as a result of the report, other than the fact that the evaluator is not present in court. The reports are 98% hearsay. How can all of these suggestions be reconciled?

Judge Sundt noted that the next change would give the party the opportunity to cross-examine. The report will come in, and the judge will read it, but if someone wants to cross-examine, there are other steps. The Reporter said that this would apply if the evaluator was present, but the change that was made was that the report can come in, and the assessor does not have to be present unless 10 days ahead of time a party so requested it. If that does not happen, a party can to rely on the third change, which was that the report is admissible, but it is subject to other objections. Judge Kaplan suggested that the objections should only be non-hearsay.

Judge Eyler said that as a practical matter, no one would object. The Reporter noted that it is appropriate if the evaluator is in court. Judge Martin observed that by definition, it is the nature of the evaluation that hearsay is there. The Reporter asked if she should limit the objections to non-hearsay ones. Mr. Carbine expressed the opinion that the Rules of Evidence should not be rewritten. An expert's report can rely on hearsay.

Mr. Zarbin commented that the way they circumvent this problem in District Court is a notification pursuant to Code, Courts Article, §10-104. This is how a medical report is

admitted despite any kind of hearsay. The Chair noted that a statute allows this. The Reporter questioned whether the third change, which is that the report is admissible subject to other objections, should be eliminated. Judge Pierson observed that this would eliminate every evidentiary objection in any of the 10 subtitles of the Evidence Rules to what is in the report. The evidence may be privileged. Judge Price added that the assessor may have lost his or her licensure. The language referring to "subject to any objection" needs to stay in.

Mr. Carbine suggested that the new language be "subject to any objection." Judges rule on objections. If there were no rule at all, and an expert witness is on the stand, and the attorney objects because the expert is relying on hearsay, the objection should be overruled. Judge Weatherly commented that someone can object to the report, and it does not come in. The Chair noted that the trial judge should state the grounds on which his or her decision was based. Judge Eyler said that she thought that the concept was that the only basis on which an objection cannot be made is that the assessor is not there.

Mr. Dunn commented that the Committee did not seem to be agreeing on the changes to Rule 9-205.3. He moved that the Rule go back to the Subcommittee. The motion was seconded. Judge Weatherly said that the Subcommittee did not mind looking at the Rule again. It had been helpful to hear the views of the non-family attorneys. The Chair asked for a vote on the motion to send Rule 9-205.3 back to the Subcommittee to redraft it based on

the discussion. The motion passed on a majority vote.

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