COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 of the Judiciary Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland on January 7, 2011.

Members present:

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

F. Vernon Boozer, Esq.
Albert D. Brault, Esq.
John B. Howard, Esq.
Harry S. Johnson, Esq.
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Hon. Thomas J. Love
Zakia Mahasa, Esq.
Timothy F. Maloney, Esq.
Robert R. Michael, Esq.
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Hon. W. Michel Pierson
Debbie L. Potter, Esq.
Kathy P. Smith, Clerk
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
Hon. Julia B. Weatherly
Hon. Robert A. Zarnoch

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Peter Helt, Esq.
Shea McSpaden, Esq.
Michelle Martin, Esq., Baltimore City State's Attorney Office
Susan A. Bauer, Esq.
Jeffrey B. Fisher, Esq., The Fisher Law Group
D. Robert Enten, Esq.
Sharon R. Holback, Esq., Office of the State's Attorney
Michael E. Leedy, Esq., Office of the State's Attorney
Brian L. Zavin, Esq., Office of the Public Defender
Richard Montgomery, Esq., Maryland State Bar Association
John Hurst
P. Tyson Bennett, Esq., Chair, Rules of Practice Committee, MSBA
Connie Kratovil-Lavelle, Esq., Administrative Office of the Courts
Hon. Deborah S. Eyler
Hon. Ann Sundt

The Chair convened the meeting. He said that he had a few

announcements. With regret from the point of view of the Rules Committee, the Honorable Ellen Hollander is no longer on the Committee. She had been sworn in as a United States District Court Judge. The Chair said that he was happy to announce that the Honorable Robert A. Zarnoch, Judge of the Court of Special Appeals, is back on the Committee as the replacement for Judge Hollander. He welcomed Judge Zarnoch. He also told the Committee that the Reporter had maintained that the Committee had a pin number, a State employee authorization for a part-time Assistant Reporter, and she was correct. It was only for a 10% part-time position. After the Chair spoke with the Honorable Robert M. Bell, Chief Judge of the Court of Appeals, and received permission to fund the position, the Chair and the Reporter met with representatives of the Administrative Office of the Courts Human Resources Department, and they have upgraded the position to full-time. The advertisement for this position is on the Judiciary website. Advertisements have also been placed in The Washington Post, The Baltimore Sun, and The Daily Record. The job requires three years of experience or the equivalent. Anyone on the Committee who knows of someone who might qualify should let the Reporter know. It is classified as temporary employment with no State benefits.

The Chair told the Committee that the meeting today is being filmed for the Administrative Office of the Courts new employee orientation.

Agenda Item 1. Consideration of proposed amendments to Rule 11 (Required Course on Professionalism) of the Rules Governing Admission to the Bar of Maryland

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The Chair presented Rule 11, Required Course on Professionalism, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

RULES GOVERNING ADMISSION TO THE BAR

OF MARYLAND

AMEND Rule 11 of the Rules Governing Admission to the Bar of Maryland to add provisions concerning the development and approval of the course, to provide under certain circumstances for decertification of an attorney who fails to take the course, to require specification of certain structure and elements in a course proposal, to modify provisions concerning the person or entity that conducts the course, to delete the provision concerning duration of the course requirement, to allow periodic evaluation of the course, and to make stylistic changes, as follows:

Rule 11. REQUIRED COURSE ON PROFESSIONALISM

(a) Duty to Complete Course

Before admission to the Bar, ~~a person~~ each individual recommended for admission pursuant to Rule 10 shall complete a course on legal professionalism approved by the Court of Appeals. For good cause shown, the Court ~~of Appeals~~ may admit ~~a person~~ an individual who has not completed the course, ~~provided that the person represents to the Court that he or she will complete~~ conditioned on the individual completing the next regularly scheduled course. Failure to complete the post-admission course,

successfully and timely, will result in the immediate decertification of the individual's privilege to practice law in Maryland. The decertification will continue until the course is completed successfully.

~~(b) Course and Faculty; Costs~~

~~The course and faculty shall be proposed by the Maryland State Bar Association and approved by the Court of Appeals. The Association shall give the course at least twice annually during the period between the announcement of examination results and the scheduled admission ceremony. The Association may charge a reasonable fee to defray the expenses of giving the course.~~

(b) Development and Approval of Course

The Chief Judge of the Court of Appeals may designate a unit within the Judicial Branch or any other qualified person or entity willing to undertake the responsibility to develop for consideration and approval by the Court the structure and elements of the course, including (1) the course content, (2) recommended faculty and support staff, (3) the times and places at which the course will be given, (4) estimated expenses for conducting the course, (5) a proposed fee adequate to meet those expenses, and (6) any other desirable and appropriate element. The proposal shall require that the course be given at least twice each year, during the period between announcement of the Bar examination results and the scheduled Bar admission ceremonies immediately following that announcement, in the number of locations determined from time to time by the Court. In its discretion, the Court may develop the structure and elements of the course on its own.

(c) Course Presentation

The approved plan shall be implemented as directed by the Court of Appeals.

~~(c)~~ (d) ~~Duration of Requirement;~~ Periodic Evaluation

~~The requirement set forth in section (a) shall remain in force for a period of ten years beginning January 1, 2001 and ending December 31, 2010. During that period the Court of Appeals shall evaluate the results of the course requirement to determine whether to extend the requirement.~~ The ~~Chief Judge of the~~ Court of Appeals, from time to time, may appoint a committee consisting of one or more judges, lawyers, legal educators, bar association representatives, and other interested and knowledgeable ~~persons~~ individuals to ~~assist the Court in the evaluation~~ evaluate the course and make appropriate recommendations to the Court.

Source: This Rule is new.

Bar Admission Rule 11 was accompanied by the following Reporter's Note.

Proposed amendments to Rule 11 eliminate the "sunset" provision in the current Rule and make substantive changes in the operation of the Rule.

Amendments to section (a) require that the course on professionalism be approved by the Court of Appeals. In addition, a decertification provision is added to fill a gap in the current Rule. The new provision allows the Court to decertify an attorney who fails to successfully complete the next regularly scheduled post-admission course after the attorney was conditionally admitted to the Bar without having taken the course.

Section (b) allows the Court of Appeals to designate a qualified person or entity – which could be a unit within the Judiciary – to develop for the Court's approval a course proposal that contains the listed structure and elements. In its discretion, the Court itself may develop the course structure and elements.

Section (c) provides for presentation of the course.

Section (d) provides a mechanism for evaluation of the course.

The Chair explained that Bar Admission Rule 11 addresses the professionalism course that new attorneys are required to take. This proposal was requested by the Court of Appeals. For years, the Maryland State Bar Association (MSBA) has been running this course. The Court has decided that they would like more direct control over the structure, the content, and the actual presentation of the course. The proposal to do this is in Bar Admission Rule 11 before the Committee.

The Chair said that aside from style changes, section (a) closes a gap that the Court has been wrestling with for a number of years. The Court will occasionally admit a person at Bar Admission ceremonies in June and December, who has not taken the course for some reason other than that they just did not show up to take it. On occasion, the Court has admitted the person with the condition that he or she takes the course the next time that it is given. The question is what happens if the person does not do so. The Court wanted to build a sanction into the Rule that if the person fails to take the course at the next opportunity, he or she will be decertified. This is the same sanction currently in the Rules for failure to pay interest on funds in Attorney Trust Accounts (Rule 16-608, Interest on Funds in Attorney Trust Accounts) and failure to file a report of pro bono

activities (Rule 16-903, Reporting Pro Bono Legal Service.)

The Chair noted that the changes the Court requested are in section (b). They address the issues of more control over what the course is to contain, who the faculty is to be, and all of the other aspects of it. Section (c) provides that the plan shall be implemented as directed by the Court. The Chair asked if anyone had any comments about the proposed changes to Bar Admission Rule 11. The Rule needs to be sent to the Court very soon, so that they can start the process that will have to be in place for the June admissions based on the February bar examination. By consensus, the Committee approved Bar Admission Rule 11 as presented.

Agenda Item 2. Consideration of proposed new Rule 4-332 (Writ of Actual Innocence)

Mr. Karceski presented Rule 4-332, Writ of Actual Innocence, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

ADD new Rule 4-332, as follows:

Rule 4-332. WRIT OF ACTUAL INNOCENCE

(a) Scope

This Rule applies to petitions for writ of actual innocence filed pursuant to Code,

Criminal Procedure Article, §8-301.

(b) Content of Petition

The petition shall be in writing, signed and verified by the petitioner, and shall state, with particularity:

(1) the court in which the indictment or criminal information was filed and the file number of that case;

(2) if the case was removed to another court for trial, the identity of that court;

(3) each offense of which the petitioner was convicted and the sentence imposed for that offense;

(4) the date of the judgment of conviction entered in the case;

(5) if the judgment was appealed, the case number in the appellate court, the issues raised in the appeal, the result of the appeal, and the date of the appellate court mandate;

(6) for each motion or petition for post-judgment relief, the court in which the motion or petition was filed, the case number assigned to each proceeding, the issues raised in the motion or petition, the result of the proceeding, and the date of disposition;

(7) that the request for relief is based on newly discovered evidence which, with due diligence, could not have been discovered in time to move for a new trial pursuant to Rule 4-331 (a);

(8) a detailed description of that evidence, how and when it was discovered, and why it could not have been discovered earlier;

(9) if the issue of whether the newly discovered evidence, with due diligence, could have been discovered in time to move for a new trial pursuant to Rule 4-331 (a) was raised in or decided in any earlier

appeal or post-judgment proceeding, the identity of that appeal or proceeding and the decision on that issue;

(10) that the evidence creates a substantial or significant possibility that, if it had been admitted at trial, the result may have been different, as that standard has been judicially determined and the factual and legal basis for that statement;

(11) that the petitioner is actually innocent and did not commit the crime;

(12) if the petitioner is not already represented by counsel, whether the petitioner desires to have counsel appointed by the court and, if so, facts establishing a right to appointed counsel;

(13) that a copy of the petition and all attachments to it was mailed to the State's Attorney of the county in which the petition was filed; and

(14) whether a hearing is requested.

(c) Amendments

Amendments to the petition shall be freely allowed in order to do substantial justice. If an amendment is made, the court shall allow the State a reasonable opportunity to respond to the amendment.

(d) Timing

A petition under this Rule may be filed at any time.

(e) Where Filed

The petition shall be filed with the clerk of the Circuit Court in which the conviction was obtained.

(f) Notices

(1) To State's Attorney

The petitioner shall send a copy of

the petition and all attachments to it to the State's Attorney of the county in which the petition was filed.

(2) To Victim or Victim's Representative

Upon receipt of the petition, the State's Attorney shall notify any victim or victim's representative of the filing of the petition, as provided by Code, Criminal Procedure Article, §11-104 or §11-503.

(3) To Public Defender

If the petitioner has requested an attorney and alleged an inability to employ one, the court shall send a copy of the petition to the Public Defender's Inmate Services Division.

(g) Response by State's Attorney

Within 90 days after receipt of the petition and attachments, the State's Attorney shall file a response, serve a copy on the petitioner, and send a copy to the Public Defender's Inmate Services Division.

(h) Denial of Petition; Appointment of Counsel

(1) Denial of Petition

Upon consideration of the court's response, the court may (A) deny the petition if it finds as a matter of law that the petition fails to comply with the requirements of section (b) of this Rule or otherwise fails to assert grounds on which relief may be granted or (B) grant leave to amend the petition to correct the deficiency. If the deficiency is one of venue, the court shall transfer the petition to the court with proper venue.

(2) Appointment of Counsel

If the court finds that a petitioner who has requested the appointment of counsel is indigent, the court may appoint counsel within 30 days after the State has filed its

answer unless (A) the court denies the petition as a matter of law or (B) counsel has already filed an appearance to represent the petitioner.

(i) Hearing

(1) When Required

Except as provided in subsection (h)(1) of this Rule, the court shall hold a hearing on the petition if the petition complies with the requirements of sections (b) and (e) of this Rule and a hearing was requested.

(2) Right of Victim or Victim's Representative to Attend

A victim or victim's representative has the right to attend a hearing on the petition as provided under Code, Criminal Procedure Article, §11-102.

(j) Burden of Proof

The petitioner has the burden of proof to establish a right to relief.

(k) Ruling

(1) Actions of Court

If the court finds that the petitioner is entitled to relief, it may set aside the verdict, grant a new trial, re-sentence the petitioner, or correct the sentence.

(2) Reasons for Ruling

The court shall state the reasons for its ruling on the record.

Source: This Rule is new.

Rule 4-332 was accompanied by the following Reporter's Note.

In 2009, the General Assembly enacted a

> new procedure that allows a convicted person to file a petition for a writ of actual innocence, alleging that there is newly discovered evidence that creates a substantial or significant possibility that the result in the case may have been different. The Criminal Subcommittee felt that it would be difficult to put the statutory procedure into a Rule because it was too confusing.
>
> The 2010 General Assembly amended the law in Chapter 234, Laws of 2010 (HB 128). The Criminal Subcommittee has drafted a new Rule that sets out the procedure for filing a writ of actual innocence. The Rule is basically derived from the statute but is expanded somewhat to be consistent with similar rules.

Mr. Karceski explained that the legislation for the writ was initiated in 2009, and as the Reporter's note to Rule 4-332 indicates, the General Assembly enacted this procedure providing that the writ can be filed at any time alleging that the person was actually innocent of the crime or crimes charged and that there was evidence that could not have been discovered pursuant to Rule 4-331, Motions for New Trial; Revisory Power. If that evidence had been known, it would have created a substantial or significant possibility that the result may have been different. When that legislation was signed into law, the Criminal Subcommittee examined it. The Subcommittee believed that it was written in such a way that it would have been virtually impossible for the Subcommittee to propose a rule to conform to it. They asked Delegate Vallario, who is a member of that Subcommittee, if the law could be rewritten. It was redrafted in

2010, and it was passed as emergency legislation. The Subcommittee agreed that the redrafted version could have been better. However, the current version is in the meeting materials. At this point, since no rule has been in place, the Subcommittee is proposing new Rule 4-332 that is in the meeting materials for today.

Mr. Karceski commented that Code, Criminal Procedure Article, §8-301, where this petition for a writ of actual innocence is now found, is very straightforward. It provides that if someone is convicted of a crime that was charged by indictment or criminal information, he or she has the right to file this writ of actual innocence at any time as long as the evidence that the person is proposing is newly discovered, creates a substantial and significant possibility of a different result, and could not have been discovered in time to move for a new trial under Rule 4-331, the rule addressing newly discovered evidence.

Mr. Karceski observed that the statutory requirements are very simple. The petition must be in writing, state the detailed grounds, describe the newly discovered evidence, request a hearing, and distinguish the evidence that is being proposed for the writ from prior petitions that have been filed. There is a requirement of notice to the State, and there is a requirement that the State answer within 90 days. Victims are notified and have a right to be present if there is a hearing. A hearing can be granted under certain conditions, or the court has the right

to dismiss the hearing, and the ruling of the court can include: setting aside the verdict, resentencing the defendant, granting a new trial, or correcting the sentence.

Mr. Karceski said that in trying to draft this Rule, the Subcommittee needed to add some procedures to the ones in the statute, because items that petitions in other rules require were not addressed. Proposed Rule 4-332 is the template of the statute with some additional procedural requirements that the Subcommittee felt were necessary. Section (a) addresses the scope of the petition. The statute provides that this petition is for offenses that are charged at the circuit court by information or indictment and for which the petitioner was convicted.

It is clear that the legislature is trying to limit this procedure to circuit court matters and not to include District Court matters. However, there are ways that cases that originate in the District Court can end up in the circuit court and are not necessarily charged by way of information or indictment. The scope provision does not address this directly, only stating that it applies to petitions filed pursuant to Code, Criminal Procedure Article, §8-301, which provides that an indictment or information plus a conviction are the requirements necessary to go forward with this Rule. The intent was that there could be thousands of cases that are tried in the District Court for which a person could potentially have applied for this writ, but the statute rules them out by stating that it must be a circuit court

matter.

The Vice Chair said that she had a question about the applicability of this to District Court. The language of the statute is: "...charged by indictment or criminal information with a crime triable in circuit court...". Assuming that there is some overlap in the ability to bring a case either in the District Court or the circuit court, theoretically this could mean that the case could be tried in the District Court, but if it were a case that were triable in the circuit court, this would apply. The Chair commented that Delegate Vallario had been apprised of this issue, and he has agreed to sponsor a bill that would clarify in the statute that this only applies to a case that is tried in the circuit court on an offense that is in the exclusive original trial jurisdiction of the circuit court. Mr. Karceski remarked that, unfortunately, the statute is unclear and not as specific as the Subcommittee would have liked.

Mr. Michael inquired if the origin of the statute was the DNA cases where years later DNA evidence had been found that excluded someone who might have been convicted. Mr. Karceski answered that he did not think that this was the purpose of the law. The Chair noted that there is a separate statute pertaining to DNA evidence. Mr. Michael asked if the Rules were already permissive in a situation where newly discovered evidence can be used to obtain a new trial. The Chair responded that unless it is a death penalty case, the current Rule requires that the motion for a new trial be filed within one year. The writ of

actual innocence can be filed at any time. Mr. Karceski added that it can be filed regardless of the crime charged as long as it is a circuit court conviction. The Subcommittee had discussed this frequently. He was not sure how many of these writs would be filed. He did not think many of them would succeed.

Mr. Maloney pointed out that the statute is modeled after a statute in Virginia. The experience there is that 135 writs were filed, and one was granted. Mr. Karceski observed that it is the last attempt on the part of a defendant. If someone fits into this situation, it would likely have been addressed long before this point. Mr. Michael remarked that this would be rare. Mr. Karceski noted that as the Rule progresses, the court has discretion to dismiss these petitions under certain circumstances.

The Chair said that these petitions are being filed, and a number of them are sitting in the Court of Special Appeals. One of the issues in which the Honorable Peter Krauser, Chief Judge of the Court of Special Appeals, is interested is whether there is a direct appeal from a denial of one of these petitions or whether the appeal should be done by application for leave to appeal. Judge Krauser may talk to the legislature about this. Judge Norton remarked that he could envision a circumstance where years later some officer stated that he had been falsifying search warrant affidavits for years. If 50 people are sitting in prison based on these warrants, they will all want to file a petition for a writ of innocence. Mr. Maloney cited the case of

a DNA chemist in Baltimore who falsified records.

Mr. Sykes inquired if there were a better name for this than a writ of actual innocence. His view was that a writ is something that is issued by the court. The statute provides that the court can order a new trial. The criterion is whether the evidence may produce a different result. The language "a petition for a writ of actual innocence" is better. Nowhere in the Rule is a statement of what a writ of actual innocence contains. There is no reason for the writ of actual innocence, because the Court has power to act on the petition where the party claims that he or she is actually innocent. The title is confusing and contrary to usual terminology.

The Chair said that the problem is that the legislature has chosen this language. Mr. Sykes suggested that the word "petition" be added to the caption of the Rule. Mr. Karceski remarked that this is consistent with the legislative intent. Mr. Sykes suggested that the language "petition for" be added to the caption of the Rule. By consensus, the Committee approved this suggestion. Mr. Karceski noted that the same language appears in the first sentence of section (a) of proposed Rule 4-332.

Mr. Karceski drew the Committee's attention to section (b), Content of Petition. Most of this is not found in the legislation. To make sense of the petition and how it is filed, the Subcommittee decided that the petition shall not only be filed in writing, but it must be signed and verified by the

petitioner. It must also contain the date on which the information or the indictment was filed and the number of the case. If the case had been removed to another court, it must contain the identity of that court to which it was removed, each offense for which the petitioner was convicted, the sentence imposed for that offense, and the date of the judgment of conviction entered. Finally, subsection (b)(5) requires that if the case were appealed, the specifics of the appeal have to be given, including the case number, the issues raised, the result, and the date of the appellate court mandate. All of these are significant, because they will help guide the State's Attorney in determining what this matter is about, where the case was tried, the results, etc. Under subsection (b)(6), if any post-judgment relief motions were filed in this case, including a post conviction petition, the number of that case, what the issues were, what the results of the proceedings were, and the date of that disposition of the post-judgment relief motions must be put into the petition.

Mr. Karceski said that subsection (b)(7) requires a statement that the request for relief is based on newly discovered evidence which, with due diligence, could not have been discovered pursuant to Rule 4-331. This is a prerequisite for filing the petition for a writ of actual innocence. Subsection (b)(8) requires a detailed description of that evidence to include how and when discovered and why it could not have been discovered earlier. Subsection (b)(9) requires that if

the issue of whether the newly discovered evidence with due diligence could have been discovered in time to move for a new trial pursuant to Rule 4-331 was raised, the petition must state whether this was raised in or decided in an earlier appeal or post-judgment proceeding, the identity of that appeal or proceeding, and the decision on that issue.

Mr. Karceski pointed out that subsection (b)(10) provides that the petition must state that the evidence creates a substantial or significant possibility that the result may have been different as the standard has been judicially determined. This comes directly from the statute, and the Subcommittee added the language "the factual and legal basis for that statement." This was not a requirement of the legislation, but the Subcommittee felt that it would serve a very legitimate purpose. Mr. Klein suggested that a comma be added after the word "determined" in subsection (b)(10). By consensus, the Committee agreed.

Mr. Karceski pointed out that subsection (b)(11) requires that the petitioner state that he or she is actually innocent and did not commit the crime. The law allows the filing of this petition. He expressed the view that many of these would be filed by persons who are serving time and who are not in a position to hire an attorney. The legislation is totally silent as to the appointment of an attorney or whether the Public Defender is to be involved. It is not funded and is completely silent as to legal representation. The Subcommittee chose to add

the language of subsection (b)(12), so that if the petitioner is not already represented by counsel, the petitioner must state whether the petitioner desires to have counsel appointed by the court, and if so, facts establishing a right to appointed counsel. If someone would like an attorney and cannot afford one, the person must explain the reasons why he or she thinks that one should be appointed.

The Vice Chair commented that it may not be specific enough to say to the petitioner that he or she has to give the facts establishing the right to appoint counsel. The facts may have to be established later for the court to find that the petitioner does not have the ability to appoint an attorney because he or she is indigent. Mr. Karceski responded that the court will not appoint counsel in this situation. This is an issue that is subject to debate. The Office of the Public Defender (OPD), which was represented during the discussions, will say that there is no requirement that they take on these cases, nor is there any reason why the court can order them to take the cases. This is their position.

The Vice Chair said that she understood that the appointment of counsel is discretionary under subsection (h)(2), but assuming that the court is going to appoint counsel, the grounds for the appointment in subsection (h)(2) are that the court has found the petitioner is indigent. Her point was why should the petitioner be told to give facts establishing the right to appointed counsel. Does the petitioner know that the facts that will

support getting counsel are that the person has no money? Should subsection (b)(12) be more specific in terms of what kinds of facts the petitioner needs to allege in order to establish a right to appointed counsel?

The Chair asked if the Vice Chair were suggesting that subsection (b)(12) state that the petitioner set forth the facts establishing indigence. The Vice Chair responded that this was her question. This provision could be confusing if the petitioner does not know what the grounds are for getting appointed counsel. Mr. Karceski remarked that the person's right to have counsel appointed is really limited to whether the petitioner is indigent. He added that he had no problem if the language of subsection (b)(12) was "facts establishing indigency." By consensus, the Committee approved this change.

Judge Pierson said that he had a comment about subsection (b)(9). He expressed the view that the language is ungainly. He suggested that subsection (b)(9) could be folded into subsection (b)(6), which addresses prior proceedings. He acknowledged that subsections (b)(7), (8), and (9) were a progression in referring to whether the evidence could be discovered in time to move for a new trial under Rule 4-331, but subsection (b)(9) could be subsumed into subsection (b)(6). The language could be: "...the result of the proceeding, the date of disposition, and whether the issue of whether the newly discovered evidence was raised or considered in any earlier appeal or post-judgment proceeding." If this change is not made,

he suggested that the language of subsection (b)(9) could be changed to read: "an identification of any proceeding in which the issue of whether the newly discovered evidence...". The subsection would end with the word "decided." Starting that provision with the word "if" is going to be confusing, particularly to self-represented litigants.

The Chair inquired if this provision should also ask what the decision was. Judge Pierson agreed and suggested that the language "and the decision on that issue" be added at the end. The Vice Chair pointed out that this was not changing the substance of subsection (b)(9). Judge Pierson explained that he did not intend to change the substance of this provision, he was attempting to make it easier to read.

Mr. Karceski remarked that what makes this language "ungainly" as stated by Judge Pierson are the words "with due diligence." The Rule could read "...whether the newly discovered evidence could have been discovered in time to move for a new trial pursuant to Rule 4-331 (a)...". Judge Pierson commented that the Rule should require that the petitioner identify any proceeding in which there is anything related to this newly discovered evidence and then allow the State or the court to follow up on whether something was in the prior proceeding that will have a bearing on the issue of a possible decision. The language should be even broader and more vague.

Mr. Karceski addressed Judge Pierson's proposal to combine subsections (b)(6) and (b)(9), and Mr. Karceski expressed the

view that those subsections should stand alone. He was not sure that if subsection (b)(6) stood alone, it would provide the same feedback. It is important to be certain that this issue, according to the petitioner, has never been the subject of any prior litigation, so that the evidence is truly newly discovered and had never been brought to the trial table before. Judge Pierson said that he did not disagree with Mr. Karceski, but it would be important to know whether a court specifically decided the Rule 4-331 (a) issue that is whether it could have been discovered. It also is important to know if that newly discovered evidence was never raised or mentioned in the prior proceeding. Mr. Karceski pointed out that subsection (b)(9) contains the language "was raised in or decided." Judge Pierson noted that the language is that the issue of whether the evidence could have been discovered was raised or decided.

The Chair commented that the issue seems to be that if there was another proceeding in which this evidence is even mentioned, that would be evidence that the petitioner knew about it before. The Vice Chair suggested that the language that reads, "could have been discovered in time to move for a new trial pursuant to Rule 4-331 (a)" should be deleted. Subsection (b)(9) would then read, as follows: "An identification of any proceeding in which the issue of newly discovered evidence was raised...". Mr. Karceski expressed the view that the reference to "due diligence" should be taken out, also. The Vice Chair agreed.

The Chair pointed out that there are two separate issues.

One is the point made by Judge Pierson that the Rule should ask if this evidence has been referred to in any earlier proceedings, which would lead to an inference that the petitioner did know about it previously. The other is if the issue of whether the petitioner could have discovered this in time to file a 10-day motion for a new trial was actually raised and decided, it is necessary for the court to know this. If the answer to this is "yes," the court could deny this petition without any hearing or any counsel, because the issue has already been decided. The Vice Chair agreed and asked if this could be addressed by the Style Subcommittee. The Chair replied affirmatively, noting that the essence of both of these issues has been clarified.

Judge Weatherly pointed out that both subsections (b)(6) and (b)(9) are asking the petitioner to identify prior proceedings that relate to this issue. She suggested that the two provisions should follow each other. She could not see a reason to separate these two subsections. The Vice Chair remarked that she was having a hard time understanding the relationship between subsections (b)(6) and (b)(9). Subsection (b)(6) refers to proceedings for post-judgment relief, and subsection (b)(9) does also. Subsection (b)(6) is worded in terms of a motion or petition, and subsection (b)(9) refers to appeals. It appears that they overlap somewhat.

The Chair commented that the two provisions could be combined. What is needed is first an identification of every post conviction proceeding that the petitioner has filed. This

allows the court to look at the records to assess the situation. Subsection (b)(9) gets more into the question of this particular issue. The Vice Chair said that the two provisions should go together or be combined. Mr. Karceski pointed out that if the two are combined, the problem is that subsections (b)(7) and (b)(8) do not have the meaning that is intended. Subsection (b)(6) asks for every post judgment relief ever requested by the petitioner. Then the Rule refers to the newly discovered evidence and details what it is. Finally, in subsection (b)(9), the request is for the petitioner to state if the issue of newly discovered was raised before and where it was raised. This follows logically. Maybe subsection (b)(6) should be made part of subsection (b)(9), rather than make subsection (b)(9) part of subsection (b)(6). The Vice Chair suggested that another alternative is to clarify in subsection (b)(6) that the petitioner has to state that his or her newly discovered evidence was brought forth in any of those proceedings. Then subsection (b)(9) would only relate to the issue of whether the evidence could have been discovered with due diligence.

Master Mahasa inquired if this refers only to evidence that was brought up and with due diligence could have been discovered earlier. The Chair responded that the statute clarifies that this has to be evidence that could not have been discovered in time to file a 10-day new trial motion. Master Mahasa remarked that the discussion sounded as if it pertained to evidence that was brought up in some proceeding or trial and not evidence that

was not necessarily brought up in trial but with due diligence could have been discovered.

Mr. Karceski commented that the answer is that if this evidence were considered in light of the legislation, it would be evidence that was discovered recently, and it may have been discovered 10 years after the petitioner had been convicted of the crime. When the petition for a writ of innocence is filed, the petitioner states that the evidence is newly discovered, but the court wants to know everything that the petitioner has ever filed to be certain that this is not relitigating an issue that the petitioner had already tried to litigate. The evidence is supposed to have come forth very recently.

Master Mahasa referred to the phrase that reads "whether the newly discovered evidence with due diligence could have been discovered." The Chair replied that this phrase is necessary, because it is in the statute. Master Mahasa remarked that she thought that it had been suggested that this phrase be taken out of the Rule. The Vice Chair pointed out that it is also in subsection (b)(6). The Chair noted that much of this discussion relates to styling the Rule.

Mr. Michael commented that subsection (b)(10) has language that was added later: "if it had been admitted at trial." This makes sense, because if the evidence is not going to make any difference, it would not be pertinent. Is this a purposeful addition to make this point? Mr. Karceski responded that just reading the petition may not be enough for the court to make the

decision whether or not the evidence is admissible, because it is too limited an amount of information. However, some information is obvious on its face that it would not be admissible under any circumstances. Mr. Michael said that the purpose of the language to which he had referred was that the issue should be one where the court is satisfied that the evidence is going to be admitted. Otherwise, it is a waste of judicial resources. Mr. Karceski responded that this was the purpose of that language.

Mr. Karceski drew the Committee's attention to subsection (b)(13), which provides that a copy of the petition and all attachments to it were mailed to the State's Attorney of the county in which the petition was filed. Subsection (b)(14) asks whether a hearing is requested. Nothing in the statute addresses amendments. This issue was debated by the Committee, which decided that since the petitions are mostly being filed *pro se*, the person who files a legitimate petition may not be able to do the appropriate lawyering and could fall short. In order not to deny a person who has a legitimate purpose in going forward, allowing someone to freely amend the petition is the fair way as long as the State is given the opportunity to respond to that amendment. This was not part of the statute, but the Committee felt that it was necessary. The Chair pointed out that this follows what was done in Rule 4-704, Petition, one of the Post Conviction DNA Testing Rules. The Vice Chair asked if the language is similar between the two Rules, and Mr. Karceski replied that it is not that similar, because Rule 4-704 allows

the State a time to respond.

The Vice Chair remarked that section (c) appears to say that each time an amendment is filed, the court is going to have to get involved. Why not put a time frame in the Rule, which is what is usually done? The Chair commented that the theory of the DNA rules which carried over to Rule 4-332, is that it is not likely that a *pro se* person who files this petition will want to amend the petition a week later. The idea was that a copy of this will be sent to the Inmate Services Division of the Office of the Public Defender, and a copy of the State's answer will be sent there as well. If the Public Defender gets into the case, or if the court appoints a lawyer, this would be when the petition would be amended to correct any deficiencies that the State will point out in its answer. The Vice Chair noted that no matter when the amendment occurs, after it takes place, there should be some period of time for the State to file an amended answer. Is it not better to have a specific time frame for this rather than the court having to fix one in every case?

Master Mahasa noted that the Subcommittee had spent much time on this Rule. There must have been a reason why no time frame was included. Mr. Karceski recollected that at every meeting this issue was discussed, either Mr. Patterson, the State's Attorney for Talbot County and a member of the Committee, or Mr. Shellenberger, the State's Attorney for Baltimore County and a consultant to the Criminal Subcommittee, had been present to present their positions. Mr. Karceski said that he did not

remember the issue of timing being discussed at the Subcommittee meetings. The State was in agreement with allowing amendments of the petition as long as they had the right to respond to whatever the amendment was. Changing this to a certain number of days may not make a difference one way or the other. If everyone agrees that it should be 30 days, that would be appropriate, but it should not be less than 30 days.

The Vice Chair commented that she had no problem with the Rule providing for the State to have a reasonable opportunity to respond, but she did not like requiring the court to fix a time in each case. Mr. Karceski inquired if this language causes the court to fix a time. The Vice Chair suggested that the language could be: "The State may file an amended response within a reasonable time." The Chair noted that if the response is filed 90 days later, the petitioner may say that this is not reasonable and move to strike the response, so the court is involved again. The Vice Chair asked if after an amended petition is filed, the State's Attorney would file a motion asking for a period of time to be set within which he or she can respond. Judge Pierson expressed the view that the language should remain as it is. This is similar to post conviction proceedings. The court in Baltimore City gets amendments with all sorts of varieties of timing that are in cases where the amendment is from the State's Attorney and from the petitioner himself or herself. They get them on the day of the hearing. It is not helpful to specify a time.

Mr. Johnson questioned the order of sections (c) and (d). The Vice Chair added that section (c) also comes before the response time by the State's Attorney. She agreed that it should be moved down in the Rule. Mr. Johnson remarked that the petition should be filed before the Rule refers to amending it. The Chair suggested that section (d) could be placed before section (c). Mr. Johnson said that this is what his point was. Mr. Brault asked if the hearing is required. Mr. Karceski answered that it is part of the requirements of the legislation. The Chair added that the hearing is addressed in subsection (i)(1).

The Vice Chair remarked that other than being excluded as a matter of law, the petitioner gets a hearing if one was requested. Mr. Karceski inquired if Mr. Brault's question were whether there has to be a hearing in every case. Mr. Brault responded affirmatively. Mr. Karceski said that the answer to that question is that there does not have to be a hearing in every case. The statute has a requirement that a petitioner can request a hearing if he or she wants a hearing. Mr. Brault noted that as long as the petition meets the requirements of the Rule, a hearing must be held. The Chair pointed out that this is addressed in the statute in subsection (e)(1). Mr. Karceski explained that the petition not only has to meet the requirements of the Rule, it must assert sufficient grounds on which the relief may be granted. The court reviews the petition and may find that even though the petitioner has fulfilled the necessary

requirements, as a matter of law, the petition is insufficient factually, and the court has the discretion to dismiss the petition without a hearing.

Mr. Brault noted that the preamble to the statute states: "...repealing a provision of law authorizing the court to dismiss a certain petition without a hearing if the court finds that the petition fails to state a claim...", but the statutory language in subsection (e)(2) is "[t]he court may dismiss a petition without a hearing if the court finds that the petition fails to assert grounds on which relief may be granted." He wanted to make sure that he understood this. Mr. Karceski said that the timing is "at any time" as provided in the statute. Section (e) provides that the petition is filed with the clerk of the circuit court where the conviction was obtained. Section (f), Notices, states that the petitioner shall send a copy of the petition and the attachments to the State's Attorney of the county in which the petition was filed.

Ms. Smith inquired if section (e) means that the petition is filed in the same criminal case as the conviction or if it means that the petition is to be treated like habeas corpus cases, which are civil. Mr. Karceski replied that this is not addressed in the statute. When the petition is filed in the county where the conviction was obtained, it can be set up either way. He remarked that Ms. Ogletree had informed him that it should be set up the same way for every clerk of every court in the State. Ms. Smith's question was whether a new file should be set up as

in a post conviction matter, or if it is made part of the criminal case. Does the post conviction relief statute address setting up a new file? He did not think that it is addressed there, and what happens with these petitions for a writ of actual innocence is the same as what would happen in a post conviction proceeding. It is not necessarily part of the original criminal case, but it is a stand-alone separate file in each case. The Subcommittee did not address this issue. There had been discussion about post conviction procedures and tracking some of the language in the post conviction DNA testing Rules. They had discussed the civil vs. criminal aspect of the two filings, the indictment and the post conviction petition. They did not address the filing in terms of what method or mode of filing should be used, because it was part of the statute. It did not enter into the Subcommittee discussions to any great extent.

Mr. Klein asked whether Rule 4-332 should provide that the petition must be filed in a separate action? The Chair said that this is part of the lingering ambiguity of the statute. What it really pertains to is something that Mr. Sykes had questioned previously -- what is this writ of actual innocence? It is a motion for a new trial based on newly discovered evidence. In effect, the only difference between this and what is in Rule 4-331 is that there is no statute of limitations on it. The petition can be filed at any time. The problem is that the statute refers to other kinds of relief, such as striking the sentence. If someone is actually innocent, the conviction, and

not just the sentence has to be stricken, also. The statute is still very confusing, and the Committee cannot do very much about that.

Mr. Maloney commented that if someone is convicted of two crimes and is found to be innocent of one, but not the other, the person is entitled to a resentencing. The Chair noted that the conviction gets stricken, also, for that offense. Mr. Maloney agreed but remarked that the person would only be entitled to a resentencing. The Chair responded that the person would be entitled to more than that. The conviction would have to be stricken. Mr. Maloney hypothesized that someone pleads guilty to embezzlement but states that he or she is not guilty of the assault that was part of the crimes committed, and the assault is dismissed on a writ of actual innocence. If the person had been sentenced on both crimes, all the person is entitled to is a resentencing on count 1, the embezzlement, and not on the second crime. The Chair noted that if there had been a separate sentence on the embezzlement, that will stand. There is no relief on that. The conviction of the assault can be totally eliminated.

The Vice Chair noted that it seems a little unusual that the petition would state that newly discovered evidence exists, and the petitioner maintains that he or she is innocent, but in section (k), despite the fact that the petitioner proved his or her innocence, the petitioner may be resentenced, or the sentence would be corrected. The Chair pointed out that this is what the

statute provides. Ms. Ogletree inquired if this would be a good reason to keep all of the information about the case in the same folder.

Judge Norton remarked that he could imagine a situation where someone is convicted of assault which is merged with a rape conviction. Then the rape conviction is dismissed, and the person has to be resentenced on the assault charge. The Chair acknowledged that this is possible, but on the crime on which the person is found innocent, everything is stricken. If the sentences imposed were consecutive, then a resentencing would be necessary. If the sentences were concurrent, a resentencing would not be necessary.

Mr. Karceski said that if someone petitions for this writ, and the person succeeds, and the person was convicted of only one count, then the case is totally dismissed. But, as Mr. Maloney had pointed out, if there are two or three counts, it could be that the person could prove his or her innocence on one or two counts, but not all. This would allow for the writ to prevail on one or two counts, but not all counts. The counts that it did not prevail on remain intact. There may or may not be a reason for resentencing. If the sentences were consecutive, the judge may want to clear the record and lower the amount of years to be served, such as 20 years from the day the person was originally sentenced. This would in effect correct the sentence, but the person would be found actually innocent of some of the crimes.

Mr. Brault asked where the clerk files a petition for a writ

of coram nobis. Judge Pierson answered that it is filed in the criminal file (Rule 15-1202, Petition). Ms. Smith remarked that those petitions also can cause a problem. If a case originated in one county but was tried in another county, when the clerk gets the petition for a writ of coram nobis, there is no file. This problem will continue to exist until the case management system is changed, so that everything is accessible to everyone.

The Chair told the Committee that Mr. Shellenberger had raised the issue previously about whether this petition should be filed in the court in which the indictment or information was filed. However, the statute makes clear that the petition has to be filed in the court where the conviction was obtained. If the case had been removed for trial, it would be in the second court. He was not sure what happens if a case is removed for trial from Baltimore City to St. Mary's County and is tried in St. Mary's County. Where there is a conviction and the case is over, does the file get sent back to Baltimore City? Apparently, this is not the procedure in every case. Ms. Smith noted that if the case is removed, then the clerk would open up a new file. It is transferred for the trial and then sent back.

The Vice Chair asked if it would make a difference if the procedures were different in the various jurisdictions. The Chair responded that it could make a difference as to which State's Attorney gets it. If the case is removed for trial, it is important to ensure that the petition gets to the State's Attorney in the original county. The Vice Chair said that this

proceeding is being held in the place where the conviction was obtained regardless of any transfer. Ms. Smith commented that this jurisdiction may not have a file, so they would have to obtain the file from the other jurisdiction. This causes a delay.

The Chair pointed out that this is what the statute provides. Ms. Smith suggested that the petition could be filed in a separate action. Mr. Brault remarked that he had been thinking about how this would work in a civil case. The judgment is obtained where it is entered on the docket, and if the file is sent to another county for trial, the judgment is nevertheless entered on the docket of the original jurisdiction. The problem being discussed today does not happen in a civil case. Are the conviction and sentence being considered today a judgment that is entered on the docket of the original jurisdiction? Ms. Smith answered affirmatively. The Chair commented that the indictment could be filed in Baltimore City, and the case is removed to St. Mary's County for trial. Ms. Smith noted that Baltimore City enters everything on the docket unless the case had been removed to St. Mary's County.

The Chair pointed out that the question that started this discussion was where a petition should be filed. Should a new file be created for this, or should it go in the criminal case? Mr. Brault remarked that if it is in the original case, it has to be filed where the case file is. The Chair disagreed, noting that the clerk may have to send it somewhere. The statute

provides that it is filed in the county where the conviction was obtained. The Vice Chair inquired what the harm is in allowing the transferring court to open up a new file if the county where the conviction was obtained sent the entire file back to the transferring court and therefore does not have the file any more. Ms. Smith responded that this is what she was asking about. The Vice Chair remarked that she did not see the harm in filing it in the same case if the case file happens to be right there. Ms. Smith pointed out that one would be a criminal case, and one would be a civil case.

Mr. Karceski commented that the only time that he could see this ever occurring is in a case that involves the death penalty. There may be no more of those cases in the future, but some are still pending for which writs of actual innocence may be filed. The number of cases that could potentially fit into this category may not be more than five. The numbers will become less and less to the point where there are none. The Chair said that if the case has not been removed, it is not a problem, except as to whether the clerk is going to create a new file. If the case has been removed, that issue remains, and the question is what to do with the petition. The Vice Chair questioned whether this is a civil case. If it is, she asked if the law mandates collecting a civil filing fee. Judge Pierson said that the Rule should be clear that it is not a civil case. The Vice Chair remarked that by virtue of the fact that the Rule is in the Criminal Rules in Title 4, it should be considered criminal.

The Chair commented that this procedure is in essence a motion for a new trial even though the sentence can be affected. Mr. Brault pointed out that the relief in the statute is not to set aside the conviction. He read from subsection (f)(1) of the statute: "In ruling on a petition filed under this section, the court may set aside the verdict...". He noted that the word used is "verdict" and not "conviction." The Chair responded that if the court sets aside the verdict, it is setting aside the conviction, because the verdict is part of the conviction. A judgment of conviction is both, because one cannot appeal from a verdict. A sentence is needed to establish the judgment. Mr. Michael remarked that if the verdict has three different findings, and the defendant acknowledges he committed one crime, but not the others, then the language makes sense. It is not setting aside the conviction, because that would eliminate all three of the counts. The Chair said that there is a conviction on each count. Mr. Karceski expressed the view that the word "verdict" makes sense in this situation.

The Vice Chair said that she was not sure that Ms. Smith's question had been answered. Ms. Ogletree reiterated that the question was whether a new file should be created for the petition for a writ of actual innocence. Mr. Karceski asked if language should be added stating that the petition is filed in the original case folder, if the language should provide that a separate folder should be created, or if the Rule should say nothing about this as it does now. The Vice Chair suggested that

the Rule could state that the filing of the petition shall be a criminal action that could either be filed separately or in the original case folder. Ms. Smith noted that if the case had been removed, it could only be filed in the original action if it stayed in the transferee county. The Vice Chair said that her suggestion would not be that specific, but it would allow the clerk to file it either way. The Rule should also be clear that this is a criminal case. The reason she made this suggestion was a situation such as the conviction occurring fifty years ago. Would it be necessary or advisable to have to go to the Hall of Records to find the file? The Chair added that this would have to be the procedure.

The Reporter noted that the last sentence of Rule 15-202, which is one of the Coram Nobis Rules, states: "If practicable, the petition shall be filed in the criminal action." She suggested that this sentence be added to Rule 4-332. By consensus, the Committee agreed to this suggestion.

Mr. Karceski drew the Committee's attention to section (f) of Rule 4-332. Subsection (f)(1) requires the petitioner to send a copy of the petition to the State's Attorney of the county in which the petition was filed. Subsection (f)(2) requires the State's Attorney to notify any victim or victim's representative that the petition was filed. Subsection (f)(3) states that if the petitioner requested an attorney and alleged indigency, the court shall send a copy of the petition to the Public Defender's Inmate Services Division.

Mr. Karceski said that section (g) provides that the State has a 90-day window after receipt of the petition and the attachments to file a response, serve a copy on the petitioner, and send a copy to the Public Defender's Inmate Services Division. As recently as this morning, the subject of the role of the Public Defender had been raised. At the Subcommittee, the idea of the Public Defender being able to state whether or not that agency will assume responsibility for representing the indigent petitioner was discussed. At the outset of the discussions pertaining to the drafting of this Rule, the position of the Public Defender was and continues to be that it has no responsibility in these matters. However, Paul DeWolfe, Esq., Public Defender, had sent a letter to the Subcommittee stating that the agency would review the petitions that are sent to the Inmate Services Division, and upon review if they believe that there is reason for the agency to represent a petitioner, the agency would do so, but only based on its initiative and not because the agency was mandated to do so.

Mr. Karceski noted that the idea had been raised to have a time period after the State's answer was filed for the Public Defender's Office to state whether or not it was going to represent the petitioner. This was not put into the current draft of the Rule. Mr. Zavin, who is an Assistant Public Defender, had previously spoken to Mr. Karceski about this issue. He asked Mr. Zavin to speak about section (g). Mr. Zavin had referred to the language that provides that the State has a 90-

day period to file a response and send a copy to the OPD. Mr. Karceski asked what the Public Defender would do then. Mr. Zavin answered that they would then notify the court as to whether they intended to get involved in the case. Mr. Karceski asked if the proposed language offered by the Public Defender would be a part of section (g). Mr. Zavin responded that this would be the logical place to put their suggested language. The Chair remarked that the language could be placed in a different subsection immediately following that.

Mr. Zavin said that their concern stems from the Post Conviction DNA Testing Rules. Subsection (b)(12) of Rule 4-332 states that the petitioner can allege a right to counsel. This is not the same as the DNA Rules, which provide in Rule 4-707, Denial of Petition; Appointment of Counsel, that the petitioner may request counsel. If Rule 4-332 provides that the petitioner has the right to counsel, the automatic response of the court would be that the petitioner would be represented by the OPD.

The Vice Chair pointed out that the Committee removed the language referring to the right to counsel from the Rule and substituted the concept of indigency. The wording is "detailed facts establishing indigency." Mr. Zavin said that this was very helpful, but he noted that their concern was the interpretation of the language. It would help the court if it was known that when his office gets a petition, they will tell the court whether or not they will be entering an appearance on behalf of the petitioner. The Chair inquired if the OPD would like a provision

in the Rule giving the OPD a certain number of days to respond to the court whether it intends to represent the petitioner. Mr. Zavin remarked that it would make sense to place this in the Rule after section (g), which is after they receive the response from the State's Attorney.

Mr. Karceski asked Mr. Zavin if he had some proposed language for the Rule. Mr. Zavin responded that the Subcommittee's language had been within 30 days. The language his office proposed did not contain a time restriction. They are comfortable with a time restriction whether it is 30 days or some other time. Subsection (h)(2) provides that the court may appoint counsel within 30 days after the State has filed its answer. The Chair noted that this would need to be changed.

The Vice Chair asked if the OPD would be notifying the court as to whether they intend to participate in a case by filing an entry of appearance, assuming that the OPD gets a petition because the petitioner has alleged indigency, and the court has sent a copy to the OPD. Mr. Karceski pointed out that the problem the OPD has with this language is that it may mean that the court will always appoint a member of the OPD as counsel. The way Mr. Zavin has suggested that the Rule should read, the OPD would say that within a period of 30 days after the filing by the State of its answer the OPD opts out and does not choose to represent the petitioner. Then, the court appoints private counsel to take the case.

The Chair suggested that in subsection (h)(2), the number 30

should be changed to 60. The Vice Chair noted that language would be added to state that the OPD would notify the court as to whether it intends to get involved in the case. By consensus, the Committee agreed to these changes.

The Vice Chair said that she had a question about section (g). In subsection (f)(3), only the court sends a copy of the petition to the OPD Inmate Services Division if the petitioner alleged indigency. However, in section (g), the State's Attorney sends a copy to the same place in any case. Mr. Karceski responded that the OPD has a copy of the original petition, and because they do not have enough information yet, they have not decided what they would like to do. The information that the State supplies the OPD may be information that causes them to decide whether they will get into the case. The Chair noted that the way to resolve this is to add to section (g) after the word "and" and before the word "send" the following language: "if indigency is alleged." By consensus, the Committee agreed to this change.

Mr. Karceski drew the Committee's attention to section (h). He said that the word "court" as it modifies the word "response" should be "State," so that it reads "...consideration of the State's response...". The Vice Chair commented that the language makes it sound as if the court just reads the State's response and then goes ahead and acts. The Chair suggested that the language could be "[u]pon consideration and the State's response...". Mr. Karceski noted that the court may (1) deny the

petition if it finds as a matter of law that the petition fails to comply with the requirements of section (b) or otherwise fails to assert grounds on which relief may be granted or (2) grant leave to amend the petition to correct the deficiency if the deficiency is one of venue. If that is the deficiency, the court shall transfer the petition to the court with proper venue. Subsection (h)(2) provides that if the court finds that the petitioner has requested the appointment of counsel and is indigent, the court may appoint counsel. The word "may" is there purposefully. The Reporter pointed out that the number "30" has been changed to "60." The Chair said that the word "answer" has been changed to the word "response."

Mr. Karceski said that the court may appoint counsel within 60 days after the State has filed its response, unless the court denies the petition as a matter of law, or counsel has already filed an appearance to represent the petitioner. The Subcommittee had discussed whether language addressing appointment of counsel should even be included, but they concluded that it was important. The Rule basically tracks the language of Rule 4-707 where the petitioner does not have an absolute right to be represented by a member of the OPD. It is a matter of choice by the OPD. If the OPD opts out, the court has the discretion of appointing counsel. In Rule 4-707, the court shall appoint counsel, but the word "may" is used in subsection (h)(2). This petition is less complicated, so the court should have the discretion to decide whether it was necessary to appoint

counsel.

Judge Pierson commented that he had just realized that a 60-day deadline had been set for the court to make its determination as to whether the petition fails as a matter of law to state grounds for relief. Is there a particular reason why a time limit is being imposed on the court's appointing counsel? The Chair replied that whether the time limit is 60 days or some other number, if the judge concludes that the petition at least prima facie states a case, then the judge would not dismiss it as a matter of law. There is at least a prima facie case that the petitioner may be innocent. It is not a good idea for the case to sit dormant waiting for a judge to decide to appoint counsel. Judge Pierson said that even though the Rule does not expressly state it, the court has to decide the prima facie issue within 60 days. This is the effect of this provision. If the court does not appoint counsel within 60 days, the Rule's language is "unless the court denies the petition as a matter of law..". This means that the judge has to make the decision whether to deny the case as a matter of law within 60 days. The Vice Chair noted that the judge could appoint counsel even though he or she has not yet made the decision, and then the judge could make the decision later.

The Chair asked Judge Pierson if he had a suggestion for changing the language. Judge Pierson responded that his suggestion would be to eliminate the time limit for the appointment of counsel. Mr. Klein pointed out that there is also

an implication that on the 61st day, the court would be powerless to appoint counsel. The Chair commented that this was not meant to prevent the court from appointing counsel. It is a direction to do so. There is no statutory right to counsel in this law, and there is probably not a Sixth Amendment right, either. The Vice Chair expressed the opinion that the time frame should be taken out. It does not add anything. The court needs to appoint counsel in time to prepare the case prior to the hearing. The Chair inquired if anyone had an objection to taking out the time frame. By consensus, the Committee approved deletion of the time frame in subsection (h)(2).

The Vice Chair questioned why it is necessary to wait until after the State has filed its response to appoint counsel. Mr. Karceski answered that the Subcommittee included this, so that there are fewer appointments and not more. Also, the court would be in the best position to determine whether to appoint counsel after the court reviews the petition and the response. The Vice Chair remarked that section (a) implies that the State has already filed its response, because counsel need not be appointed if the court denies the petition as a matter of law, which cannot happen until the State has filed its response. If the Rule provides that the court may appoint counsel unless the court denies the petition as a matter of law, this cannot happen unless the State has filed its response.

Judge Weatherly expressed the opinion that this is not correct. The petitions that do not comply with the stated

requirements or otherwise fail to assert grounds on which relief may be granted would be eliminated, and the petitions that may be meritorious would be deferred to see if the Public Defender would enter an appearance. The Vice Chair explained that her point was that under subsection (h)(1), the court cannot deny the petition as a matter of law until it has considered the petition and the State's Attorney's response. She expressed the view that subsection (h)(2) has unnecessary language. It should provide that the court may appoint counsel unless someone else has already entered his or her appearance, or the court denies the petition as a matter of law.

Ms. Holback expressed her concern and that of her colleagues that there is a substantial possibility that the court may find that the verdict may have been different, and it is not equivalent to actual innocence. The Chair pointed out that this is in the statute. Ms. Holback said that her problem is that when this is the standard at the outset, then after the court makes a finding of actual innocence, it may set aside the verdict, grant a new trial, resentence the petitioner, or correct the sentence. A judge reading this literally may think that there is an exoneration and set aside a verdict with no further action. She and her colleagues would like the word "and" added before the language "grant a new trial" in subsection (k)(1). The Rule should clarify to judges that if they grant the relief under the statute of setting aside a verdict, they are granting a new trial.

The Vice Chair asked if it were possible for the judge to find the newly discovered evidence to be so compelling and true that there is no need for a new trial. Ms. Holback responded that this is not what the burden is in the statute nor in any post conviction statute. The Chair asked about the situation where the new evidence would establish that the court had no jurisdiction, because the crime was not committed in Maryland. What does it mean -- a verdict of not guilty? It would have to be dispositive, if the evidence would have likely produced a different result. Ms. Holback responded that it is a substantial possibility that it may have produced a different result. The Chair pointed out that the language the U.S. Supreme Court has used is "substantial probability." The Court of Appeals has said that this means "substantial possibility." The legislature picked this language up.

Ms. Holback remarked that even in DNA cases, where the court grants a new trial and it seems apparent to the judge that the defendant may be actually innocent, the State is still entitled to a new trial, and then the prosecutor typically decides whether it is an exoneration, or whether the defendant needs to be tried again. This could take all of the discretion away from the prosecutor. The Chair inquired if Ms. Holback could see any circumstance where the evidence is of a nature that the court had no choice but to strike the verdict. There is no new trial.

Judge Norton noted that there was a case in Baltimore County where the victim was found to be alive. Ms. Holback responded

that this is a rare possibility. Is there an appellate right?. There cannot be an appeal on a finding of a post conviction standard. The Chair commented that it is not clear that this can be appealed. An appeal cannot be provided for by rule. Ms. Holback reiterated that the word "and" should be added to subsection (k)(1). The Chair pointed out that this would require a new trial in a circumstance where one is not allowed. If there is no jurisdiction, there would not be a new trial.

Mr. Karceski inquired if anyone were willing to move that the word "and" be added to subsection (k)(1), and no motion was forthcoming. The Chair suggested that Ms. Holback present this issue to the legislature.

Mr. Karceski said that section (i), the right of the victim to be present, had not yet been discussed. The Chair noted that the victim's rights are statutory. Mr. Karceski drew the Committee's attention to section (j). The Rule only provides that the petitioner has the burden of proof. The logical question would be "What is the burden?" However, the statute does not answer this. The Chair added that this is substantive. Mr. Karceski expressed the view that it may be a preponderance of the evidence. The Subcommittee decided to leave it the way it reads in the statute and let the matter take its course. Subsection (k)(1) had already been discussed, and subsection (k)(2) provides that the court shall state the reasons for its ruling on the record.

The Chair stated that Rule 4-332 would be styled, and the

changes that were decided on today would be added. By consensus, the Committee approved Rule 4-332 as amended.

Agenda Item 3. Reconsideration of proposed new: Rule 2-603.1 (Claims for Attorneys' Fees and Related Expenses) and Rule 3-603.1 (Claims for Attorneys' Fees and Related Expenses)

The Chair presented Rule 2-603.1, Claims for Attorneys' Fees and Related Expenses and Rule 3-603.1, Claims for Attorneys' Fees and Related Expenses, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 600 - JUDGMENT

ADD new Rule 2-603.1, as follows:

Rule 2-603.1. CLAIMS FOR ATTORNEYS' FEES AND RELATED EXPENSES

(a) Definitions

In this Rule, except as otherwise provided or as necessary implication requires:

(1) "Attorneys' fees" include related expenses; and

(2) "Related expenses" means those expenses that are related to and incurred as part of the provision of legal services.

Committee note: The Rule defines "attorneys' fees" generally as including related expenses as a matter of convenience, to avoid having to repeat both terms throughout the Rule. The factors to be considered in determining a

proper attorneys' fee ordinarily are different from those to be considered in determining the reasonableness of related expenses.

(b) Scope

(1) Generally

This Rule applies only to actions in which, by law or contract, a party is or may be entitled to claim attorneys' fees from another party solely by prevailing in an underlying claim against the other party that is separate from a claim for attorneys' fees.

Committee note: The intent of section (b) is that the Rule does not apply to (1) an action in which attorneys' fees constitute an element of damages that must be proved prior to judgment as part of the party's underlying claim, (2) a dispute between an attorney and the attorney's client over an attorney's fee, or (3) an award of attorneys' fees under Rule 1-341 or (4) a provision for the award of counsel fees in an action under Code, Family Law Article. Any issue as to whether a claim for attorneys' fees is separate from the underlying claim should be presented to, and resolved by, the trial court prior to judgment.

(2) Title 14 Actions

The procedural requirements of this Rule shall not apply to a request for attorneys' fees in an action under Title 14 of the Maryland Rules in which a sale of property must be ratified by the court and the award of attorneys' fees must be approved by the court following review and a report by a court auditor. The person requesting the award of attorneys' fees must nevertheless present sufficient evidence to establish, under all of the circumstances (A) an entitlement to attorneys' fees, and (B) that the fee requested is reasonable.

Committee note: See *Monmouth Meadows v. Hamilton*, Md. (2010). In determining the reasonableness of the amount of a requested

fee, the court may give significant weight to whether the requested fee does not exceed a maximum fee established by a government agency or quasi-government agency for the service rendered.

(c) Motion

(1) Attorneys' Fees Incurred In Trial Court Proceedings

(A) Generally

A party seeking an award of attorneys' fees incurred while the action is pending in the trial court shall file a motion for such an award.

(B) Time for Filing

The motion shall be filed within 15 days after the later of entry of judgment in the action or entry of an order disposing of a motion filed under Rules 2-532, 2-533, or 2-534.

(2) Attorneys' Fees Incurred in Connection with Appellate Proceedings

A party seeking an award of attorneys' fees incurred in connection with an appeal, application for leave to appeal, or petition for certiorari shall file a motion for such an award. The motion shall be filed in the circuit court within 15 days after entry of the mandate or order disposing of the appeal, application, or petition. Proceedings on the motion shall be in the circuit court.

Committee note: The intent is that proceedings be in the circuit court, even if the appeal was from the District Court.

[(3) Effect of Failure to Timely File

Unless, for good cause shown, the court excuses a failure to comply with the time requirements of this section, the court shall deny a motion that is not timely

filed.] [Delete this subsection as unnecessary?]

(d) Memorandum

(1) Requirement

A motion filed pursuant to section (c) of this Rule shall be supported by a memorandum.

(2) Time for Filing

(A) Generally

Unless otherwise provided by court order, the memorandum shall be filed within 30 days after the motion is filed or, if a motion for bifurcation is filed pursuant to section (e) of this Rule, within 30 days after that motion is decided.

[(B) Failure to File Timely

Unless, for good cause shown, the court excuses a failure to comply with the time requirement of subsection (d)(2) of this Rule, the court shall deny the motion if the memorandum is not timely filed.] [Delete this subsection as unnecessary?]

(3) Contents

(A) Generally

Subject to section (e) of this Rule, the memorandum shall set forth, with particularity, the nature of the case, the legal basis for the claimant's right to recover attorneys' fees from the other party, the applicable standard for determining a proper award, including whether a lodestar approach is required, and all relevant facts supporting the party's claim under that standard.

Committee note: See *Monmouth Meadows v. Hamilton*, ___ Md. ___ (2010) concerning factors relevant to the determination of reasonableness of attorneys' fees and the

appropriate use of the lodestar method for calculating fee awards.

(B) Details Required

Except as provided in section (e) of this Rule or by order of court, the memorandum shall set forth:

(i) the items required by subsection (d)(3)(A) of this Rule;

(ii) the claims permitting fee-shifting as to which the moving party prevailed;

(iii) all other claims made by the prevailing party or by any other party which the prevailing party contested;

(iv) a detailed description of the work performed, broken down by hours or fractions thereof expended on each task, and, to the extent practicable, allocated to (a) claims permitting fee-shifting as to which the moving party prevailed and (b) all other claims;

Committee note: A party may recover attorneys' fees and related expenses rendered in connection with all claims if they arise out of the same transaction and are so interrelated that their prosecution or defense entails proof or denial of essentially the same facts. *Reisterstown Plaza Assocs. v. General Nutrition Ctr.*, 89 Md. App. 232 (1991). *See also EnergyNorth Natural Gas, Inc. v. Century Indem. Co.*, 452 F.3d 44 (1st Cir. 2006); *Snook v. Popiel*, 168 Fed. Appx. 577, 580 (5th Cir. 2006); *Legacy Ptnrs., Inc. v. Travelers Indem. Co.*, 83 Fed. Appx. 183 (9th Cir. 2003).

(v) the amount or rate charged or agreed to in a retainer agreement between the party seeking the award and that party's attorney;

(vi) the attorney's customary fee for similar legal services;

(vii) the customary fee prevailing in the attorney's legal community for similar legal services;

(viii) the fee customarily charged for similar legal services in the county where the action is pending;

(ix) a description of any related expenses for which reimbursement is sought;

(x) facts relevant to any additional applicable factors that are required by law or provided by Rule 1.5 of the Maryland Lawyers' Rules of Professional Conduct; and

(xi) any additional relevant factors that the moving party wishes to bring to the court's attention.

Committee note: If known, the memorandum may set forth, and the court may consider, the nature of any fee agreement between the party against whom the claim is made and that party's attorney. Under Rule 3-603.1 (c), applicable in the District Court, a memorandum accompanying a motion for attorneys' fees that do not exceed the lesser of 15% of the underlying claim or 15% of the limit of the District Court's general civil monetary jurisdiction, need not contain all of the detail and information that this Rule ordinarily would require in a circuit court case but would suffice if it contains any other facts establishing that the fee requested is reasonable. That proceeds from a premise that, in light of statutory authorizations of a 15% fee in certain kinds of routine collection cases, a court may find a presumptive reasonableness in a requested fee that does not exceed the 15% limit. Although the Committee was reluctant to recommend such a blanket provision in circuit court cases, it did not intend to preclude a circuit court from accepting a memorandum with less detail than ordinarily would be required if there are other circumstances that would allow the court to find a fee not exceeding 15% of the underlying claim to be reasonable. The language in the beginning of this subsection (d)(3)(B) is intended to provide the court with some discretion in

that regard. If a party desires to be excused from providing all fo the detail ordinarily required by this Rule, the motion and memorandum will have to provide a solid basis for such relief and the granting of such relief should not be assumed.

(e) Bifurcation

On motion or on its own initiative, the court may bifurcate the issues of the entitlement to attorneys' fees and the amount of attorneys' fees to be awarded and may direct that the initial memorandum address only the issue of entitlement, subject to being supplemented upon resolution of that issue in favor of the moving party.

(f) Additional Requirements in Complex Cases

(1) In any case in which a claim for attorneys' fees has been made in an initial or amended pleading and, due to the complex nature of the case, that claim likely will be substantial and will cover a significant period of time, a party may move for an order that (A) any memorandum in support of a motion under section (d) of this Rule comply with the requirements of subsection (f)(3) of this Rule and (B) quarterly statements pursuant to subsection (f)(4) of this Rule be required.

(2) The motion shall be filed within 30 days after the party files an answer to the pleading in which the claim for attorneys' fees is made.

Committee note: The detail required by subsection (f)(3) and the quarterly reports required by subsection (f)(4) should be reserved for the more complex cases that will remain in litigation for an extended period. In those cases, it is important that counsel know in advance what will be required in order to conform their record-keeping. Where practicable, an order under this section should be part of a scheduling order entered under Rule 2-504.

(3) If so ordered by the court, a memorandum in support of a motion for attorneys' fees shall be accompanied by time records that are recorded by specific task and attorney, paralegal, or other professional performing the task. The records shall be submitted in the following format organized by litigation phase, referred to as the "litigation phase format":

(A) case development, background investigation, and case administration (includes initial investigations, file setup, preparation of budgets, and routine communications with client, co-counsel, opposing counsel, and the court);

(B) preparing pleadings;

(C) preparing, implementing, and responding to interrogatories, document production, and other written discovery;

(D) preparing for and attending depositions;

(E) preparing and responding to pretrial motions;

(F) attending court hearings;

(G) preparing for and participating in Alternative Dispute Resolution proceedings;

(H) preparing for trial;

(I) attending trial;

(J) preparing and responding to post-trial motions;

(K) preparing and responding to a motion for fees; and

(L) attending post-trial motion hearings.

Committee note: In general, preparation time and travel time should be reported under the category to which they relate. For example, time spent preparing for and traveling to and

from a court hearing should be recorded under the category "court hearings." Factual investigation should also be listed under the specific category to which it relates. For example, time spent with a witness to obtain an affidavit for a summary judgment motion or opposition should be included under the category "pretrial motions." Similarly, a telephone conversation or a meeting with a client held for the purpose of preparing interrogatory answers should be included under the category "interrogatories, document production, and other written discovery."

(4) If so ordered by the court, counsel for a party intending to seek attorneys' fees shall submit to the opposing party quarterly statements showing the amount of time spent on the case and the total value of that time. These statements need not be in the litigation phase format or otherwise reflect how time has been spent. The first statement is due at the end of the first quarter in which the action is filed. Failure to submit the quarterly statements may result in a denial or reduction of fees.

(5) In deciding a motion for attorneys' fees in an action in which the court has imposed additional requirements pursuant to section (f) of this Rule, the court may consider the Guidelines Regarding Compensable and Non-compensable Attorneys' Fees and Related Expenses contained in an Appendix to these Rules.

(g) Response to Motion For Attorneys' Fees

Unless extended by the court, any response to a motion for attorneys' fees shall be filed no later than 15 days after service of the motion and memorandum.

(h) Stay Pending Appeal

Upon the filing of an appeal of the judgment entered in the underlying cause of action, the court may stay the issuance of a judgment as to the award of attorneys' fees until the appeal is concluded.

Source: This Rule is new and is derived in part from the 2008 version of Fed. R. Civ. P. 54 and L.R. 109 of the U.S. District Court for the District of Maryland.

Rule 2-603.1 was accompanied by the following Reporter's Note.

A circuit court judge suggested that there should be a rule providing guidance for judges on setting attorneys' fees. To address this, the Rules Committee recommends new Rule 2-603.1, which borrows concepts and language primarily from Fed. R. Civ. P. 54 and Local Rule 109 of the United States District Court for the District of Maryland.

Section (a) provides the definition for "attorneys' fees" and "related expenses."

Section (b) delineates the types of claims to which the Rule does and does not apply.

Subsection (c)(1) is derived from Fed. R. Civ. P. 54 (d)(2)(B) and L. R. 109 2. a. For consistency with Maryland procedure, the time for filing the motion for attorneys' fees has been changed from 14 to 15 days after the later of entry of a judgment in the action or entry of an order disposing of certain post-judgment proceedings or within 15 days after a motion for bifurcation has been decided.

Subsection (c)(2) is new. The procedure for requesting attorneys' fees in connection with an appeal, application for leave to appeal, or petition for certiorari is consistent with appellate procedure in Maryland.

[Subsection (c)(3), the "waiver" language of L. R. 109 2. a. has been replaced by a provision allowing the court to deny a motion that was not timely filed unless the late filing is excused for good cause shown.] [Delete this subsection?]

Subsections (d)(1) and (d)(2) are derived from L. R. 109 2. b. The time for filing the memorandum has been changed from 35 to 30 days to be consistent with Maryland procedure. **[A provision for the court to excuse late filing of a memorandum for good cause shown has been added.] [Delete this provision?]**

Subsection (d)(3) is derived from L. R. 109 2. b. The Committee recommends expansion of the contents of the memorandum to include the applicable standard for determining a proper award and all relevant facts supporting the party's claim under that standard, a designation of the legal basis for the recovery of attorneys' fees, the other claims made by the prevailing party or by any other party which the prevailing party contested; the amount or rate agreed to in a retainer agreement between the party seeking the award and that party's attorney, and any facts relevant to any additional applicable facts that are required by law or provided by Rule 1.5 of the Maryland Lawyers' Rules of Professional Conduct. *Monmouth Meadows v. Hamilton* ___ Md. ___ (2010) is cited in a Committee note following this section.

Section (e) is derived from Fed. R. Civ. P. 54 (d)(2)(C), which permits bifurcation of the issues of entitlement to attorneys' fees and the amount of fees and expenses to be awarded.

Section (f) is in part new and in part derived from the Local Rules of the United States District Court for the District of Maryland, Appendix B, Rules and Guidelines for Determining Attorneys' Fees in Certain Cases. The Committee's view was that in complex cases, the court should have the discretion to order that the memorandum in support of a motion for attorneys' fees and related expenses is to be accompanied by time records organized in litigation phase format. This would be helpful in civil rights and discrimination cases as well as in cases with multiple claims.

Section (g) is derived from L. R. 109 2. a., except that the time period to file the response to the motion for attorneys' fees is changed from 14 to 15 days to be consistent with Maryland procedure.

Section (h) has been added to comply with Maryland procedure.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 600 - JUDGMENT

ADD new Rule 3-603.1, as follows:

Rule 3-603.1. CLAIMS FOR ATTORNEYS' FEES AND RELATED EXPENSES

(a) Requests for Attorneys' Fees - Generally

Sections (a), (b), (c), and (d) of Rule 2-603.1 apply to claims for attorneys' fees and related expenses in the District Court, except that:

(1) subsections (c)(1)(B) and (d)(2) of Rule 2-603.1 do not apply, and

(2) if a motion for attorneys' fees of $4,500.00 or less is filed and the requested fees do not exceed 15% of the amount of the underlying claim, the contents of the memorandum and the time for filing it are governed by subsection (c)(2) of this Rule.

(b) Motion

A request for attorneys' fees shall be made by motion. Unless, for good cause, the court grants an extension of the time for filing the motion: (1) if attorneys' fees are sought as part of a judgment on affidavit or a judgment by confession, the motion for attorneys' fees shall be filed contemporaneously with the motion for judgment on affidavit or judgment by confession, and (2) in all other cases, the motion shall be filed no later than the day of trial.

(c) Memorandum

(1) Generally

Except as otherwise provided in subsection (c)(2) of this Rule, the motion for attorneys' fees shall be supported by a memorandum that conforms to the requirements of Rule 2-603.1 (d)(3) and is filed no later than 15 days after entry of judgment on the underlying claim.

(2) If Attorneys' Fees of $4,500.00 or Less are Requested and the Requested Fees do not Exceed 15% of the Underlying Claim

If a party seeks attorneys' fees of $4,500.00 or less, and the request fees do not exceed 15% of the amount of the underlying claim, the motion for attorneys' fees shall be supported by a contemporaneously filed memorandum that sets forth with particularity (A) the legal basis for the party's right to recover attorneys' fees from the other party, (B) the amount of the recovery to which **[the] [any]** percentage should be applied, and (C) any other facts relevant to establishing that the fee request is reasonable, together with an affidavit that the fee sought from the adverse party does not exceed the fee that the lawyer's client has agreed to pay to the lawyer.

Committee note: Examples of statutes in which the legislature has authorized attorneys' fees of up to 15% are: Code, Commercial Law Article, §12-307.1 for defaults on consumer loans and Code, Commercial Law Article, §12-623 for defaults on retail installment sale

> contracts. Under Rule 3-603.1 (c)(2), a request for attorneys' fees that do not exceed 15% of the underlying claim is considered to be presumptively reasonable, provided that the dollar amount sought does not exceed $4,500.00 (15% of the jurisdictional amount applicable to contract and tort actions in the District Court set forth in Code, Courts Article, §4-401 (1)) and the fee sought does not exceed the fee that the lawyer's client has agreed to pay to the lawyer. A party seeking attorneys' fees in compliance with these requirements may file a less detailed memorandum than otherwise required.
>
> Source: This Rule is new.

Rule 3-603.1 was accompanied by the following Reporter's Note.

> Under proposed new Rule 3-603.1, a party seeking attorneys' fees and related expenses follows the procedures set forth in Rule 2-603.1, except that the time for filing the motion and memorandum are as set forth in Rule 3-603.1 (b) and (c)(1), respectively, and a less detailed memorandum is required if attorneys' fees of $4,500.00 or less are requested and the requested fees do not exceed 15% of the underlying claim.

The Chair said that this issue has been before the Committee several times. After the last meeting, Rule 2-603.1 was split into two, one for the circuit court, and one for the District Court. The intent was to create a more simplified procedure for the District Court at least where the fee requested does not exceed 15% of the underlying claim. One of the issues for the Committee to consider was whether it is satisfied with the fee structure of Rule 3-603.1. Paul Sandler, Esq. and the Chair's law clerk had done some research on this topic. They had

identified at least 110 existing Maryland statutes providing for attorney fee-shifting. Also in the meeting materials is a white paper from the Access to Justice Commission in which they are recommending a much broader approach to this issue with respect to cases that affect public rights in some way, including class action suits. (See Appendix 1).

With respect to Rule 2-603.1, the Reporter had some comments that were bolded in the Rule for the Committee to consider. The Committee has material from Jeffrey Fisher, Esq., pertaining to the request by the foreclosure bar to be exempted from attorneys' fees altogether as well as a proposal that was handed out today to address that issue without giving the foreclosure bar a total exemption, but an exemption from the procedural aspects of attorneys' fees. Also in the handout is the question of whether to allow some discretion in the circuit court where the amount claimed does not exceed 15% of the underlying claim. (See Appendix 2).

Mr. Brault told the Committee that he had a fundamental problem that is at the core of everything that has been questioned about this Rule. The issue of attorneys' fees began because a judge in Montgomery County asked for a rule on how to handle attorneys' fees. He and other judges felt that they did not have any background on which to assess the fees. The question was in the context of what is recognized as the civil rights fee-shifting, which the federal courts have considered at great length. When the Subcommittee first began looking at this

issue, Mr. Brault had pointed out the Fourth Circuit case of *Carolina Power and Light Co. v. Dynegy Marketing and Trade*, 415 F. 3rd 354 (2005) in which the court found that after a major trial involving millions of dollars, on appeal the judgment was not final, because the attorneys' fees that had been sought were part of the claim and not part of the costs of relief under the fee-shifting concept.

Mr. Brault said that the Subcommittee started to look at the problem of what a claim for attorneys' fees is as opposed to a shifting of the attorneys' fees in contravention of the American Rule. The Subcommittee thought that they had made some reasonable decisions about this, but then the Court of Appeals decided the case of *Monmouth Meadows v. Hamilton*, 416 Md. 325 (2010), and the Rule came back to the Subcommittee again. The question is how to address *Monmouth*. Mr. Fisher had sent in a copy of an opinion by the Honorable Evelyn Omega Cannon, of the Circuit Court for Baltimore City, addressing tax foreclosure cases in Baltimore City, and Judge Cannon made the same decision that the Court of Appeals did later in *Monmouth*. It looks like the Court of Appeals even picked up Judge Cannon's language. The same sentence appears in both opinions. Instead of the Court deciding if it is a claim for attorneys' fees, the issue is whether the claim for attorneys' fees must be resolved as part of the underlying judgment or is in the nature of costs, to be resolved later.

Mr. Brault said that in *Monmouth*, the Court decided that the concept of fee-shifting in the civil rights arena has, as its rationale, the protection of constitutionally-guaranteed rights. Therefore, the statute has the "lodestar" layering to protect the constitutional rights that are in litigation. Whereas in a lien case with rights allowable under the Real Estate Code for a homeowners' association, this is not a constitutional issue, but rather a contract matter. So, the "lodestar" method is not used in those cases. However, the proposed Rule uses "lodestar." The issue is how to write the Rule to deal with "lodestar" and not deal with a claim for attorneys' fees under contract.

Mr. Brault noted that the foreclosure bar, the debt collection bar, and the bankers all have gotten involved, because they are concerned about how the Rule affects their fee structure, and they are asking if the Rule can have some language added to protect them from the *Monmouth* rule. This is what the Committee has to keep in mind as the Rule is reviewed. The Rule reads beautifully, but it is not that helpful in sorting the issues out. Section (b), Scope, provides that the Rule only applies to actions in which, by law or contract, a party may be entitled to claim attorneys' fees from another party solely by prevailing in an underlying claim.

Mr. Brault said that he thought that this made sense at the time it was put into the Rule with the background of the civil rights concept and the "lodestar" context. This is not referring to the real estate property rights in the *Monmouth* context. Then

Mr. Fisher, Ronald Canter, Esq., the Chair, and others pointed out to Mr. Brault and to the Subcommittee that it is necessary to win to be awarded attorneys' fees. Judge Weatherly pointed out that this is not true in family cases. Mr. Brault noted that if family cases were not excepted, the "lodestar" concept would apply to them, also. If one does not get a judgment, he or she would not get the attorneys' fees. In a foreclosure or a debt collection case, when do they find attorneys' fees, when do they apply them, and when is it appealable? Even *Carolina Power* is not all that helpful in explaining what the court has held in terms of when the decision can be applied in the future. This is the problem that has to be addressed.

Mr. Brault commented that the current draft of Rule 2-603.1 before the Committee today exempts foreclosures. This is what the specialty bars wanted to make sure that their cases do not fall into the "lodestar" concept when they have provisions within their documents that set the fee. Under *Monmouth*, it appears clear that the fee can be set in the document, but nevertheless, they have to prove that it is reasonable in the context in which that fee is applied. Whether it is a set fee of a certain amount of dollars or it is a percentage or a fee allowable in terms of hours, how is it being applied, and does it meet the requirements of Rule 1.5, Fees, which is a Maryland Rule of Professional Conduct? This is a problem that is difficult to solve.

The Vice Chair asked what the problem is. Mr. Brault answered that it is how to write the Rule without putting in

pages of exemptions. The Chair said that when this issue arose, it was in the context of a protracted case. There had been several of these cases, some of them involving statutory fee-shifting. The first case to go to the Court of Appeals, *Friolo v. Frankel*, 373 Md. 501 (2003) and later *Friolo v. Frankel*, 403 Md. 443 (2008), were statutory, wage collection cases. Some cases were contractual. One was *Diamond Point Plaza v. Wells Fargo Bank*, 400 Md. 718 (2007) a convoluted case, which involved a mortgage and lease of a shopping center with fee-shifting back and forth, and multiple claims, counterclaims, and cross-claims, some of which permitted fee-shifting, some of which did not. When the Subcommittee first began discussing this issue, the consultants were people dealing with environmental or civil rights cases in the U.S. District Court. The Subcommittee adopted all of the mechanics of "lodestar," because that is what applied. Mr. Brault added that because of the *Friolo* cases, it appeared that "lodestar" applied. The Chair said that the context was the large cases, whether they were statutory or contractual.

The Chair noted that the subject was brought to the Rules Committee, and the Rule was worded in such a way that the District Court judges indicated was too complicated for their cases. The way that the Rule was structured, it would have applied to all cases. The District Court was in no position to deal with "lodestar" and all of the other procedures. The Rule

went back to the Subcommittee to address the District Court aspect of attorneys' fees. In that context, the 15% issue came up. Mr. Canter had noted that many of these cases are under collection statutes that limit the fees to 15%. Could this statutory limit be used to establish a reasonableness standard?

The Chair said that then *Monmouth* came out and held that it cannot simply be a 15% standard, the attorney still has to show that this amount was reasonable under all the circumstances. As it had in previous cases which address only fees between the attorney and the client, the Court of Appeals referenced Rule 1.5. They held that the standards in that Rule would apply to fee-shifting. This confused matters. The Subcommittee split the Rule into one for the circuit court and one for the District Court. The Court of Appeals will be asked to approve the Rule for the District Court, which has much less detail than the circuit court Rule, because 15% is presumptively reasonable.

The Chair said that the circuit court Rule still has problems. Mr. Fisher had requested that foreclosures be entirely exempted from the Rule. The Chair expressed the view that the Rule applies to foreclosures, and a party has to prevail to get any fees. If the property is not sold, the attorney would not be entitled to a fee. The court auditor would have to approve a fee as reasonable. The question is whether foreclosure cases can be exempted from all of the motion practice. No motion or memorandum is necessary in a foreclosure, and the Rule was rewritten to this effect. Beyond the foreclosure aspect of this,

someone may have a collection case, which could be an appeal from the District Court, or it may have started in the circuit court, but the requested fee is not in excess of 15%. The circuit court, in its discretion, could apply the District Court procedures and not require the motion, memorandum, etc. This is an issue before the Committee.

The Chair commented that Rule 2-603.1 addresses two very different concepts. One is the procedure discussed by Mr. Brault when he referred to *Carolina Power*. The Court of Appeals had also had cases on this as to whether the fees are part of the claim itself and must be shown to get a judgment, or whether the fees are on top of the judgment, a type of costs which has to be post-trial, because an attorney would not get them unless he or she wins. Another issue is what standard the court uses in deciding what is reasonable, which is a *Monmouth* issue.

Mr. Brault inquired if the judgment includes the attorneys' fees in a debt action or foreclosure action. Ms. Ogletree answered that in a foreclosure action, the judgment includes the fees, because they are part of the costs that the trustee is allowed to claim in the instrument. Mr. Fisher added that there are two judgments. One is a ratification of the sale which is a final, appealable order, and it does not include any other kind of relief other than the approval of the sale. This all gets referred to the auditor, and attorneys' fees are allowed during the audit phase. The Chair said that someone may get a deficiency judgment at that point. Mr. Fisher responded that

people do not automatically seek deficiency judgments. The audit will cover the expenses charged against the funds received that will include publication, costs, bond charges, service of process costs, and court costs, etc.

The Vice Chair asked how someone could obtain a confessed judgment in the circuit court under this Rule. Ms. Bauer told the Committee that she is an attorney who did debt collections. When attorneys fees are considered, the debt collection attorneys make the claim for the fees in the initial demand. These are decided by the court at the same time that the court decides whether the debt is owed. Both are decided at the same point in time. She referred to the handout that was distributed today, which has only the circuit court Rule and asked if both the circuit court and District Court Rules were being discussed today. The Chair responded affirmatively.

Ms. Bauer remarked that the only way that she and her colleagues request attorneys' fees is if there is a signed contract that provides for attorneys' fees, whether the language of the contract is that reasonable attorneys' fees are allowable, or the contract contains a percentage amount.

The Chair said that this works properly in the District Court. When Ms. Bauer had discussed collection cases, this refers to something that is not really defined anywhere, except in one's own practice. There can be provisions for attorneys' fees in landlord-tenant cases, commercial leases in which a breach of the lease calls for attorneys' fees, and in mortgages

and other kinds of lien instruments. If a tenant defaulted on a lease, and the landlord is suing for rent and attorneys' fees, which are provided for in the lease, is this a collection case? Ms. Bauer responded that this gets into two different areas. There are specific laws with regard to landlord-tenant relationships. The Chair noted that a party still has to win to collect the attorneys' fees. Ms. Bauer agreed, and she said that the majority of her clients are fairly well established, and their contracts specifically provide for a percentage for attorneys' fees. She would only make a claim for attorneys' fees if a signed contract exists with that percentage stated.

Judge Pierson pointed out that *Mortgage Investors of Washington v. Citizens Bank and Trust Co.*, 278 Md. 505 (1976) states that a note that provides for a percentage of the claim as attorneys' fees is enforceable. Since that time, there have been many cases that held that notwithstanding the contractual stipulation in a contract, it is still the court's duty to determine the reasonableness of the fees. None of those cases has expressly held that this Rule applies where there is a percentage in the contract, although that is where he had thought that the appellate courts were going. Footnote 15 of *Monmouth* states: "None of the homeowners agreements here called for a percentage of the debt as the appropriate fee award. Thus, we do not address that situation." It is arguable now that under Maryland law if a contract has a percentage clause, it is not necessary to go through the Rule 1.5 analysis, and if this is the

case, should this be carved out of the Rule as well?

The Chair responded that the problem with this is other language in *Monmouth* that expressly disavowed what the District Court had done in that case, which was to apply the 15% in awarding attorneys' fees. They cited Rule 1.5 for the considerations that the court needs to take into account to decide that even an agreed-upon fee is reasonable. Judge Pierson commented that this is what the Court said up front in the opinion, but if that is considered in the context of footnote 15, there is a question as to whether an exception should be carved out for cases with a percentage clause.

Mr. Maloney noted that the opinion never squarely addressed the interplay between Rule 1.5 and contracts with percentage clauses. He agreed that footnote 15 created some ambiguity, but the spirit of *Monmouth* suggests that the opinion is no longer viable to the extent that that opinion ever really addressed the question of percentage contracts. Judge Pierson said that he would have agreed with Mr. Maloney except for footnote 15. When the Court specifically included this statement that they are not considering awards for a percentage of the debt, it seems to indicate that they have not decided the legality of those.

The Chair asked what the result would have been if the contract or the note in *Monmouth* would have provided that the defendant pays a fee of 49% of the claim. Ms. Ogletree remarked that she had seen mortgages with a 35% fee. The Chair inquired if the Court of Appeals would allow this. Judge Pierson answered

that they would not. Mr. Maloney added that the Court never held that a 15% fee can be charged irrespective of Rule 1.5. Judge Pierson disagreed, expressing the view that it did hold this. The dissent in that case provided this. Mr. Maloney stated that the Court of Appeals would not agree with this today.

Judge Pierson said that he had been an enthusiastic proponent of this Rule for two reasons when the discussions about it began. Leaving aside the situation where the fees are part of the claim, there was much confusion among the bar as to when these motions had to be filed. Secondly, many motions were filed that had no content that was useful to the judges, so they did not know how to rule. Judge Pierson had regarded a rule on this subject as very useful for providing guidance to the bar and to the bench. It has now gotten to the point that because of the development of the common law fees in Maryland, the target keeps shifting. This was intended for situations with one specific template of litigation, but now there are issues as to whether it should apply to other templates. He suggested a consideration of whether there should be a rule at all. The Vice Chair seconded that as a motion.

The Chair said that this can be voted upon if it is a motion, and it is seconded. He commented that with respect to *Monmouth*, if something is proposed to the Court of Appeals, they will decide whether they approve it or not and how it should be done. If nothing is sent, the bar and bench will be stuck with what is being done now. This means that the circuit courts in

the complex cases will make inconsistent decisions. He was not sure how the District Court judges were interpreting *Monmouth* in terms of what they can and cannot do and what they need to get from attorneys to use a percentage or not. What would be left is the current confusion, which is worse now because of *Monmouth*.

Judge Pierson commented that he had two alternative ways to address this. There could be a stripped-down simple rule that provides when to file a motion. The other way is if there is going to be a rule, it should have a provision that states that the court can except cases or classes of cases from all of the procedural requirements. Mr. Brault said that the point he had been trying to make earlier was that this is a cost rule. He had seen innumerable cases where there were judgments. The way it works is the plaintiff wins and gets a judgment. The judgment hypothetically is $100,000, and it is recorded. Rule 2-601, Entry of Judgment, provides that the judgment is entered when it is recorded by the clerk after the verdict. This was crafted this way, so that everyone would know when the 10-day Rules (for example, Rules 2-532, Motion for Judgment Notwithstanding the Verdict, 2-533, Motion for New Trial, and 2-534, Motion to Alter or Amend a Judgment) and the 30-day Rules (for example, Rules 2-535, Revisory Power, and 8-202, Notice of Appeal – Times for Filing) begin to run. After that, judgment for money damages is recorded by the clerk. Some time later, which is somewhat vague (there is no rule using 15 days as Rules 2-603.1 and 3-603.1 do), the plaintiff's attorney goes to the clerk and moves for costs to

be added to the judgment. Then there is a money judgment, the 10-day motion is filed, and the 30-day appeal is filed. Somewhere along the line, a few hundred dollars for costs, a costs judgment, is added. That is not in the judgment that goes on appeal. What is being addressed in the Rules being discussed today is part of the costs after the money judgment.

Mr. Brault stated that this is what he found to be confusing. If a debt action is filed and within that debt action, the attorney asks for a specific amount of money as part of the claim, then when that judgment is entered, it includes the attorney's fees. This is what the Fourth Circuit in *Carolina Power* discussed as to when a judgment is able to be filed for appeal. It is filed for appeal when the whole judgment, including the claim for attorneys' fees within the context of the claim is put together. The Chair asked if the jury is going to determine the attorneys' fees in a straight civil action that allows for attorneys' fees and goes before a jury on the issue of whether there was liability and for how much. The Court of Appeals has answered "no." The Vice Chair asked about when the attorneys's fees are part of the damages in the case. It is part of the claim.

Mr. Brault said that in *Sherwood v. Hartford*, 347 Md. 32 (1997), he and his firm represented the insured, and they claimed attorneys' fees. They had to put on experts, and the jury found specifically what the attorneys' fees were. The Chair inquired if this case involved a failure to defend, and Mr. Brault

answered affirmatively. The Chair said that this is what the claim is. Mr. Brault remarked that if the claim is attorneys' fees, part of the proof of those fees is reasonableness. This is the way that he read *Monmouth*. The fees always have to be reasonable. He noted the fact that the plaintiff's attorney often gets much higher fees than the defense attorney.

The Vice Chair said what troubles her about this Rule is that over and over again, the Committee has discussed what the Rule applies to and what it does not apply to, but she did not hear in the discussion any understanding about what it means. It seemed clear that it did not apply to the case in which attorneys' fees are part of the damages. Until today, she had thought this Rule only applied in cases where the arrangement was that the prevailing party would be entitled to attorneys' fees if a certain condition happened. This type of claim cannot be made for attorneys' fees until a party knows that he or she is going to prevail. Mr. Brault said this is true for all of the fees after judgment.

The Vice Chair pointed out that the discussions have evolved into not just the situation where the contract expressly states that the prevailing party is entitled to attorneys' fees, but a belief that this Rule applies every single time a party needs to win in order to get attorneys' fees, regardless of the language in the contract. How would one obtain a confessed judgment under this Rule? In a loan for $1 million, the terms may say that in the event of a default, the loan is accelerated, and the debtor

owes 15% of the amount owed. This could be a large sum of money. The attorney is filing his or her complaint up front asking for 15%, having no idea whether the confessed judgment will stand, whether he or she will get paid in five years, 10 years, or never. It is an excellent idea to have a simple rule that tells someone when to file a motion for post-judgment attorneys' fees.

Judge Pierson commented that he did not disagree with Mr. Maloney's statements but felt that this issue should be determined by case law. What will happen in the confessed judgment situation and in the note collection situation? It is difficult to write a rule that fits every situation. The Chair responded this is not an attempt to make such a rule, but to present something to the Court of Appeals, so they can resolve this issue. Simply stating when a motion has to be filed is not sufficient. The foreclosure bar says that they do not need to file any motions nor any memorandum, because they have the audit process. If the point of view is right that a note that calls for 15% is part of the judgment, then no motions would be filed for that either. The Rule will be in a state of complete ambiguity.

Mr. Brault referred to section (b), which read as follows: "This Rule applies only to actions in which, by law or contract, a party is or may be entitled to claim attorneys' fees from another party solely by prevailing in an underlying claim against the other party that is separate from a claim for attorneys' fees." He thought that this statement was sufficient and that

this is the general rule Judge Pierson was talking about. It would not get into the exception for family law or any other exceptions. The rest of it could be resolved. The Rule could add the language: "...to claim attorneys' fees as costs from another party...". Costs are what are being referred to in section (b). The Rule provides that after the appeal, a party can ask for more costs. Someone can get attorneys' fees for handling the appeal. It is purely a cost matter.

Mr. Brault said that he is involved in a case pertaining to this issue that is before the Court of Special Appeals now. The Honorable Peter Krauser had it on a motion to dismiss the appeal. There was a judgment of $50 million and attorneys' fees. The attorneys for the plaintiff submitted a motion for a final judgment. They asked the trial judge for a final judgment for a certain amount of money. They would deal later with the attorneys' fees to which they were entitled under the notes. It was a default situation. The judge entered a final judgment. They wanted this, so that they could attach some real estate in New York City. They went to New York and attached the property. Mr. Brault's firm was retained for the appeal. Mr. Brault had told his son who was handling the appeal that the other side had lost their attorneys' fees, because they were part of the note and should have been part of the claim. The other side moved to dismiss the appeal, because the attorneys' fees had not been resolved. They then realized that they may have been wrong. They went to the trial court to ask that the judgment be set

aside. They tried to get it changed, and the case is still pending on the original appeal.

Mr. Brault noted that the Court of Special Appeals will have to decide when the right to those attorneys' fees arose under the contract. Was it part of their claim, or was it part of costs? If it is only costs, the matter can be postponed, and they can get the costs later. This is at the heart of this entire problem. If it is costs, then all that is necessary is this Rule. It will only apply to the kind of cases that the Committee decides are appropriate. If it is part of their claim, when they filed the lawsuit under the terms of the lease or the note, then it has to be put into their judgment to start with.

The Chair pointed out that this does not get to the issue of the reasonableness of the costs. He said that a motion that there be no rule was seconded and was on the floor. Then the discussion had addressed letting the Rule deal only with procedure. Judge Norton commented that one of the holdings in *Monmouth* was that the District Court judges would not be able to pick an amount for the attorneys' fees out of thin air that seemed reasonable to them. They were getting requests for attorneys' fees that seemed to be unreasonable.

Judge Norton commented that there was still an issue as to a fixed percentage within a contract. There probably had not been a thorough canvassing of all of the District Court judges on this. A District Court judge would not want any additional hearing when 100 to 150 motions are coming before each judge each

day. The judges did not want the Rule to impose any type of supplemental hearings. They wanted there to be existing documentation if it was sufficient as to not shock the judge's conscience before a supplemental hearing. If the circuit court rule is eliminated as has been suggested, that still leaves the dilemma of what the District Court judge has to do when the fees are to be "reasonable." The Rule should be looked at to make sure that it is not too easy to get a supplemental hearing on the mass filings in the District Court.

Mr. Helt said that he wanted to talk about the scenario that he deals with. His clients are mostly business to business cases. Their contracts usually specify an attorneys' fees percentage. These are decided between two businessmen. He and his clients were having trouble figuring out where they fit into this scheme. It used to be simple, such as having one count in a circuit court complaint referring to attorneys' fees based on the specific portion of the contract. The proposed Rule would turn what used to be a simple procedure based on a contract right that his client had to what may require extra motions and hearings that would not only bog them down but bog the court down. They do not get extra money for this. They get only what is in the contract no matter how many times they have to go to court. If they do not collect the money, they do not get anything at all.

The Vice Chair remarked that despite the fact that she seconded the motion, she believed that there was merit to having some kind of deadline, as the federal court has, for the filing

of motions. Rather than using the language in the proposed Rule which is being interpreted many different ways, the Rule could provide that by law whenever someone is allowed to ask for attorneys' fees post-judgment or as costs, it has to be done within 15 days. This would bring finality to the case as a whole. Judge Pierson said that he would accept this amendment.

Mr. Klein commented that he wanted to clarify that Judge Pierson's motion was to not adopt proposed Rule 2-603.1. There will be attorneys' fees for discovery sanctions. The Chair said that his understanding was that the motion addressed both Rules 2-603.1 and 3-603.1. He asked for a vote on the motion to reject the two Rules completely. The motion failed with only four in favor.

Judge Pierson moved to adopt the Vice Chair's suggestion providing for a deadline. The Vice Chair seconded the motion. Judge Pierson explained that he interpreted the scope of the Rule as Mr. Brault had done, which is that the Rule would apply to either fee-shifting based on prevailing party or contract based on a prevailing party clause. Some contracts provide that if any litigation under that contract ensues, the prevailing party shall be entitled to attorneys' fees. The Rule could state that such a claim has to be filed within a specific period after judgment. The Chair asked if this would include referring to a memorandum establishing a basis for the claim or what is reasonable. Judge Pierson responded that it is a question of what the scope of the Rule is. If it only applies to fee-shifting based on prevailing

party or contract based on a prevailing party clause, and not to anything else, and this is clearly understood, then the Rule is appropriate as it is now. It is good for the civil rights cases and the prevailing party cases.

The Vice Chair suggested changing section (b) to delete what it currently provides and instead state: "This Rule only applies to those actions in which the law allows a party to seek attorneys' fees post-judgment." She added that she did not like the idea of referring to the "prevailing party." The Chair asked how the rest of the Rule would read if section (b) read the way that the Vice Chair had suggested. The Vice Chair replied that she had not worked that out yet, but she would be more comfortable with the remainder of the Rule if it only applies to those cases which are past the judgment stage. The Chair noted that this was the intent of the Rule. The Vice Chair's language may express it better. If the case is post-judgment, someone would only be entitled to attorneys' fees if he or she won the case. Mr. Brault pointed out that this could result in an argument about when is the judgment final. The Vice Chair remarked that this depends on whether the attorneys' fees are part of the damages. This would never be resolved by words in a rule. Judge Pierson added that this is a substantive issue that cannot be regulated by rule.

The Chair reiterated that the intent of the Rule was that it would only apply to those situations where the case is post-judgment, and the attorney is or may be entitled to the fees

post-judgment. Outside of the family law area, he did not know of any case in which one would be entitled to fees unless he or she won something in the judgment. The one who lost is not going to get attorneys' fees from the other side. This issue was raised in the white paper from the Access to Justice Commission. They discuss two-way fee-shifting in which the defendant can get fees if he or she wins. Mr. Brault commented that the problems in this area can get worse as evidenced by the white paper. The Chair pointed out that absent a contractual provision to that effect, a statute would be necessary to effect this.

Mr. Johnson referred to the statement that this would apply to cases in which the attorney is entitled to fees post-judgment. He asked if this applied to the situation where a count in the complaint states that the plaintiff is entitled to attorneys' fees. This is not post-judgment, but the complaint is asking for attorneys' fees. Mr. Helt said that he gets this with the judgment as part of the order. Mr. Brault explained that one reason the attorney wants attorneys' fees in the judgment is that the person can get interest on that judgment. The Vice Chair expressed the view that this would no longer apply to confessed judgments, because the confessed judgment is the judgment, and the claims for attorneys' fees and costs are not part of the judgment. They are not considered to be damages that are part of the judgment. They are the equivalent of costs. The language that she suggested works better than the reference to "prevailing party."

The Reporter asked if this would exclude a foreclosure action. Ms. Ogletree added that if there is no sale of the property, someone is not entitled to expenses. This is stated clearly in the deed of trust. The Chair pointed out that there must be a sale, and it must be ratified. Mr. Fisher commented that apart from the Title 14 issue, if the Rule is approved, there are unintended consequences. He said that he was not speaking against the Rule, because if the language proposed that refers to Title 14 is added, then the foreclosure cases are clearly excluded. This is the unintended consequence. He and his colleagues get *pro se* lawsuits. The deeds of trust state that the attorneys are entitled to attorneys' fees because they are protecting the property, protecting the lien, or collecting the debt. The default might trigger the right to fees to be collected, but otherwise it is not by its language dependent on the prevailing party. They get numerous, totally frivolous lawsuits outside of the foreclosure case. They defend those cases, and they ultimately prevail. They do not seek attorneys' fees. Their bill goes to the client, and the client adds it to the mortgage debt. If and when there is a foreclosure, the fee is collected.

The Chair told Mr. Fisher that he could apply Rule 1-341, Bad Faith -- Unjustified Proceeding. Mr. Fisher responded that they do not do so, because the fees are just made part of the debt. In these cases, they are going to have to seek some affirmative relief. Apparently, they must get the approval of

the fee in the court case before they can tell the client that the fee is recoverable. This clearly would be a cost and expense as well as an unintended consequence of the Rule. The judge who asked for this Rule initially may have gotten the guidance that he asked for in *Monmouth*. Mr. Brault noted that the Rule has information in it that the circuit court judges want. This is related to the discovery rules and the provisions about memoranda. Ordinarily, the Rule would apply to major cases. The fees in the civil rights cases greatly exceed the damages in the average cases. The judges would like to have the proposed Rules.

The Chair pointed out that the basis for drafting a rule started with statutory claims which have different considerations. The Court of Appeals made this clear in *Monmouth*. Mr. Maloney expressed the opinion that widespread confusion exists as to this issue, and it needs to be addressed. Mr. Helt said that the District Court has a form that the judge fills out pertaining to costs and attorneys' fees. This what the attorney gets back. Mr. Helt added that he would assume that the attorney fee request would not be post-judgment.

The Chair responded that the way that the District Court Rule was proposed is that the attorney could do what is being done now, asking for the fees in a motion for a judgment on affidavit or requesting the attorneys' fees when the attorney files the confessed judgment action. This can all be handled by the District Court at one time. If a note calls for a percentage

fee of 49%, he read *Monmouth* to hold that the judge will make the attorney justify the fee, which the attorney may not be able to do. Providing in the Rule for a percentage or a flat amount may not be enough. The attorney may need to justify it. If the claim is for $200, and the contract provides for attorneys' fees of $150, the judge may not allow it. It would not matter what the contract provided.

Mr. Enten told the Committee that he had read *Monmouth*. He referred to footnotes 14 and 15 in the case, and he noted that he would take his chances based on the idea that where there is an express amount in the underlying contract, this case does not apply. Footnote 14 states "Our holding that where an attorney is entitled to reasonable fees under the terms of a contract, that attorney is not permitted to define that amount by use of a percentage...". Footnote 15 states: "None of the homeowners agreements here called for a percentage of the debt as the appropriate fee award. Thus, we do not address that situation."

Mr. Maloney asked about footnote 13, which states: "...Nor must a court always mention Rule 1.5 as long as it utilizes the rule as its guiding principle in determining reasonableness." Mr. Enten responded that Rule 1.5 states: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee for an unreasonable amount for expenses...". The proposed Rule does not change this. An attorney cannot collect an unreasonable amount without violating the Code of Professional Conduct. The Court of Appeals has made it clear that where there is an express

amount not exceeding 15%, *Monmouth* does not apply. The cure may be worse than the disease. In routine collection cases where the case is for $30,500 or a case is for $29,000, and there is an express agreement, or in a case worth $10,000,000, is $1,500,000 a reasonable fee? If the court were to hold that this is not reasonable, Mr. Enten would argue it. The Rule provides that this situation does not apply.

Mr. Enten remarked that the answer to the language "solely prevailing" is to state that where the contract in question allows for the prevailing party to recover attorneys' fees, or the prevailing party is entitled to recover attorneys' fees by statute, then this Rule applies. This excludes the other cases from the scope of the Rule. The Vice Chair noted that this is what the Rule now states. Mr. Enten responded that he had read the language "solely prevailing" to be in line with the initial comments that one would never get attorneys' fees unless the person prevailed. He recalled Mr. Brault discussing the situation where either the appropriate statute or the contract in a routine debt collection case, whether commercial or consumer, is never going to have a provision in it that states that the prevailing party can recover the fees.

The Chair pointed out that the debtor may be able to get the fees from the creditors. The Vice Chair commented that this takes the Rule back to where it was when the discussion first started. When she first read the Rule, her belief was that it meant that the words in the document, whether it is a mortgage,

lease, or anything else, had to state: "This party is entitled to attorneys' fees if the party prevails." However, it is not being interpreted this way. The interpretation is that whenever one has to win in order to get one's fee, then this Rule applies. Mr. Enten suggested that the Rule should have language that states that it applies when the underlying document upon which the suit is based provides that the prevailing party may recover his or her fees.

The Chair noted that all of this discussion gets back to the fact that the American Rule is that each party pays his or her own attorney. There is no fee-shifting of any kind. The two exceptions to this Rule are if a statute permits it or a contract permits it. Otherwise, the party must pay his or her own attorney, and they do not get the fees from the other side. The two questions to answer are how does one proceed in these cases, and to what extent does the court have to determine whether the fee is reasonable. Mr. Enten remarked that the Court of Appeals is clear that the issue of what is reasonable is limited to cases where there is no express percentage in the document. Mr. Maloney responded that as a matter of law, the second part of footnote 13 in *Monmouth* is wrong. What the Court of Appeals is saying in that case is that although they agree with percentages in the document, the court must always refer to Rule 1.5 as long as it utilizes the Rule as its guiding principle. He recognized that the case also has footnotes 14 and 15 as well. It is not true that Rule 1.5 does not apply to percentage cases. Mr. Enten

commented that the "laundry" list in Rule 1.5 is not exclusive. The wording that legislative bill drafters use is "including", but attorneys who do not practice before the legislature prefer the language, "including, but not limited to." The Department of Legislative Services would say that the word "including" means "including, but not limited to." This is the same situation. The court can look at this list and can also look at any other factor to determine whether the fee is reasonable.

Mr. Brault pointed out that the Rules Committee cannot pass substantive law in the guise of a rule. A rule cannot state what is or is not reasonable. The point is to create a procedure for the courts to follow and rules for guidance in discovery as they attempt to resolve what is reasonable. Mr. Enten said that he had no problem with this. The Vice Chair remarked that if the percentage in the document were to be 75% of the claim, that would be shocking. The 15% provision in contracts is very common. There is a presumption that this is usually fair and reasonable under the Rules of Professional Conduct. The Chair noted that the 15% figure was centered in the District Court. What was being proposed to the Court of Appeals was that if the attorney is not asking for more than 15%, whether the note states "15%" or not, or if the note states "reasonable" and the attorney is not asking for more than 15%, then the District Court should find that this is presumptively reasonable. This is based on the fact that not only is it standard practice and has been for many years, but many consumer protection Maryland statutes permit 15%.

The court can have some comfort level in agreeing with the amount in the note, whether it is a flat fee, a reasonable fee, or a 15% fee, and it can be part of the judgment.

The Vice Chair inquired how this would be handled in the circuit court when the note states that the fee is 15%. The Chair said that the question is if the same principle can be applied to the circuit court as it is in the District Court. The proposal is to give the circuit court discretion to agree if the attorney is not asking for more than 15%. The Vice Chair asked if this is in the Committee note. The Chair responded that this is more than in the Committee note.

The Reporter drew the Committee's attention to the Committee note, which appears after subsection (d)(3)(B)(xi). It refers to the memorandum. The Chair said that subsection (d)(2)(A) reads as follows: "Unless otherwise provided by court order, the memorandum shall be filed ...". The intent was that the circuit court could have discretion to accept a memorandum with less detail than would be required if there are other circumstances that would allow the court to find a fee not exceeding 15% of the underlying claim to be reasonable. This is explained in the Committee note.

Mr. Maloney said that he thought that the Rule was ready to be voted on. The Chair responded that the problem was that there were a number of other issues in the text of the Rule that the Committee needed to address. The Vice Chair suggested that the Committee go through the Rule section by section. Her preference

based on the discussion today was that section (b) should state that the Rule only apply to those situations where a party is entitled by law to attorneys' fees after the entry of a final judgment. Mr. Leahy inquired if this solved the issue about the prevailing party. Judge Pierson noted that last year some Court of Special Appeals cases held that in a prevailing party contract case, the claim for attorneys' fees was not part of the claim on the merits. (*Grove v. George*, 192 Md. App. 428 (2010) and *Weichert v. Faust*, 191 Md. App. 1 (2010)). This would suggest that in a contract that has a prevailing party provision as opposed to another type of provision, attorneys' fees are not part of the damages. Mr. Maloney remarked that there should be a way to describe this situation in the Rule.

The Chair said that in terms of the procedure of filing motions and memoranda, it does not answer the question of whether the fees are part of the judgment in those situations that are not covered by the Rule. Some of the people present today had indicated that whenever a note provides for any percent, it is part of the judgment and not under this Rule. It is necessary to address the question of what authority or discretion the court has in terms of requiring proof that the fee is reasonable. *Monmouth* addresses this in footnotes. This can be either ignored or addressed.

The Vice Chair remarked that she was not so clear that in the 15% confessed judgment case, the fees are part of the judgment. When an attorney files up front for the confessed

judgment, such as $1 million and $150,000 in attorneys' fees, that gets put on the docket separately with the attorneys' fees segregated. If the motion to vacate the confessed judgment is successful, and the entire case is vacated, whether or not the attorneys' fees are part of the damages in the case or whether they can be sought post-judgment might depend on the language of the document. For example, if the document provides that in the event of a default, the attorney is entitled to a 15% attorneys' fee, and the defense feels that there has been no default, no one specific answer may be available.

The Chair noted that the case described by Mr. Brault, which was a failure to defend, is clear that the insurance company has a duty to defend, and if they do not, the party has to get his or her own attorney to do the defense. That attorney files suit for a breach of contract, and the damage is whatever was paid to the attorney who filed suit. Mr. Brault added that under *Cohen v. American Home Assurance Company*, 255 Md. 334 (1969), the attorney gets the fees to prosecute the claim from the other case, and both claims have to go before the jury. In that case, they had to put on testimony as to what their fee was through that day of the trial. The Chair added that this is part of the damages. The Vice Chair suggested that the Rule not expressly address the confessed judgment situation for percentage fees. They can be dealt with in District Court, and they must be dealt with in circuit court.

Judge Norton pointed out that the District Court Rule is

tailored so that the circuit court Rule does not affect it in terms of an entirely different procedure. Another consideration is whether absent the applicability of the new circuit court Rule to the District Court Rule, there is some utility to having some different version of the Rule cover reasonable attorneys' fees situations whereby a rule can govern a truncated process that would solve the issue of what is "reasonable." The Chair noted the problem of a District Court case in which the attorneys are asking for fees of more than 15%. In landlord-tenant actions, there is no limit on the damages. It is almost like a circuit court case.

The Reporter commented that the 15% amount could be taken out of the District Court Rule and put in an earlier rule, although she was not sure where it would go. It is part of the underlying claim, and then the District Court and circuit court Rules could be coordinated to whatever happens post-judgment. The Vice Chair remarked that this may cause problems in an area that has worked properly for a long time. The Reporter observed that the District Court may be somewhat in chaos at this point. Judge Norton said that if only the issue of reasonableness and *Monmouth* is going to be addressed, it would be better to concentrate on that problem rather than skirt around any additional procedures imposed by the circuit court.

The Chair noted that the sense of the Committee was to have a rule, since the motion to not have a rule was defeated; however the Rule would not be able to be drafted today. It would have to

go back to the Subcommittee. The Vice Chair remarked that the discussion so far did not direct how the Rule should be changed. Mr. Brault suggested the following language for subsection (b)(1): "This Rule applies only to actions in which by law or contract a party is entitled to claim attorneys' fees as part of costs following judgment." Mr. Enten asked if this included any contract that has a provision for attorneys' fees. The Vice Chair answered that it applies only to attorneys' fees that are post-judgment.

Ms. Ogletree said that the Rule needs to be clear that attorneys' fees in foreclosure cases are not post-judgment. Mr. Brault agreed, commenting that there should be a paragraph in the Rule stating that the Rule does not apply to foreclosure and family law. In foreclosures, the auditors look at what the attorneys' fees are. In family law cases, the judge looks at what the fees are. The Chair remarked that the judge looks at the fees in foreclosure cases, too. Ms. Ogletree said that she wanted to be sure that foreclosure is not within the scope of the Rule.

Mr. Maloney suggested that the District Court exception for attorneys' fees of $4,500 or less or fees of no more than 15% of the amount of the underlying claim should be grafted into the circuit court Rule, because it would not make any sense to have this in the District Court and not the circuit court. Mr. Brault pointed out that the District Court is limited by its jurisdiction. Mr. Maloney responded that if there is a case in

the circuit court with a $3000 attorneys' fee, it should not be necessary to follow all of the procedures in the Rule. Judge Norton said that this should not be referenced by noting the statutory limit, so that if the legislature raises the limit, the Rule would not have to be changed. The Reporter said that this should be in the body of the Rule and not in a Committee note.

The Chair pointed out that since this is a circuit court Rule, the attorney will still have to follow the procedures regarding the memorandum. Mr. Brault remarked that this will only be necessary in complicated cases. The Chair commented that this could be a problem. For example in a circuit court case for a breach of a huge commercial lease, which provides that on default, an attorney is entitled to reasonable attorneys' fees, whether it is at 15% or 82% of the underlying claim, this is going to be construed as part of the claim, and it is not a post-judgment fee. What is the difference between a note of $3000, which allows also for attorneys' fees, and this huge lease that provides that upon default, the attorney is entitled to attorneys' fees? It is the same principle. If the court is going to have to determine what is reasonable, whether it is stated as a percentage, an amount, or "reasonable" in the one case, it will have to do the same in the other case. What the Rule was trying to do in the 15% cases was to make it easy and not require that the attorney have to follow all of the procedures in the Rule. But the court still has to determine reasonableness.

The Vice Chair asked if the Chair meant that the reasonableness issue with respect to attorneys' fees that are part of the judgment should be addressed by this Rule. The Chair said that he did not know where *Monmouth* really lies as to this. A rule would give the Court of Appeals the opportunity to address this issue. The Vice Chair reiterated that Rule 2-603.1 is a post-judgment rule. Mr. Brault noted that in *Monmouth*, the appeal was on the issue of attorneys' fees, so it had to be part of the judgment to be appealed. The Chair said that it was a contract case in which fees and costs were being requested after the parties prevailed on the underlying contract. In the second *Friolo* case (*Friolo v. Frankel*, 403 Md. 443 (2008)), which was a statutory wage claim, the Court held that the reasonableness of the fees is for the judge to decide if the fees are part of the claim. The statute provides that someone is entitled to wages, possibly treble damages, which the jury decides, and reasonable attorneys' fees. Is this part of the claim, or is it post-judgment? Mr. Brault responded that he thought that it is part of the claim. Judge Pierson noted that a case on this holds that it is part of the costs. The Chair added that it is because the judge has to decide reasonableness. This is not a matter for the jury.

The Vice Chair commented that the most difficult aspect of this is to decide whether the attorneys' fees are part of the underlying claim. It is hard to analyze without looking at the specific words of the contract. This issue cannot be resolved.

The Chair pointed out that the Rule does not attempt to do so. Mr. Brault remarked that the wage cases are like the federal civil rights cases where the fees are clearly post-judgment. The Reporter suggested that a procedure could be added to the Rule before the judgment is entered to file a motion to have this issue resolved by the trial court. This would result in a ruling one way or the other as to whether there are post-judgment attorneys' fees or not and would avoid the possibility of malpractice. The Chair stated that the Rule would be referred back to the Subcommittee.

Agenda Item 5. Reconsideration of proposed new Rule 9-205.2 (Parenting Coordination) and conforming amendments to: Rule 16-204 (Family Division and Support Services) and Rule 17-101 (Applicability)

After lunch, the Chair presented Rules 9-205.2, Parenting Coordination, 16-204, Family Division and Support Services, and 17-101, Applicability, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 200 - DIVORCE, ANNULMENT, ALIMONY,

CHILD SUPPORT, AND CHILD CUSTODY

ADD new Rule 9-205.2, as follows:

Rule 9-205.2. PARENTING COORDINATION

(a) Applicability

This Rule applies to <u>the appointment</u>

of parenting coordinators by a court and to consent orders approving the employment of parenting coordinators by the parties ~~parenting coordination~~ in actions under this Chapter ~~in which child custody or child access is an issue~~.

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

(b) Definitions

In this Rule, the following definitions apply:

(1) Parenting Coordination

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

(2) Parenting Coordinator

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

DRAFTER'S NOTE: The last phrase is deleted as unnecessary as part of a definition. Sections (e) and (f) make clear that only an individual possessing the qualifications stated in section (c) may be appointed or approved by the court. No change in substance from the prior draft is intended.

(c) Qualifications of Parenting Coordinator

(1) Age, Education, and Experience
To be designated or approved by the

court as a parenting coordinator, an individual shall:

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

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

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

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

(2) Parenting Coordination Training

A parenting coordinator also shall have completed:

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

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

Committee note: The accredited specialty training requirement could be met by training offered by recognized national organizations such as the American Bar Association or the Association of Family and Conciliation Courts.

(3) Continuing Education

Within each calendar year, a parenting coordinator shall complete a minimum of four ~~eight~~ hours of continuing education approved by the Administrative

Office of the Courts in the topics listed in subsection (c)(2) of this Rule and recent developments in family law. The Administrative Office shall maintain a list of approved continuing education programs.

(d) Parenting Coordinator Lists

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

(e) Approval of Parenting Coordinator Employed by Parties

In any action in which the custody of or visitation with a child of the parties is or was at issue, the parties, by agreement, may employ a parenting coordinator to assist them in dealing with existing or future conflicts regarding their access to and responsibilities for the child. The parties may jointly request the court to enter a consent order approving the agreement. The court shall enter such an order if it finds that the parenting coordinator has the qualifications set forth in section (c) of this Rule and that the agreement:

(1) is in writing and signed by the

parties and the parenting coordinator;

(2) states the services to be provided by the parenting coordinator;

(3) states the extent to which the parenting coordinator may receive information pertaining to the child or the parties that is confidential or privileged and any limitations on the use of that information by the parenting coordinator;

(4) states the amount or rate of compensation to be paid to the parenting coordinator, which may exceed the amount or rate provided for in section (j) of this Rule; and

(5) is otherwise consistent with the best interest of the child.

Committee note: Parties who, by agreement, employ a parenting coordinator on their own initiative are not required to seek court approval. Section (e) of this Rule applies only if they request a court order approving the agreement.

(f) Appointment of Parenting Coordinator by Court

In an action in which the custody of or visitation with a child of the parties is in issue and the court determines that the level of conflict between the parties with respect to that issue so warrants, the court may appoint a parenting coordinator in accordance with this section.

(1) Appointment During Pendency of Action ~~and Post-Judgment Parenting Coordinators~~

After notice and a hearing ~~an opportunity for the parties to be heard~~, the court may appoint a parenting coordinator during the pendency of the action on motion of a party, on joint request of the parties, or on the court's own initiative. Unless sooner terminated in accordance with this Rule, the appointment shall terminate upon the entry of a judgment granting or modifying

custody of or visitation with the child.

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

(2) Appointment Upon Entry of Judgment

With the consent of the parties and after a hearing, the court may appoint a ~~post-judgment~~ parenting coordinator upon entry of a judgment granting or modifying custody or visitation. The court may appoint the individual who served as a parenting coordinator during the pendency of the action. Unless sooner terminated in accordance with this Rule, the appointment of a post-judgment parenting coordinator shall not exceed two years unless the parties and the parenting coordinator agree in writing to an extension for a specified period of time.

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

(3) Selection

The court may not appoint ~~only~~ an individual as a parenting coordinator unless the individual ~~who~~:

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

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

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

~~individual.~~

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

(4) Contents of Order or Judgment

An order or judgment appointing a parenting coordinator shall include:

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

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

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

(C) **~~subject to section (i) of this Rule, a provision concerning payment of the fees and expenses of the parenting coordinator~~** if the appointment is of a post-judgment parenting coordinator, any decision-making authority of the parenting coordinator authorized pursuant to subsection (~~f~~ g)(1)(H) of this Rule.~~; and~~

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

~~(4) Term of Appointment~~

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

~~(A) the service of an individual appointed as a pendente lite parenting~~

~~coordinator terminates with the entry of a judgment that resolves all issues of child custody, visitation, and access; and~~

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

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

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

(~~f~~ g) Provision of Services by the Parenting Coordinator

(1) Permitted

As appropriate, a parenting coordinator may:

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

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

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

(D) assist the parties in developing ~~develop~~ guidelines ~~with the parties~~ for appropriate communication between them;

(E) suggest resources to assist the parties;

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

(G) in response to a subpoena issued at the request of a party or an attorney for a child of the parties, or upon action of the court pursuant to Rule 2-514 or 5-614, produce documents and testify in the action as a fact witness;

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

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

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

(2) Not Permitted

A parenting coordinator may not:

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

~~Committee note: A parenting coordinator may ask the parties and the attorney for the child for the release of confidential~~

~~information that is not in the case record, but neither the parenting coordinator nor the court may require or coerce the release of such information to the parenting coordinator.~~ **~~Pursuant to subsection (g)(2) of this Rule, if confidential information that is not part of the case record is released to the parenting coordinator, the information may lose its confidential or privileged status unless further disclosure by the parenting coordinator is prohibited by statute or the terms of the release. Compare subsection (g)(1), applicable only to case records.~~**

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

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

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

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

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

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

(~~G~~ h) Confidential Information ~~Access to Case Records; Disclosure~~

(1) Access to Case Records

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

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

(2) ~~Disclosure of Information by Parenting Coordinator~~ Other Confidential Information

(A) A parenting coordinator may not require or coerce the parties or the attorney for the child to release any confidential information that is not included in the case record.

(B) Confidential or privileged information received by the parenting coordinator from a party or from a third person with the consent of a party may be disclosed by the parenting coordinator to the other party, to the attorney for the child, and in court pursuant to section (g)(1)(G) and (I) of this Rule. Without the express

consent of the party who provided the information or consented to a third person providing it or otherwise required by law, the parenting coordinator may not disclose the information to anyone else.

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

(~~h~~ i) Removal or Resignation of Parenting Coordinator

(1) Removal

The court shall remove a parenting coordinator:

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

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

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

(2) Resignation

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

(~~i~~ j) Fees

(1) Fee Schedules

Subject to the approval of the Chief Judge of the Court of Appeals, the county administrative judge of each circuit court may develop and adopt maximum fee schedules for parenting coordinators. In developing the fee schedules, the county administrative judge shall take into account the availability of qualified individuals willing to provide parenting coordination services and the ability of litigants to pay for those services. **~~Except as agreed by the parties, an individual designated~~ A parenting coordinator appointed by the court ~~to serve as a parenting coordinator in an action~~ may not charge or accept a fee for parenting coordination services in that action in excess of the fee allowed by the applicable schedule.** Violation of this subsection shall be cause for removal from all lists maintained pursuant to section (d) of this Rule, Rule 9-205, and the Rules in Title 17.

(2) ~~Designation by Court~~ Allocation of Fees and Expenses

Subject to any agreement entered into by the parties pursuant to section (e) of this Rule, ~~subsection (i)(1) of this Rule and **any fee agreement** between the parties and the parenting coordinator,~~ the court shall designate how and by whom the parenting coordinator shall be paid. **If the court finds that the parties have the financial means to pay the fees and expenses of the parenting coordinator, the court shall allocate the fees and expenses of the parenting coordinator between the parties** and may enter an order against either or both parties for the reasonable fees and expenses.

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

Source: This Rule is new.

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

A draft of proposed new Rule 9-205.2 originally was approved by the Rules Committee at its March 2010 meeting, subject to revision and redrafting to address the issues of (1) fees in excess of the fee schedule and (2) release of confidential information that is not part of the case record. The Rule has been redrafted to address these issues and reorganized so that provisions for the selection and appointment of a parenting coordinator by the court are separate from provisions for court approval of a parenting coordinator chosen and employed by the parties.

Changes from the previous draft of the Rule are shown by underlining and strike-throughs. For the Committee's convenience, an unmarked copy of the Rule also is provided.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

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

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

Rule 16-204. FAMILY DIVISION AND SUPPORT SERVICES

(a) Family Division

(1) Established

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

(2) Actions Assigned

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

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

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

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

(D) establishment and termination of the parent-child relationship, including paternity, adoption, guardianship that terminates parental rights, and emancipation;

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

(F) name changes;

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

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

(I) family legal-medical issues, including decisions on the withholding or

withdrawal of life-sustaining medical procedures;

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

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

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

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

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

(3) Family Support Services

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

(A) mediation in custody and visitation matters;

(B) custody investigations;

(C) trained personnel to respond to emergencies;

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

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

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

(F) information regarding lawyer referral services;

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

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

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

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

(4) Responsibilities of the County Administrative Judge

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

(A) allocate sufficient available judicial resources to the family division so that actions are heard expeditiously in accordance with applicable law and the case management plan required by Rule 16-202 b;

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

(B) provide in the case management plan

required by Rule 16-202 b criteria for:

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

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

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

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

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

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

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

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

(b) Circuit Courts Without a Family Division

(1) Applicability

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

(2) Family Support Services

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

(3) Family Support Services Coordinator

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

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

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

Source: This Rule is new.

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

Proposed amendments to Rule 16-204 conform the Rule to provisions in new Rule 9-205.2.

MARYLAND RULES OF PROCEDURE

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

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

Rule 17-101. APPLICABILITY

. . .

(b) Rules Governing Qualifications and Selection

The rules governing the qualifications and selection of a person designated to conduct court-ordered alternative dispute resolution proceedings apply only to a person designated by the court in the absence of an agreement by the parties. They do not apply to a master, examiner, ~~or~~ auditor, or parenting coordinator appointed under Rules 2-541, 2-542, ~~or~~ 2-543, or 9-205.2.

. . .

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

New Rule 9-205.2 is a self-contained Rule pertaining to parenting coordination. The second sentence of Rule 9-205.2 (b)(1) reads, "Although parenting coordination may draw upon alternative dispute resolution techniques, except as otherwise provided in this Rule, it is not governed by the Rules in Title 17."

The proposed amendment to Rule 17-101 (b) excludes a parenting coordinator appointed under Rule 9-205.2 from the applicability of the Rules in Title 17 that govern the qualifications and selection fo a

person designated by the court to conduct alternative dispute resolution proceedings.

The Chair explained that Rule 9-205.2 had been referred back to the Family and Domestic Subcommittee for more drafting. With attention paid to rule revisions that the Alternative Dispute Resolution (ADR) Subcommittee have made, the Family and Domestic Subcommittee tried to make a clear separation between agreements that the parties have as to the parent coordinator and the court appointing one. In section (a), the underlined language applies to anything that the court is going to have to approve to create the appointment of a parent coordinator. Subsection (b)(1) has no change in substance, it is only a stylistic change. The change in subsection (b)(2) is explained in the drafter's note.

The Chair said that the change in subsection (c)(3) is to conform to a change made by the ADR Subcommittee, which is to require continuing education for at least four hours a year instead of eight hours every two years. He pointed out that section (d) has some changes but none of substance. The purpose of the changes is to clarify how to get on the list of parent coordinators. Section (e) separates out the situation where the parties want to pick their own parenting coordinator and have the court approve the selection through a consent order. It requires that the court look at the agreement and make sure that this is appropriate.

Judge Eyler commented that the way this Rule was redrafted followed the suggestions made at the September Rules Committee

meeting. The issue of whether the parties can agree to a fee that is above what has been established by the court was discussed. Section (e) creates a structure, which is that when the parties approve, the fee can be whatever they agreed to, but if the court appoints the coordinator, the fee schedule must be followed.

The Chair drew the Committee's attention to section (f), Appointment of Parenting Coordinator by the Court. He noted that the court can do this on its own after a hearing pendente lite, but after judgment, the parties have to agree to the appointment. Then the court can appoint the same person if the court so chooses. Subsection (f)(3) provides that the court may not appoint someone as parenting coordinator who does not agree to accept a fee not in excess of the one allowed in the fee schedule. Judge Eyler remarked that this provision retained the idea that even if the parties get their own coordinator, and it is a situation where the parents ask for the court's approval, the coordinator still has to meet the qualifications. The Vice Chair noted that if the parents do not seek court approval, they can choose whomever they wish.

Judge Sundt pointed out that under the Committee note after section (e), they could hire "John Doe." The Chair said that if the parents are not asking the court to take any action, they can contract with anyone they select. Judge Sundt commented that judges may need some education, although she expressed the view that the Rule is very clear. She was not sure if a judge who is

presented with a request for approval is going to ask if the person meets the qualifications. It may be that the Judicial Institute can help with this.

The Chair observed that a similar issue was discussed when the ADR Rules were drafted. The court cannot license parent coordinators; the legislature could provide for this. The only control that the court has when it is going to get involved. If the parties decide to hire their neighbor as parent coordinator, it cannot be prevented. The Vice Chair observed that the first and second sentences of section (e) could be in one sentence. The first sentence by itself does not sound as if it applies only when court approval is being sought. It simply states that the parties may employ a parenting coordinator. The next sentence provides that the parties can ask for court approval. It was not until she read the Committee note that she realized that the section was intended only to apply to the situation where the parties not only employ a parenting coordinator but also get court approval.

Master Mahasa inquired what the language "seek court approval" meant. The Chair responded that the parents are asking the court to enter a consent order that approves the agreement. Master Mahasa asked whether the parenting coordinator can be anyone if the parents do not seek the court's approval for one. The Chair replied affirmatively. Judge Eyler commented that the Vice Chair's point was that the language at the beginning of section (e), "in any action," implies that there may be court

involvement. She did not know that a language change in (e) that would state "[i]n any action and those in which the parties want court approval" would be helpful. The Vice Chair responded that the first sentence read all by itself implies that it applies to parenting coordinators who are hired outside of the court process without court involvement. Ms. Ogletree agreed.

The Vice Chair remarked that the Committee note states that section (e) applies only when court approval is being sought. Master Mahasa said that it was her understanding that if the court was involved, the parent coordinator had to meet the qualifications set out in the Rule. Ms. Ogletree responded that this was the case if the parents asked for court approval. Judge Weatherly added that if a custody case were pending, the parties can decide that they need a parenting coordinator. If they do not ask for the court to approve the choice, they can hire anyone they wish. However, there is still an order of custody in existence. Ms. Ogletree noted that the person chosen by the parties would not necessarily be blessed by the court. It would be a totally voluntary act of the parties. Judge Eyler added that the parties could use their local minister. Master Mahasa pointed out that the choice would not be enforceable in court. Section (e) may not be totally clear about this.

The Chair commented that the Style Subcommittee can redraft this section. The Reporter noted that the last time Rule 9-205.2 was discussed, the critical issues that needed to be resolved were the fees in excess of the fee schedule and the release of

confidential information that is not part of the case record. These two issues were addressed, and the rest of the contents of section (e) were moved around. Ms. Kratovil-Lavelle said that section (h) addresses confidential information. The Chair remarked that section (e) follows what the Committee had previously agreed on.

Master Mahasa asked whether the court could appoint another parenting coordinator if litigation were pending and the court did not feel that the chosen parent coordinator who was a family member was sufficient. Judge Eyler replied that the way this section is written, during the pendency of the litigation as long as there is notice and a hearing, the court can appoint another person. The court could do so for a number of reasons, including that the parties are still in conflict notwithstanding that they are using an outside parenting coordinator.

The Chair said that he was not sure how it works currently. The Rule does not address this one way or the other; it simply states that pendente lite the court can appoint on its own initiative even if the parties object to the appointment. He was not certain what a judge would do if the court asked for a parenting coordinator to be appointed immediately pendente lite and then appointed a certain psychologist. The parties respond by saying that they would accept the appointment of a parenting coordinator, but they do not want the one chosen by the judge. They would like another coordinator who is qualified. Would a judge refuse and tell the parties they have to use the

coordinator chosen by the judge?

Judge Sundt answered negatively, noting that the judge is looking for any point of agreement by the parties. Ms. Ogletree added that any of the parties could file a motion to have the appointment of the psychologist chosen by the judge stricken. The Chair observed that the court could force the parties to use a certain parenting coordinator, but it would be a big mistake to do so. Master Mahasa remarked that she thought that the court could not do this. The statute provides that the parties can choose their own person. Judge Sundt clarified that this is the case post-judgment only. The court could draw from the list of parenting coordinators pendente lite. The parties may have never heard of a parenting coordinator.

Judge Eyler explained that the parties could choose someone on the list and ask the judge to appoint that person. Judge Sundt said that if the parenting coordinator is qualified, he or she submits an application to be on the court list. Their qualifications have to be open to the public. The Vice Chair remarked that she understood that the parenting coordinator cannot voluntarily release confidential information. However if as the relationship with the parties develops, is it likely that one of the parents might disclose confidential information without understanding that that confidential information might be disclosed to the other parent? Judge Sundt answered that this is possible, although the parenting coordinators who are emerging through this process are generally health care professionals

themselves. They have a very strong sense of confidentiality issues, and the Rule helps guide them into realizing that although they do not have a confidential relationship with the clients, they have to be very careful. The Vice Chair expressed the view that the sentence reads the opposite. The parenting coordinator hears from one parent something that appears to be confidential, and the coordinator tells the other parent. Judge Sundt responded that the parenting coordinator may feel obligated to do this. Judge Eyler added that the order can spell out what is in the Rule.

The Vice Chair noted that subsection (h)(2)(B) provides that confidential or privileged information received by the parenting coordinator from a party or from a third person with the consent of the party may be disclosed by the coordinator to the other party. It does not have to be disclosed, but it may be. The consent only relates to the information received from the third party. There is no formal signed consent. Judge Sundt pointed out that the parenting coordinators will have their own contracts with people.

The Chair drew the Committee's attention to section (i), Removal or Resignation of Parenting Coordinator. The Committee had decided at the previous meeting to strike subsection (i)(1)(C). He drew the Committee's attention to section (j), Fees. This schedule applies if the court has appointed a parenting coordinator. Mr. Michael asked if each court is going to publish the schedule. The Chair replied that each circuit

court would publish it. Judge Sundt added that the county administrative judge would publish it. Judge Eyler said that the list has to be approved by the Chief Judge of the Court of Appeals. Judge Weatherly noted that this procedure is consistent with that of social workers and best interest attorneys. The Chair pointed out that the fees in Howard, Frederick, and Montgomery Counties may be higher than in other counties.

The Chair said that new Rule 9-205.2 and conforming amendments to Rules 16-204 and 17-101 would be sent to the Court of Appeals for its approval. He thanked the consultants who helped. Judges Sundt and Eyler thanked the Chair for his assistance in drafting the Rule. They expressed the opinion that the Rule has improved greatly. The Chair said that it was a collaborative effort. Once the Rule is in place, some minor changes may be necessary. Ms. Kratovil-Lavelle inquired if Rule 9-205.2 would go to the Style Subcommittee. The Vice Chair replied affirmatively. Ms. Kratovil-Lavelle asked if the Committee would look at the Rule again. The Vice Chair answered that unless the Style Subcommittee found some substantive problems with Rule 9-205.2, it would not go back to the Committee.

Agenda Item 4. Continued consideration of proposed new Title 12, Chapter 700 - Dormant Mineral Interests - New Rule 12-701 (Definitions), New Rule 12-702 (Trust for Unknown or Missing Owner of Severed Mineral Interests), and New Rule 12-703 (Termination of Dormant Mineral Interest)

Ms. Ogletree presented Rules 12-701, Definitions; 12-702,

Trust for Unknown or Missing Owner of Severed Mineral Interest; and 12-703, Termination of Dormant Mineral Interest, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 12 - PROPERTY ACTIONS

CHAPTER 700 - SEVERED MINERAL INTERESTS

ADD new Rule 12-701, as follows:

Rule 12-701. DEFINITIONS

In this Chapter, the terms "mineral," "mineral interest," "severed mineral interest," "surface estate," "surface owner," and "unknown or missing owner" have the meanings set forth in Code, Environment Article, §15-1201. A "dormant mineral interest" is a mineral interest that satisfies the criteria set forth in Code, Environment Article, §15-1203 (a)(2).

Source: This Rule is new.

Rule 12-701 was accompanied by the following Reporter's Note.

Chapter 269, Laws of 2010 (HB 320) authorizes the owner of surface real property subject to a mineral interest such as oil, metallic ores, or coal, to file an action to terminate a dormant mineral interest or, if the owner of a severed mineral interest is unknown or missing, to have the mineral interest placed in trust. If the unknown or missing owner cannot be ascertained or located, the trustee later petitions for termination of the trust. Because these procedures involve property, the Rules administering the statute have been placed in Title 12.

Proposed new Title 12, Chapter 700 is based on the statute and comprises three Rules:

• Rule 12-701, containing definitions;

• Rule 12-702, containing procedures to establish and administer a trust for unknown or missing persons with a legal interest in a severed mineral interest and to terminate that trust; and

• Rule 12-703, containing procedures to terminate a dormant mineral interest.

The statute provides that an action to terminate a dormant mineral interest requires the same notice as an action to quiet title set forth in Code, Real Property Article, §14-108, in rem notice. However, the statute does not provide a method for notice of an action to establish the trust or to terminate the trust. The recommendation is to provide for in rem notice, since (1) it is the method used in an action to terminate the dormant mineral interest, (2) the persons receiving notice generally are unknown or missing, and (3) Rule 10-602 provides for notice to persons with an interest in a fiduciary estate whose identity or whereabouts are unknown in the manner provided by Rule 2-122, which is in rem notice.

To address a Constitutional equal protection concern as to which the statute is silent, the Committee recommends the addition of the language, "and the severed mineral interest has become a dormant mineral interest," to Rule 12-702 (f)(2)(A) and (E). With the addition of this language, the known owner of a severed mineral interest and the unknown or missing owner of a severed mineral interest receive equal protection under the law; i.e., neither interest is subject to termination until the expiration of a 20-year period of dormancy. Without the additional language, the interest of an unknown or missing owner would be subject to termination after only five years of dormancy.

MARYLAND RULES OF PROCEDURE

TITLE 12 - PROPERTY ACTIONS

CHAPTER 700 - SEVERED MINERAL INTERESTS

ADD new Rule 12-702, as follows:

Rule 12-702. TRUST FOR UNKNOWN OR MISSING OWNER OF SEVERED MINERAL INTEREST

(a) Petition

(1) Generally

An owner in fee simple of a surface estate subject to a severed mineral interest that is vested, in whole or in part, in an unknown or missing owner may file a petition to place the mineral interest of the unknown or missing owner in trust. The petition shall be filed in the circuit court of any county in which the surface estate is located.

Cross reference: Code, Environment Article, §§15-1201 through 15-1206.

(2) Contents

The petition shall be captioned "In the Matter of ..." stating the location of the surface estate subject to the severed mineral interest. It shall be signed and verified by the petitioner and shall contain at least the following information:

(A) the petitioner's name, address, and telephone number;

(B) the reason for seeking the assumption of jurisdiction by the court and a statement of the relief sought;

(C) a legal description of the severed mineral interest;

(D) to the extent known, the name,

address, telephone number, and nature of the interest of all persons with a legal interest in the severed mineral interest, including any unknown or missing owners, and their heirs, successors, or assignees;

(E) an affidavit of the petitioner filed pursuant to Rule 1-305 describing the attempts to identify and locate each unknown or missing owner who is the subject of the petition;

(F) the nature of the interest of the petitioner;

(G) the nature, value, and location of the surface estate subject to the severed mineral interest; and

(H) an affidavit of the petitioner, affirming fee simple ownership of the surface estate and including a reference to each recorded document establishing such ownership.

(b) Notice

The proceeding shall be deemed in rem or quasi in rem. Notice to all persons with a legal interest in the severed mineral interest named in the petition shall be given pursuant to Rule 2-122.

(c) Hearing

The court shall hold a hearing on the petition.

(d) Order Creating Trust

(1) If the court finds that the title to a severed mineral interest is vested, in whole or in part, in an unknown or missing owner, the court may enter an order:

(A) placing the severed mineral interest of the unknown or missing owner in trust;

(B) appointing a trustee for the unknown or missing owner;

(C) if it is likely that any revenue will accrue to the benefit of the unknown or missing owner, directing the trustee to create a separate trust bank account to manage all trust assets; and

(D) authorizing the trustee to **[sell, execute, and deliver a valid lease on the minerals] [lease the mineral interest]** to the owner of the surface estate, subject to any conditions the court deems appropriate.

(2) The court shall provide for notice of the order to be served on persons with a legal interest in the severed mineral interest in accordance with Rule 2-122.

(e) Administration of Trust

A trust created under this section shall be administered pursuant to Rules 10-702 to 10-712.

(f) Termination of Trust

(1) Petition by Unknown or Missing Owner

(A) Generally

An unknown or missing owner whose interest in a severed mineral interest has been placed in trust, at any time prior to the filing of a petition under subsection (f)(2) or (f)(3) of this Rule, may file a petition to terminate the trust and convey the interest to the petitioner. The petition shall be signed and verified by the petitioner, filed in the court that created the trust, and name as respondents the trustee and each surface owner.

(B) Contents

The petition shall be captioned "In the Matter of ..." and shall state:

(i) the petitioner's name, address, e-mail address, if any, and telephone number;

(ii) the name, address, e-mail address, if any, and telephone number of the

trustee and each surface owner;

(iii) the nature and extent of the petitioner's legal interest in the severed mineral interest in trust and include a reference to each recorded document establishing that interest and be accompanied by any unrecorded document establishing that interest; and

(iv) whether, the petitioner has recorded or intends to record a notice of intent to preserve the mineral interest in accordance with Code, Environment Article, §15-1204.

(C) Service

The petition shall be served on the trustee and each surface owner.

(D) Response

The trustee and each surface owner shall file a response to the petition within the time prescribed by Rule 2-321.

(E) Hearing

Unless waived in writing by all parties, the court shall hold a hearing on the petition.

(F) Order

If the court finds that the petitioner is the unknown or missing owner whose severed mineral interest was placed in the trust, that the petition is timely and in compliance with this Rule, and that the trust with respect to that mineral interest should be terminated, it shall enter an order (i) terminating the trust as to that mineral interest, (ii) directing the trustee to file a final accounting, convey the mineral interest to the petitioner, and distribute all proceeds in accordance with the accounting, as approved by the court, and (iii) assessing costs as it deems just under the circumstances.

(2) Petition by Trustee

(A) Generally

If (i) the unknown or missing owner of a vested severed mineral interest to whom notice of the petition or order was given does not contest or move to terminate a trust created under section (d) of this Rule on or before five years after the date that the court issued the order creating the trust, **and (ii) the severed mineral interest has become a dormant mineral interest,** the trustee shall file a petition to terminate the trust and to convey to the surface owner title to the severed mineral interest. The petition shall name as respondents each surface owner and each person with a legal interest in the severed mineral interest, including any unknown or missing owners.

(B) Contents

The petition shall be captioned "In the Matter of ..." stating the location of the surface estate subject to the severed mineral interest. It shall be signed and verified by the petitioner and shall contain at least the following information:

(i) a legal description of the severed mineral interest;

(ii) a description of the putative property interests of each party;

(iii) the last known address of each party;

(iv) an affidavit signed by each surface owner, affirming fee simple ownership of the surface estate and requesting the court to convey title to the severed mineral interest at issue; and

(v) an affidavit signed by the petitioner, affirming that after conducting a diligent inquiry, including a search in each county where the severed mineral interest is located, performed in accordance with generally accepted standards of title

examination of the land records of the county, the records of the register of wills of the county, and the records of the circuit court for the county, the trustee cannot locate the unknown or missing owner.

(C) Notice

Notice to all respondents shall be given pursuant to Rule 2-122.

(D) Hearing

The court shall hold a hearing on the petition.

(E) Order Terminating Trust

The court shall enter an order requiring the trustee to convey the unknown or missing owner's mineral interest to the named surface owner if (i) the unknown or missing owner does not appear to contest the petition, and (ii) the court finds that the person named in the petition as surface owner is in fact the fee simple owner of the surface estate **and that the severed mineral interest has become a dormant mineral interest.** After receiving the final report of the trustee as required by Code, Environment Article, §15-1206, the court shall enter an order (a) terminating the trust as to that mineral interest, (b) directing the trustee to file a final accounting, convey the mineral interest to the petitioner, and distribute all proceeds in accordance with the accounting, as approved by the court, and (c) assessing costs as it deems just under the circumstances.

(3) Petition by Surface Owner or Other Interested Person

If the trustee does not file the petition within the time prescribed in subsection (f)(2) of this Rule, the surface owner or any person with a legal or beneficial interest in the severed mineral interest placed in trust may file a petition to direct the trustee to comply with

subsection (f)(2) of this Rule or to appoint a substitute trustee to do so. The petition shall be served on the trustee in accordance with the provisions of Rule 2-121 and further proceedings shall be in accordance with subsection (f)(2) of this Rule.

Cross reference: For duties of the trustee, see Code, Environment Article, §15-1206.

Source: This Rule is new.

Rule 12-702 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 12-701.

MARYLAND RULES OF PROCEDURE

TITLE 12 - PROPERTY ACTIONS

CHAPTER 700 - SEVERED MINERAL INTERESTS

ADD new Rule 12-703, as follows:

Rule 12-703. TERMINATION OF DORMANT MINERAL INTEREST

(a) Petition

(1) Generally

At any time after October 1, 2011, a surface owner of real property that is subject to a severed mineral interest may maintain an action to terminate a dormant mineral interest by filing a petition in the circuit court of any county in which the real property is located, but if a trust created under Rule 12-702 is in existence, then in the county where the trust was created.

(2) Contents

The petition shall be captioned "In the Matter of ..." stating the location of the surface estate or estates subject to the mineral interest. It shall be signed and verified by the petitioner and shall contain at least the following information:

(A) the petitioner's name, address, and telephone number;

(B) the reason for seeking the assumption of jurisdiction by the court and a statement of the relief sought;

(C) a legal description of the severed mineral interest;

(D) the name, address, telephone number, and nature of the interest of all interested persons;

(E) the nature of the interest of the petitioner;

(F) the nature, value, and location of the surface estate or estates subject to a severed mineral interest; and

(G) an affidavit signed by each surface owner affirming fee simple ownership of the surface estate, including a reference to each recorded document establishing such ownership.

Cross reference: See Code, Environment Article, §§15-1203 through 15-1205.

(b) Service - Notice

(1) Service

The petitioner shall serve notice in accordance with Rule 2-121 on each interested person and each person who has previously recorded a notice of intent to preserve the mineral interest or a part of a mineral interest pursuant to Code, Environment Article, §15-1204.

Cross reference: See Code, Environment Article, §15-1203 (c) for actions constituting use of an entire mineral interest.

(2) Notice

If an owner of the severed mineral interest is unknown or missing, the proceeding shall be deemed in rem or quasi in rem as to that owner, and notice to that owner shall be given pursuant to Rule 2-122.

(c) Late Notice of Intent to Preserve Interest

Unless the mineral interest has been unused for a period of 40 years or more proceeding the commencement of the action, the court shall permit the owner of the mineral interest to record a late notice of intent to preserve the mineral interest and dismiss the action, provided that the owner of the mineral interest pays the litigation expenses incurred by the surface owner of the real property that is subject to the mineral interest.

(d) Hearing

The court, in its discretion, may hold a hearing on the petition.

(e) Order

The court shall enter an order granting or denying the petition.

Cross reference: See Code, Environment Article, §15-1203 (d)(2) for the effects of an order terminating a mineral interest.

Source: This Rule is new.

Rule 12-703 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 12-701.

Ms. Ogletree told the Committee that the last time new Title 12, Chapter 700 was before the Committee, the Committee was struggling with an issue that has still not been resolved, equal protection. The statute, Code, Environment Article, §§15-1201 et. seq., provides that if there is a mineral interest that is not being used, the public policy would be to encourage its use. If the owner of the interest is known and the interest has been dormant for 20 years, what is used is essentially an action to quiet title and foreclose the right of the person to come back in and use the mineral interest. As with reverters, there is a policy that allows the person who is the owner to file an intention to keep the interest alive and it stays alive.

Ms. Ogletree said that the second issue is where an owner of the property or of a fractional interest in the mineral interest is not known. The statute provides that someone can petition to place the mineral interest in a trust, administered by a trustee for a period of five years, making arrangements to lease it or collect the profits from it. If this is done, a separate bank account can be set up. At the end of that time, the trustee is supposed to petition to terminate the trust. The Chair clarified that the trustee must petition for termination. Ms. Ogletree noted that if the trustee does not petition for termination, the statute has no provision for any consequence. The Property Subcommittee tried to provide for this. The purpose of the law and Rules is to make the mineral interests transferable and usable as quickly as possible.

At the last meeting, the issue was raised about treating unknown and known mineral interest holders the same way to comply with equal protection under the law. The Attorney General expressed the view that there is a rational basis for not treating them the same. The Subcommittee has decided that it is not necessary for the Rule to provide that it has to be a severed mineral interest and that it has to be in trust for 20 years or the longer of those time periods, the 20-year period or the five-year period, to terminate the trust. Since the Attorney General does not agree, the Subcommittee would like to flag this issue for the Court of Appeals.

Ms. Ogletree said that in Rule 12-701, the statutory definitions are incorporated. Code, Environment Article, §15-1202, has a scope provision that refers to mineral interests that are not applicable. Examples would be an interest held by Native Americans or some governmental interests. The Rules do not include these, so it may be a good idea to explain this in a Committee note. The exclusion in Code, Environmental Article, §15-1202 should be referred to. The Chair remarked that there is a simpler way to address this. A severed mineral interest is a separate fee simple estate. It should be assessed and taxed separately. If it were, and the person did not pay the taxes on it, a tax sale would occur. The Chair said that he had called the State Supervisor of Assessments and asked him whether they tax these interests. The answer was that they are not taxed. The Chair inquired why the interests are not taxed. The reply

was they do not have the expertise to value the mineral interest. The Rules would not be necessary if the State would tax the interests.

The Vice Chair commented that Ms. Ogletree's point seemed to be that the exclusions in Code, Environment Article, §15-1202 are really a scope provision. Ms. Ogletree noted that Rule 12-701 states that the mineral interests have the meanings set forth in the statute. However, certain interests are excluded. The Vice Chair suggested that there could be a separate Rule entitled "Scope" that would provide what the Rule does not apply to. Ms. Ogletree responded that this would make the exclusions very clear. The Reporter asked if there would be a new Rule 12-702, and the Vice Chair replied affirmatively.

Ms. Ogletree presented what has been changed in Rule 12-703, formerly numbered Rule 12-702. This pertains to the trust for unknown or missing owners. The statute sets out the requirement that the fee simple owner has to file a petition to place the mineral interest in trust. The petition shall be filed in the circuit court of any county in which any part of the surface estate is located. They may run from county to county. The contents of the petition in subsection (a)(3) basically recite the statutory requirements that are in Code, Environment Article, §15-1206 (c), which states what is required to be in the petition. The only change was a reference to a new Rule that had been suggested, Rule 1-305, Affidavits of Efforts to Locate. The Assistant Reporter noted that the Rule had not been adopted.

Ms. Ogletree noted that the reference to "Rule 1-305" in subsection (a)(2)(E) would have to be taken out and replaced with the usual language regarding efforts to locate a person. What is necessary to be done remains the same, but the petitioner has to figure out his or her own form to list the efforts to locate someone.

The Reporter questioned if more details should be added, or if this provision could read, "an affidavit of the petitioner describing the attempts to identify and locate each unknown or missing owner." Ms. Ogletree responded that this is the general rule whenever attempts to locate someone are required to be shown. It is the same procedure as in Rule 2-122, Process – Service – In Rem or Quasi in Rem. This is an in rem action, so in rem service is used. This currently requires: (1) mailing if the person's whereabouts are known, (2) posting at the courthouse door, and (3) posting of the property, which Ms. Ogletree assumed would be posting the surface estate because of the difficulty in posting mineral interests below the surface. Code, Environment Article, §15-1206 requires a hearing to determine whether the trust was created. Section (d) provides that the court may enter an order placing the mineral interest of the unknown or missing owner in trust. The statute lists what the order has to contain.

The Vice Chair asked what would happen if no one appears. Ms. Ogletree responded that conditions could be placed on what the surface owner has asked for. It could be paying royalties or other actions that the court feels are appropriate for the

unknown owners. The statute provides that the court may place conditions on the authority of the trustee to sell, execute, and deliver a valid lease on the minerals to the surface owner. The surface owner intends to exploit the minerals that are on the property. This is the statutory attempt to protect the unknown owners. The wording of Code, Environment Article, §15-1206 (a)(4) is somewhat unusual in using the language referring to the selling of a lease. Should subsection (d)(1)(D) of Rule 12-702 track the wording of the statute, or should it use the language "lease the mineral interest"? The wording of the statute is "...authorize the trustee to sell, execute, and deliver a valid lease on the minerals....". The Chair said that he had looked at similar trust provisions in several other states, and all of them are written better than the Maryland statute.

Mr. Howard asked about the conversation with the supervisor of the State Department of Assessments and Taxation. The Chair reiterated that he had been told that the mineral interests are not assessed. Mr. Howard asked about the mineral interests that are being developed. The Chair responded that the supervisor had stated that one Western county has a tax on the amount that is extracted. Ms. Ogletree noted that there is a tax on the extraction of sand in Caroline County. The Chair pointed out that this is not the value of the land. Mr. Howard remarked that unless the land is being developed, no one would know what is under the surface of the land. Ms. Ogletree added that engineers would have to drill the land.

The Chair said that the State has made its budget decision, but if any of the land has substantial minerals under it, the State and the counties are losing tax revenue. Mr. Howard commented that up until now he had not considered this situation, but given the tight State budget, someone should assess the mineral estates. Ms. Ogletree noted that the estates can be valued. The sand mines on the Eastern Shore are valued based on the amount of reserve that is in the ground. There is a value per ton on the reserve. The second part of the evaluation is whether one can get the permits to exploit that area, because this is not always possible. The Chair pointed out that the Marcellus Shale is in Western Maryland, and there may be other minerals such as oil and gas under the ground.

Mr. Sykes inquired as to the wording of subsection (d)(1)(D). The Vice Chair said that she preferred the language "lease the mineral interest." Ms. Ogletree agreed that this describes what the trustee does. By consensus, the Committee agreed to use this language.

Ms. Ogletree said that section (e) requires that the trust be administered under Rules 10-702 to 10-712, pertaining to fiduciary estates, which provide guidelines as to how to administer the trust. Section (f) governs termination of the trust. Subsection (f)(1)(A) provides that if the owner appears, he or she can petition to terminate it. Subsection (f)(1)(B) addresses the contents, which are essentially the same contents as for establishing the trust, including whether or not the

person intends to record a notice of intent to preserve the interest. Subsection (f)(1)(C) provides that the petition is served on the trustee and each surface owner, so that the people who are involved in the trust have notice of it. The statute is silent with respect to this, so this language was added by the Committee. Subsection (f)(1)(D) states that the trustee and surface owner are required to file a response within the time prescribed by Rule 2-321, Time for Filing Answer.

The Vice Chair said the answer rule rather than a motions rule is incorporated. In the answer rule, the time for filing one's answer runs from the day someone delivers the papers to the person or the person is served, and no extra three days for service by mail is added. Is this the intent? Ms. Ogletree replied affirmatively.

The Vice Chair inquired how service is to be effected. Ms. Ogletree answered that this is service on an unknown owner who has suddenly appeared, and people who asked for the trust to be created are being served. This is the surface owner whose identity is known and the trustee who is in charge of whatever funds have been collected in the meantime. What if there are a number of other unknown owners in existence? The Chair noted that the identity of co-owners may be known.

The Vice Chair asked whether the language in subsection (f)(1)(C), "The petition shall be served on the trustee and each surface owner" means that the petition can be mailed with a certificate of service. Ms. Ogletree answered affirmatively,

noting that a case already exists. The Vice Chair inquired if this should be stated in the Rule. The language "shall be served" may not be sufficient. It may be better to refer to a rule or service by first class mail. Ms. Ogletree said that she had no objection to referring to a specific rule.

The Chair pointed out that the petition is to terminate the trust. If co-owners are known, should they be served? Ms. Ogletree answered that they should be served, because they may not want the trust to be terminated. The Chair remarked that they may not have much to say, because only the interest of the unknown owners is being terminated. There may be interested parties in the case. It may be useful to add this to the petition to create the trust as well. Ms. Ogletree responded that in the petition to create the trust, it is necessary to state who the interested persons are. Service is by publication, so it is not exactly the same principle. Since the identity and whereabouts of the people are known, service is by publication. The service in Rule 2-121, Process – Service – In Personam requires in personam service or if the people to be served are not able to be found, in rem service.

Ms. Ogletree said that the petition to terminate is by a subsurface owner who suddenly appears. A trust is already in existence. It was established by in rem publication. Now the person who got notice by publication is asking to terminate the trust. The person would like to file a notice to record his or her interest and go forward. This individual has to notify the

person who asked that the trust be established, the surface owner, and the trustee. The Vice Chair noted that subsection (f)(1)(C) provides for this. This should be able to be done by first class mail. Ms. Ogletree agreed, adding that it can be done this way because there is an existing case that allows it, *Griffin v. Bierman*, 403 Md. 186 (2008).

Ms. Ogletree said that subsection (f)(1)(E) provides that a hearing is required unless the parties decide that one is not needed. For instance, the subsurface owner may agree that he or she wants to sell and has no problem with waiving a hearing. Subsection (f)(1)(F) has the requirements for the content of the order. It terminates the trust and directs the trustee to file a final accounting and convey the mineral interest to the petitioner, and then distribute the proceeds. Subsection (f)(2)(A) provides that the trustee terminates the mineral interest when the trustee is required by statute to do so. The bolded language in that provision is going to be deleted, because of the equal protection argument. The Chair pointed out that the "(i)" in the first line has to be deleted as well.

Ms. Ogletree noted that subsection (f)(2)(A) recites what the petition has to contain and states that it has to be served on the surface owner and any person with a legal interest in the mineral interest. In subsection (f)(2)(E), Order Terminating Trust, part (i) and the bolded language would be stricken. If there is going to be a court order terminating the trust by the trustee, the trust is filed in only one county, the county where

any part of the property is located. Some language should be added that requires a copy of the order or the conveyance to be filed in any county where the property is located. Otherwise, proper notice would not be given.

The Chair asked if this should be done at the beginning of the process as well. Ms. Ogletree responded that the petition does not have to be filed in those counties, but any conveyance of the property should be recorded in any county where the property is located. The Chair asked whether the creation of the trust effectively conveys the title to the trustee. Ms. Ogletree replied affirmatively, but she pointed out that the trustees under this Rule have a duty to convey. If the trust is only in County A, and the property is in Counties A, B, and C, it should be recorded in all three counties.

Judge Pierson said that the trustee is going to have to file the deed. The order is not self-executing. Ms. Ogletree agreed that the trustee should have to file the deed, but she wanted to make sure that it is filed not only in the county where the trust is being administered, but wherever the mineral interest is located. The Vice Chair questioned where this language would go. Ms. Ogletree responded that it could go at the end of subsection (f)(2)(D). The Vice Chair said that she did not disagree with Ms. Ogletree, but she asked whether this is within the scope of what the court should be telling someone to do as opposed to knowing where to file it to perfect title. It may not belong in the Rule. Ms. Ogletree said that she searched title, so she

wanted to be sure that no traps exist for anyone buying or selling.

The Chair inquired how this is done in Rule 12-401, Partition or Sale in Lieu of Partition. Ms. Ogletree answered that ordinarily, the deed would be recorded in both of the places that the purchaser records. This is probably what the procedure would be in Rule 12-703. The Vice Chair inquired about a large tract of land, the boundaries of which go over the boundary line of a county. The holder of the mineral interest can only own what is under that piece of property. Judge Pierson noted that there would be probably be two deeds. The Vice Chair questioned whether it would be one deed filed in both places. Ms. Ogletree remarked that this is usually done as counterpart deeds to avoid paying separate taxes. The Chair asked how the deed could be recorded in two places if the clerk keeps the deed. Ms. Ogletree answered that this is done seriatum. With instant recording, it is often done in Caroline and Queen Anne's Counties, because of farm lands that straddle the county lines. The problem is apportioning the purchase price, since it is apportioned depending on how many acres and in what county it is located. She was not sure how this would be done with an unknown mineral interest.

The Reporter pointed out that subsection (a)(1) of Rule 12-702 states: "The petition shall be filed in the circuit court of any county in which the surface estate is located." She inquired how the other county gets notice of this. Ms. Ogletree replied

that someone in another county may not know about it, except that one county would give the owner the deed, and if the deed goes across two counties, there will be two sets of numbers. The Reporter remarked that there could be two trusts. Ms. Ogletree responded that there is only one trust. Historically, throughout the Eastern Shore, trusts of property that extends into another county are set up in one county. The Chair said that there is a court order creating the trust that would be recorded in Queen Anne's County. Would the recording of that trust in Queen Anne's County give constructive notice or a lis pendens in Caroline County? Ms. Ogletree said that this would have to be done by using Rule 12-102, Lis Pendens. She assumed that any surface owner who knows that the property is in more than one county is going to follow that Rule, but it is not referred to in Rule 12-702.

Mr. Howard asked about Ms. Ogletree's statement concerning property straddling two counties. Ms. Ogletree answered that this is currently the procedure with real property. If a farm is located in Caroline and Dorchester Counties, either duplicate copies of the deed are recorded, or someone brings the deed to both counties. This is easier now that items are instantly recorded. The former procedure was that the person recording had to wait until the document was sent back from the first county, which is why people used a counterpart.

The Reporter pointed out that subsection (f)(2)(E) requires the court to enter an order directing the trustee to file a final

accounting, convey the mineral interest to the petitioner, and distribute all proceeds. Should there be a Committee note indicating that the conveyance also refers to the deed? Ms. Ogletree replied that a Committee note could be added stating that where the property is in more than one county, it is important to record the deed in both places. The Vice Chair commented that it may be the petitioner who records the deed.

Ms. Ogletree clarified that the person recording is the one who buys the property; most likely the surface owner who will want to be sure that his or her title to the property is good. The Chair noted that the statute requires that when the trust is terminated, the property be sold to the surface owner. This leaves out the ability of any co-owner to buy it. He asked how this procedure is going to work or who is going to ever get a title policy on the property. Hypothetically, there are two owners, A and B, and B is unknown, but A is known. Ms. Ogletree observed that they have fractional interests. The Chair said that they could be tenants by the entirety or tenants in common. B's trust is terminated. Ms. Ogletree noted that the trust is terminated as to the whole property.

The Chair questioned how a known owner's interest can be put in trust. The statute is vague on this issue. It refers to the property, but the trust is only for unknown or missing owners. Ms. Ogletree remarked that the owners may only have a 1% or 10% interest in mineral rights. In that case, the trust would be just for that interest. The Chair agreed, pointing out that

someone else's interest cannot be put in trust. The hypothetical Person A is known and has 50% interest; B is unknown and has 50% interest. The trust will be created for B's interest. If the trust is terminated, the rights have to be sold to the surface owner who becomes a tenant in common with A.

Ms. Ogletree noted that the surface owner can partition the property. The Chair said in the hypothetical situation, the surface owner does not want the mineral rights, but he or she must get it under the statute. Mr. Howard commented that the surface owner could sell the mineral rights. The Reporter remarked that the surface owner began the proceedings by filing the original petition. Ms. Ogletree observed that the surface owner thought that he was getting the entire mineral interest. She pointed out that this problem cannot be fixed by rule. If the mineral rights were sold before 1970, there are genealogical problems to address. There could be hundreds of fractional owners.

The Chair inquired what would happen if the owner is a corporation that is now defunct. Ms. Ogletree responded that it would be necessary to find the last directors of that corporation. Mr. Howard remarked that this statutory procedure sounds unworkable. Ms. Ogletree added that someone who has never done title work would not have recognized the problems. The Chair said that notwithstanding the question about ownership for five years and for 20 years, it is likely that the mineral rights in the trust will be dormant anyway. If someone is missing for

20 years, it would be very difficult to locate him or her. Ms. Ogletree pointed out that after 20 years, the ownership could become adverse possession. The Chair responded that the problem is that the possession is not adverse. This is why a statute was needed. The surface owner's interest is not adverse to the mineral interest. Ms. Ogletree noted that it could be adverse. The Chair acknowledged that it could be, but it is not necessarily the case. The owner may be a farmer who is not doing anything adverse.

Ms. Ogletree pointed out that subsection (f)(3) provides that if the trustee does not file the petition properly or at all, the surface owner is given the same rights and ability to appoint a substitute trustee to terminate the trust, which is ordinarily how problems are solved when trustees do not do what they are supposed to do. The Vice Chair noted that someone unfamiliar with this subject may not be able to tell from the Rule what a "dormant mineral interest" is. Ms. Ogletree responded that it is defined in the statute.

The Chair stated that Title 12, Chapter 700 would be reconsidered by the Committee at the next meeting.

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