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 April 15, 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.
Hon. Joseph H. H. Kaplan
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Zakia Mahasa, 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
Hon. Julia B. Weatherly
Hon. Robert A. Zarnoch

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Kara M. Kiminsky, Esq., Assistant Reporter
Ronald Wineholt, Esq.
Cheryl Hystad, Esq., Legal Aid Bureau, Inc.
D. Robert Enten, Esq.
Steve Lash, The Daily Record
Jeffrey B. Fisher, Esq.
Bruce Bereano
Jack Andryszak, Esq.
P. Tyson Bennett, Esq., Chair, Rules of Practice Committee, MSBA
Debra Gardner, Esq., Public Justice Center
Robert Zarbin, Esq., Maryland Association for Justice

The Chair convened the meeting. He announced that the Vice Chair had been selected as one of Maryland's top 100 women for 2011. The awards event will be held on May 9, 2011 from 5:00 p.m. to 8:30 p.m. at the Meyerhoff Symphony Hall. The Chair and

the Committee congratulated the Vice Chair. The Chair stated that the May meeting of the Committee will be held on May 20, 2011 not May 13, 2011 as originally scheduled.

The Chair announced that Judge Kaplan and Mr. Sykes were honored on March 16, 2011 by the Baltimore City Bar Association as among 10 living legends.

Agenda Item 1. Consideration of proposed Rules changes pertaining to garnishments: New Rule 2-645.1 (Garnishment of Account in Financial Institution), New Rule 3-645.1 (Garnishment of Account in Financial Institution), and Amendments to: Rule 2-645 (Garnishment of Property – Generally) and Rule 3-645 (Garnishment of Property – Generally)

The Chair presented new Rules 2-645.1 and 3-645.1, Garnishment of Account in Financial Institution, and conforming amendments to Rules 2-645 and 3-645 (Garnishment of Property - Generally) for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 600 - JUDGMENT

ADD new Rule 2-645.1, as follows:

Rule 2-645.1. GARNISHMENT OF ACCOUNT IN FINANCIAL INSTITUTION

(a) Definitions

The definitions in 31 C.F.R. §212.3 apply to terms used in this Rule.

(b) Scope

This Rule applies to the garnishment

of an account when the garnishee is a financial institution and the judgment debtor is a natural person.

(c) Application of Rule 2-645

Rule 2-645 applies to a garnishment subject to this Rule, except that this Rule prevails over Rule 2-645 to the extent of any inconsistency and the requirements, prohibitions, or limitations not contained in Rule 2-645 also apply.

Committee note: Federal regulations found in 31 C.F.R. Part 212 contain requirements, prohibitions, and limitations applicable to the garnishment of accounts of a judgment debtor in a financial institution which prevail over any inconsistent State law. Relevant terms are defined in 31 C.F.R. §212.3 including "account," "account review," "financial institution," and "protected amount." This Rule is intended to comply with the Federal requirements.

(d) Content of Writ

(1) Directions to Financial Institution

A writ of garnishment subject to this Rule shall direct the financial institution:

(A) not to hold property of the judgment debtor that constitutes a protected amount;

(B) not to hold property of the judgment debtor that may come into the garnishee's possession following service of the writ if the account contains a protected amount; and

(C) to comply with other applicable requirements, prohibitions, and limitations contained in 31 C.F.R. Part 212.

(2) Notification to Judgment Debtor

A writ of garnishment subject to this Rule shall notify the judgment debtor

that:

(A) some Federal benefit payments may be automatically protected from garnishment and will not be held in response to the writ of garnishment; and

(B) any claim for exemption for a non-protected amount must be filed with the court no later than 30 days after service of the writ of garnishment on the garnishee.

(e) Answer of Garnishee

(1) The answer of the garnishee shall state, if applicable, that a protected amount is in the judgment debtor's account but need not specify the amount.

Committee note: Subsection (e)(1) does not affect the requirement that the garnishee hold, subject to further proceedings, a non-protected amount that is in the garnishee's possession on the date of the account review and specify that amount in its answer.

(2) If the answer of the garnishee states that the property held by the garnishee consists only of a protected amount, the garnishee shall include with the answer a request for a judgment in favor of the garnishee terminating the garnishment.

Source: This Rule is new.

Rule 2-645.1 was accompanied by the following Reporter's Note.

The Department of the Treasury and several benefits-paying agencies announced new federal regulations regarding garnishments that will take effect on May 1, 2011 and be codified at 31 C.F.R. §§212.1 to 212.12. The federal regulations will apply only to financial institutions, which the federal regulations define as "state and federal banks and credit unions and any other entity chartered under federal or state law to engage in the business of banking."

The federal regulations restrict a creditor's ability to garnish accounts that contain certain specified federal benefit payments. The regulations require a financial institution that receives a garnishment order pertaining to a judgment debtor who is an individual to review all accounts held by that individual and determine whether any federal benefit payments were electronically deposited into the account during the preceding two months. The federal regulations protect these benefit payments and preclude the financial institution from freezing them. If the account contains such benefit payments, the financial institution must calculate the "protected amount" and send the account holder notice of the protections from garnishment. There is a model notice contained in the appendix to the federal regulations for this purpose, which financial institutions may use.

The federal regulations preempt any State law that would prevent a financial institution from complying with the federal regulations. New Rule 2-645.1 is proposed to ensure compliance with the new federal regulations. Because the federal regulations apply only in limited circumstances, existing Rule 2-645 remains applicable to situations that do not involve financial institutions or federal benefit payments, or are otherwise not covered by the federal regulations.

Section (a) of proposed new Rule 2-645.1 incorporates the definitions contained in the federal regulations into the Rule. These definitions were incorporated because several terms used throughout the Rule, such as "account review," "benefit payment," "financial institution," and "protected amount," are intended to have the specific meanings set forth by the federal regulations.

Section (b) provides that the Rule is applicable to the garnishment of an individual's account in a financial institution.

Section (c) is added to comply with the federal regulations and to address Supremacy Clause issues by making clear that, if there are inconsistencies between Rule 2-645.1 and Rule 2-645, Rule 2-645.1 prevails.

Section (d) outlines required contents of the writ that are in addition to the requirements listed in Rule 2-645 and prevail over certain requirements in that Rule. Subsection (d)(1) directs the financial institution to comply with the requirements, prohibitions, and limitations of the federal regulations. The subsection highlights the requirement that the garnishee not hold certain property that it otherwise would be required to hold under Maryland law. Subsection (d)(2)(A) is added to ensure that the judgment debtor, in accordance with the federal regulations, is notified that some federal benefit payments may be protected. Subsection (d)(2)(B) is added to ensure that the judgment debtor is aware that redress in the courts must be sought in order to claim exemptions that are not part of the "protected amount."

Subsection (e)(1) is added to comply with the federal regulations, and subsection (e)(2) is added to address situations in which an account may consist only of funds that qualify as a "protected amount." Subsection (e)(2) is intended to provide a prompt resolution in such situations by requiring the garnishee, at the same time that it files its answer, to request an order for judgment in favor of the garnishee terminating the writ of garnishment.

Proposed new Rule 3-645.1 is applicable to garnishments in the District Court. It tracks the provisions of Rule 2-645.1.

Amendments to Rules 2-645 and 3-645 make those Rules subject to the provisions of Rule 2-645.1 and 3-645.1, respectively.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 600 - JUDGMENT

ADD new Rule 3-645.1, as follows:

Rule 3-645.1. GARNISHMENT OF ACCOUNT IN FINANCIAL INSTITUTION

(a) Definitions

The definitions in 31 C.F.R. §212.3 apply to terms used in this Rule.

(b) Scope

This Rule applies to a garnishment where the garnishee is a financial institution and the judgment debtor is a natural person.

(c) Application of Rule 3-645

The provisions of Rule 3-645 apply to a garnishment subject to this Rule, except that, to the extent this Rule contains requirements, prohibitions, or limitations not found in Rule 3-645 or is otherwise inconsistent with Rule 3-645, the provisions of this Rule prevail.

Committee note: Federal regulations found in 31 C.F.R. Part 212 contain requirements, prohibitions, and limitations applicable to the garnishment of accounts of a judgment debtor in a financial institution which prevail over any inconsistent State law. Relevant terms are defined in 31 C.F.R. §212.3 including “account,” “account review,” “financial institution,” and “protected amount.” This Rule is intended to comply with the Federal requirements.

(d) Content of Writ

A writ of garnishment subject to this

Rule shall:

(1) direct the financial institution:

(A) not to hold property of the judgment debtor that constitutes a protected amount;

(B) not to hold property of the judgment debtor that may come into the garnishee's possession following service of the writ if the account contains a protected amount; and

(C) to comply with other applicable requirements, prohibitions, and limitations of 31 C.F.R. Part 212; and

(2) notify the judgment debtor that:

(A) some Federal benefit payments may be automatically protected from garnishment and will not be held in response to the writ of garnishment; and

(B) any claim for exemption for a non-protected amount must be filed with the court no later than 30 days after service of the writ of garnishment on the garnishee.

(e) Answer of Garnishee

(1) The answer of the garnishee shall state, when applicable, that a protected amount is in the judgment debtor's account but need not specify the amount.

Committee note: Subsection (e)(1) does not affect the requirement that the garnishee hold, subject to further proceedings, a non-protected amount that is in the garnishee's possession on the date of the account review and specify that amount in its answer.

(2) If the answer of the garnishee states that the property held by the garnishee consists only of a protected amount, the garnishee shall include with the answer a request for a judgment in favor of the garnishee terminating the garnishment.

Source: This Rule is new.

Rule 3-645.1 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 2-645.1.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 600 - JUDGMENT

AMEND Rule 2-645 to make the Rule subject to the provisions of Rule 2-645.1, as follows:

Rule 2-645. GARNISHMENT OF PROPERTY - GENERALLY

(a) Availability

Subject to the provisions of Rule 2-645.1, ~~This~~ this Rule governs garnishment of any property of the judgment debtor, other than wages subject to Rule 2-646 and a partnership interest subject to a charging order, in the hands of a third person for the purpose of satisfying a money judgment. Property includes any debt owed to the judgment debtor, whether immediately payable or unmatured.

(b) Issuance of Writ

The judgment creditor may obtain issuance of a writ of garnishment by filing in the same action in which the judgment was entered a request that contains (1) the caption of the action, (2) the amount owed under the judgment, (3) the name and last

known address of each judgment debtor with respect to whom a writ is requested, and (4) the name and address of the garnishee. Upon the filing of the request, the clerk shall issue a writ of garnishment directed to the garnishee.

(c) Content

The writ of garnishment shall:

(1) contain the information in the request, the name and address of the person requesting the writ, and the date of issue,

(2) direct the garnishee to hold, subject to further proceedings, the property of each judgment debtor in the possession of the garnishee at the time of service of the writ and all property of each debtor that may come into the garnishee's possession after service of the writ,

(3) notify the garnishee of the time within which the answer must be filed and that the failure to do so may result in judgment by default against the garnishee,

(4) notify the judgment debtor and garnishee that federal and state exemptions may be available,

(5) notify the judgment debtor of the right to contest the garnishment by filing a motion asserting a defense or objection.

Committee note: A writ of garnishment may direct a garnishee to hold the property of more than one judgment debtor if the name and address of each judgment debtor whose property is sought to be attached is stated in the writ.

(d) Service

The writ shall be served on the garnishee in the manner provided by Chapter 100 of this Title for service of process to obtain personal jurisdiction and may be served in or outside the county. Promptly after service upon the garnishee, the person

making service shall mail a copy of the writ to the judgment debtor's last known address. Proof of service and mailing shall be filed as provided in Rule 2-126. Subsequent pleadings and papers shall be served on the creditor, debtor, and garnishee in the manner provided by Rule 1-321.

(e) Answer of Garnishee

The garnishee shall file an answer within the time provided by Rule 2-321. The answer shall admit or deny that the garnishee is indebted to the judgment debtor or has possession of property of the judgment debtor and shall specify the amount and nature of any debt and describe any property. The garnishee may assert any defense that the garnishee may have to the garnishment, as well as any defense that the judgment debtor could assert. After answering, the garnishee may pay any garnished indebtedness into court and may deliver to the sheriff any garnished property, which shall then be treated as if levied upon by the sheriff. A garnishee who has filed an answer admitting indebtedness to the judgment debtor or possession of property of the judgment debtor is not required to file an amended answer solely because of an increase in the garnishee's indebtedness to the judgment debtor or the garnishee's receipt of additional property of the debtor.

(f) When no Answer Filed

If the garnishee fails to file a timely answer, the judgment creditor may proceed pursuant to Rule 2-613 for a judgment by default against the garnishee.

(g) When Answer Filed

If the garnishee files a timely answer, the matters set forth in the answer shall be treated as established for the purpose of the garnishment proceeding unless the judgment creditor files a reply contesting the answer within 30 days after its service. If a timely reply is not filed, the court may enter judgment upon request of the judgment creditor, the judgment debtor,

or the garnishee. If a timely reply is filed to the answer of the garnishee, the matter shall proceed as if it were an original action between the judgment creditor as plaintiff and the garnishee as defendant and shall be governed by the rules applicable to civil actions.

(h) Interrogatories to Garnishee

The judgment creditor may serve interrogatories directed to the garnishee pursuant to Rule 2-421. The interrogatories shall contain a notice to the garnishee that, unless answers are served within 30 days after service of the interrogatories or within the time for filing an answer to the writ, whichever is later, the garnishee may be held in contempt of court. The interrogatories shall also inform the garnishee that the garnishee must file a notice with the court pursuant to Rule 2-401 (d) at the time the answers are served. If the garnishee fails to serve timely answers to interrogatories, the court, upon petition of the judgment creditor and proof of service of the interrogatories, may enter an order in compliance with Rule 15-206 treating the failure to answer as a contempt and may require the garnishee to pay reasonable attorney's fees and costs.

(i) Release of Property; Claim by Third Person

Before entry of judgment, the judgment debtor may seek release of the garnished property in accordance with Rule 2-643, except that a motion under Rule 2-643 (d) shall be filed within 30 days after service of the writ of garnishment on the garnishee. Before entry of judgment, a third person claimant of the garnished property may proceed in accordance with Rule 2-643 (e).

(j) Judgment

The judgment against the garnishee shall be for the amount admitted plus any amount that has come into the hands of the garnishee after service of the writ and

before the judgment is entered, but not to exceed the amount owed under the creditor's judgment against the debtor and enforcement costs.

(k) Termination of Writ

Upon entry of a judgment against the garnishee pursuant to section (j) of this Rule, the writ of garnishment and the lien created by the writ shall terminate and the garnishee shall be under no obligation to hold any additional property of the debtor that may come into its possession after the judgment was entered.

(l) Statement of Satisfaction

Upon satisfaction by the garnishee of a judgment entered against it pursuant to section (j) of this Rule, the judgment creditor shall file a statement of satisfaction setting forth the amount paid. If the judgment creditor fails to file the statement of satisfaction, the garnishee may proceed under Rule 2-626.

Source: This Rule is derived as follows:
Section (a) is new but is consistent with former Rules G47 a and G50 a.
Section (b) is new.
Section (c) is new.
Section (d) is in part derived from former Rules F6 c and 104 a (4) and is in part new.
Section (e) is in part new and in part derived from former Rule G52 a and b.
Section (f) is new.
Section (g) is new.
Section (h) is derived from former Rule G56.
Section (i) is new.
Section (j) is new.
Section (k) is new.
Section (l) is new.

Rule 2-645 was accompanied by the following Reporter’s Note.

See the Reporter’s note to Rule 2-645.1.

MARYLAND RULES OF PROCEDURE

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(b) Issuance of Writ

The judgment creditor may obtain issuance of a writ of garnishment by filing in the same action in which the judgment was entered a request that contains (1) the caption of the action, (2) the amount owed under the judgment, (3) the name and last known address of each judgment debtor with respect to whom a writ is requested, and (4) the name and address of the garnishee. Upon the filing of the request, the clerk shall issue a writ of garnishment directed to the garnishee.

(c) Content

The writ of garnishment shall:

(1) contain the information in the request, the name and address of the person requesting the writ, and the date of issue,

(2) direct the garnishee to hold, subject to further proceedings, the property of each judgment debtor in the possession of the garnishee at the time of service of the writ and all property of each debtor that may come into the garnishee's possession after service of the writ,

(3) notify the garnishee of the time within which the answer must be filed and that failure to do so may result in judgment by default against the garnishee,

(4) notify the judgment debtor and garnishee that federal and state exemptions may be available,

(5) notify the judgment debtor of the right to contest the garnishment by filing a motion asserting a defense or objection.

Committee note: A writ of garnishment may direct a garnishee to hold the property of more than one judgment debtor if the name and address of each judgment debtor whose property is sought to be attached is stated in the writ.

(d) Service

The writ shall be served on the garnishee in the manner provided by Chapter 100 of this Title for service of process to obtain personal jurisdiction and may be served in or outside the county. Promptly after service upon the garnishee, the person making service shall mail a copy of the writ to the judgment debtor's last known address. Proof of service and mailing shall be filed as provided in Rule 3-126. Subsequent pleadings and papers shall be served on the creditor, debtor, and garnishee in the manner provided by Rule 1-321.

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debtor and shall specify the amount and nature of any debt and describe any property. The garnishee may assert any defense that the garnishee may have to the garnishment, as well as any defense that the judgment debtor could assert. After answering, the garnishee may pay any garnished indebtedness into court and may deliver to the sheriff any garnished property, which shall then be treated as if levied upon by the sheriff. A garnishee who has filed an answer admitting indebtedness to the judgment debtor or possession of property of the judgment debtor is not required to file an amended answer solely because of an increase in the garnishee's indebtedness to the judgment debtor or the garnishee's receipt of additional property of the debtor.

(f) When no Answer Filed

If the garnishee fails to file a timely answer, the judgment creditor may proceed pursuant to Rule 3-509 for a judgment by default against the garnishee.

(g) When Answer Filed

If the garnishee files a timely answer, the matters set forth in the answer shall be treated as established for the purpose of the garnishment proceeding unless the judgment creditor files a reply contesting the answer within 30 days after its service. If a timely reply is not filed, the court may enter judgment upon request of the judgment creditor, the judgment debtor, or the garnishee. If a timely reply is filed to the answer of the garnishee, the matter shall proceed as if it were an original action between the judgment creditor as plaintiff and the garnishee as defendant and shall be governed by the rules applicable to civil actions.

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The judgment against the garnishee shall be for the amount admitted plus any amount that has come into the hands of the garnishee after service of the writ and before the judgment is entered, but not to exceed the amount owed under the creditor's judgment against the debtor and enforcement costs.

(k) Termination of Writ

Upon entry of a judgment against the garnishee pursuant to section (j) of this Rule, the writ of garnishment and the lien created by the writ shall terminate and the garnishee shall be under no obligation to hold any additional property of the debtor that may come into its possession after the judgment was entered.

(l) Statement of Satisfaction

Upon satisfaction by the garnishee of a judgment entered against it pursuant to section (j) of this Rule, the judgment creditor shall file a statement of satisfaction setting forth the amount paid. If the judgment creditor fails to file the statement of satisfaction, the garnishee may proceed under Rule 3-626.

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Section (e) is in part new and in part derived from former M.D.R. G52 a and b.
Section (f) is new.
Section (g) is new.
Section (h) is derived from former M.D.R. G56.
Section (i) is new.
Section (j) is new.
Section (k) is new.
Section (l) is new.

Rule 3-645 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 2-645.1.

The Chair said that the Committee was very grateful to Cheryl Hystad, Esq., from the Legal Aid Bureau for bringing this issue to the Committee's attention and also to Marjorie Corwin, Esq., who represents the Maryland Bankers Association, and Ronald Canter, Esq., from the Creditors' Rights Bar, for assisting the Committee in drafting the proposed changes to the Rules.

The Chair explained that on February 23, 2011, after many years of study, some federal agencies led by the Treasury

Department, the Social Security Administration, the Department of Veterans Affairs, and other agencies jointly adopted a federal regulation that was intended to provide additional protection to federal benefits, such as Social Security, Veterans, and federal retirement benefits. The benefits are exempt from attachment under federal law. For some time, the government has been directly depositing those benefits into recipients' bank accounts, where they are often merged with other monies in the accounts. Creditors of the recipients have been filing garnishments against the bank accounts. The federal regulation is intended to protect those federal benefits even after they have been direct-deposited in the bank accounts of individuals. The federal regulation takes effect May 1, 2011 and expressly preempts inconsistent state law. It is necessary to conform the rules pertaining to garnishment to the federal regulation. The Committee had been advised that the best way to address the new regulation is to have a separate rule. It is a very narrow situation.

The Chair told the Committee that Ms. Hystad and Robert Enten, Esq., from the Maryland Bankers Association were present at today's meeting. He asked Ms. Hystad and Mr. Enten if they had any comments. Ms. Hystad said that she would be happy to answer any questions, but the Chair had already fully explained the need for the rule changes. Mr. Enten remarked that the Maryland Bankers Association had worked diligently with Ms. Hystad, Mr. Canter, the Chair, and the members of the Judgments

Subcommittee on the Rules. Mr. Enten said that he and the Bankers Association believed that the draft of the proposed Rules conformed the Maryland Rules to the federal regulation. This addresses the narrow instance of a bank account into which federal benefits have been deposited. This does not affect corporate accounts or any accounts not receiving federal benefits. The proposed changes put Maryland in line with the federal rule and the rules in most other states. The Bankers Association totally supports the new Rules.

Master Mahasa inquired why the judgment creditor has to know the total amount of unprotected funds rather than the amount being requested as available. Ms. Hystad replied that the unprotected funds do not have to be disclosed, only any amount over that. Judge Norton referred to the utility of the reports to the court to disclose what is unprotected to see if this is in contest or not, so that the court can enter a judgment that is not in contest. Will this Rule allow the court to ascertain what amount is unprotected? Otherwise, there could be a barrage of hearings to ascertain what is unprotected. The Chair responded that the bank will inform the court as to what is protected. Judge Norton noted that the bank could state that the account has $1000, some of which is protected. Ms. Hystad pointed out that the way the federal regulation and the Maryland Rule are written the banks can conclusively decide the protected amount, because it is specified in the federal rule. The state court should not have to get into any discussion about what is protected. Judge

Norton hypothesized a situation where the bank account has $1500 in it of which $500 is protected. What will the report say? Ms. Hystad replied that what the bank should say is that there is a protected amount but not disclose how much it is, and then the bank will state the amount of the unprotected funds. Judge Norton remarked that he is concerned about knowing the amount of the unprotected money.

Master Mahasa pointed out that subsection (e)(1) of proposed Rules 2-645.1 and 3-645.1 provides that the protected amount need not be disclosed. Mr. Enten clarified that the unprotected amount has to be disclosed. Master Mahasa said that this is what she was questioning. Why is it necessary to know the unprotected amount? Is not the concern to make sure that the amount that the creditor is trying to garnish is in the account? Judge Norton responded that it depends on the amount of the judgment. If the account has $1200, and the judgment is for $800, that is relevant. On the other hand, if the account has only $800, and the judgment is $1200, that is relevant. Ms. Hystad added that the amount that was not protected by federal regulation, such as $1000, can be claimed by the creditor, so the court needs to know how much the unprotected amount is. The federal rule is very narrow. It provides for determination of the protected amount for two months of federal benefits deposited into the account. There may be additional money that is also exempt, but it is not going to be automatically protected under federal law. The court will need to notify the bank as to how much is not automatically

protected, and the court will rule on whether that amount goes to the creditor or if it is otherwise exempt.

Judge Norton remarked that the banks need to tell the court what the unprotected amount is, but the Rule does not expressly state this. The Vice Chair pointed out that the Committee note after subsection (e)(1) in Rule 2-645.1 addressed this issue somewhat. The Reporter noted that from a practical point of view, she had been informing the Honorable Ben Clyburn, Chief Judge of the District Court, and the people responsible for drafting the court forms about this issue, and they know that the forms will have to be revised quickly. She had also informed the Honorable Marcella Holland, Administrative Judge for the Circuit Court of Baltimore City, that changes would have to be made in the circuit court so that this could be addressed quickly. The Chair added that there will be a separate form when the bank account has protected amounts. Under the federal regulation, the bank has to review the account within two days of the receipt of the writ of garnishment and ascertain if there are any protected amounts.

Judge Norton commented that he thought that the Rule would be very helpful, because the judges now get objections stating that the money in the accounts is protected. This will speed up this process. The Chair responded that what is being planned is that if the only money in the account is protected, the bank will report this and also contemporaneously file a motion for judgment or to dismiss, because there is nothing left in the account to

garnish. The Vice Chair asked if the bank is allowed to disclose the protected amount. Is it in the bank's discretion to decide to disclose the protected amount or not to disclose it? Ms. Hystad replied that the federal rule does not address this. The way the proposed Maryland rule is drafted it would be in the discretion of the bank, but the bank does not have to disclose, particularly in cases with no other funds in the account.

The Chair inquired if this raises any privacy issues. Mr. Enten responded affirmatively. Ms. Corwin, who had participated in the drafting of the Rules, was not available today, but Mr. Enten said that his understanding was that the garnishee will provide a statement that the garnishee is in possession of funds in a specified amount, the name of the judgment debtor, and which funds will be held pending further order of the court. The garnishee would further state that there are additional funds in the judgment debtor's account and that those funds that are a protected amount pursuant to federal law and exempt from garnishment. Mr. Enten explained that he was both representing the creditors as well as the bankers getting the garnishment. Ms. Hystad represents the consumer, and he asked her if she felt that the information was adequate to protect her clients' interests. She answered affirmatively.

The Vice Chair expressed the opinion that a negative aspect of the Rule is that it provides that the bank need not disclose the protected amount, which implies in subsection (e)(1) that the protected amount can be disclosed. If there are privacy concerns

or other reasons why the protected amount should not be disclosed, it may be preferable for the Rule to provide that the garnishee “may not” specify the amount.

The Chair said that he did not know if such federal privacy rules exist, so the Rule should not necessarily provide that the garnishee cannot specify the amount. Mr. Enten remarked that the banks should not be in a position of being asked why they did not disclose the amount if they could do so. The Rule provides a clear roadmap. The bankers are in agreement with the Rule as it is. He said that he could ask Ms. Corwin to address the Vice Chair’s question, since he had not participated in the drafting of the Rule. He added that it appeared that anyone involved in this matter was satisfied with the Rule. The Vice Chair expressed the view that the Rule does not provide a clear roadmap. There is the potential for half of the garnishments coming to the court disclosing the protected amount, and the other half not disclosing it. The Chair commented that he did not think that this would happen, because the banks will be uniform in dealing with this. Mr. Enten noted that the banks will make the response exactly as he had stated earlier.

The Chair told the Committee that at the last minute, some revisions had been made to the language in section (b), Scope. Initially, that section provided that the Rule applies to the garnishment of the account of a natural person in a financial institution. Originally, Ms. Corwin had been concerned about the reference to an “account.” She finally conceded that it was

appropriate, so the word "account" has to be added back in. The Reporter read the revised version of section (b): "This Rule applies to the garnishment of an account where the garnishee is a financial institution and the judgment debtor is a natural person." The Chair added that this is what the regulation applies to. Mr. Enten noted that it would apply to the garnishment of one or more accounts. The Reporter responded that the language is appropriate because of Rule 1-201, Rules of Construction, which indicates that words in the singular encompass the plural.

The Chair noted that new Rules 2-645.1 and 3-645.1 were identical. The amendments to Rules 2-645 and 3-645 were simply conforming to make clear that the general garnishment rules were subject to the new Rules to the extent of any inconsistency. These Rules must go into effect May 1, 2011, because that is when the federal regulation takes effect. The Court of Appeals has been alerted that the proposed Rules will have to be sent up to them as an emergency today. The Court will hold a hearing on the Rules on April 21, 2011. If the Rules are not in effect, once the federal regulation goes into effect, the Rules in Maryland would be inconsistent with the federal regulation. The Chair asked for further comments or questions concerning the four Rules presented today. The Reporter asked if the Vice Chair's style comments could be reviewed before the Rules are finalized. The Vice Chair said that she would present her comments. She suggested that the language in section (b) should read as

follows: “This Rule applies to the garnishment of an account where...the garnishee is a financial institution and the judgment debtor is an individual.” The reason for the word “individual” is because it is a defined term. The Chair explained that the problem with that is that the term “natural person” is the one used in the federal regulation. The Vice Chair withdrew that suggestion. By consensus, the Committee changed the word “where” to the word “when.”

The Vice Chair commented that she would change the language of section (c). Now it provides that this Rule applies under certain circumstances, and Rule 2-645 applies unless there is an inconsistency. Any extra requirements in Rule 2-645.1 also apply. The Vice Chair said that she would change section (c) to state: “Rule 2-645 applies to a garnishment subject to this Rule, except that this Rule prevails over Rule 2-645 to the extent of any inconsistency, and the requirements, prohibitions, or limitations not contained in Rule 2-645 also apply.” This is purely a style matter. The Reporter noted that the Style Subcommittee would not look at the Rule, because it has to be prepared today to go to the Court of Appeals.

The Vice Chair suggested that section (d) should be changed by titling subsection (d)(1) “Directions” and subsection (d)(2) “Notification.” Subsection (d)(1) would read: “A writ of garnishment subject to this Rule shall direct the financial institution:...”, and then subsections (A), (B), and (C) would remain the same. Subsection (d)(2) would read: “A writ of

garnishment subject to this Rule shall notify the judgment debtor that:...", and the rest of subsection (d)(2) would remain the same. There was an ongoing conflict as to whether to use the state style of the Code where everything is numbered and subtabbed. The suggested changes would be in between the two styles. By consensus, the Committee approved these changes.

Turning to section (e), the Vice Chair suggested that the word "when" be changed to the word "if" in subsection (e)(1). By consensus, the Committee approved this change.

By consensus, the Committee approved Rules 2-645.1, 3-645.1, 2-645, and 3-645 as amended.

Agenda Item 2. Consideration of the draft Special Report to the Court of Appeals on Aspects of Contributory Negligence and Comparative Fault (See Appendix 1)

The Chair presented the draft Special Report to the Court of Appeals on Aspects of Contributory Negligence and Comparative Fault, which was written in response to a request from the Court of Appeals that the Rules Committee look at certain aspects of comparative fault. (See Appendix 1). He pointed out a stylistic change. The last word in the first paragraph of Section II, Subsection A, which appears on page 6. should be changed from "law" to the word "cases." On page 8, in footnote 4, which appears after the beginning of Subsection D and is a footnote to Subsection C, the word "entered" should be the word "enacted." On page 12 in Section III, Subsection B, some commas need to be

dropped. The Chair told the Committee that the materials that were used to write the Report were available if anyone would like to look at them. The project was very interesting. The proposal of the Special Subcommittee is before the Committee today. He asked if any member of the Committee or anyone present at today's meeting had a comment. Mr. Michael said that the Chair did an excellent job writing the Report.

Agenda Item 3. Reconsideration of proposed Rules changes concerning Claims for Attorneys' Fees and Related Expenses - New Title 2, Chapter 700 (Claims for Attorneys' Fees and Related Expenses), New Rule 3-741 (Attorneys' Fees), and Amendments to: Rule 2-305 (Claims for Relief), Rule 2-341 (Amendment of Pleadings), Rule 3-302 (Pleadings Allowed), Rule 3-305 (Claims for Relief), Rule 3-306 (Judgment on Affidavit), Rule 3-341 (Amendment of Pleadings), and Rule 3-611 (Confessed Judgment) - (See Appendix 2)

Mr. Brault presented Rules 2-701, Definitions; 2-702, Scope of Chapter; 2-703, Procedure Where Attorneys' Fees Allowed by Statute; 2-704, Procedure Where Attorneys' Fees Allowed by Contract; 3-741, Attorneys' Fees, 2-305, Claims for Relief; 2-341, Amendment of Pleadings; 3-302, Pleadings Allowed; 3-305, Claims for Relief; 3-306, Judgment on Affidavit; and 3-341, Amendment of Pleadings, 3-611, Confessed Judgment; for the Committee's consideration. (See Appendix 2).

Mr. Brault told the Committee that this issue had been around for a long time. The latest iteration of the Rules was before the Committee today. He said that he would give the background for the changes to the Rules. When the Attorneys' Subcommittee had discussed this topic, it became clear that there

are a variety of circumstances relating to attorneys' fees. The initial discussion began with the idea that attorneys' fees were in aid of execution or in aid of a judgment. Therefore, it seemed that the Rules belonged in the Title 2, Chapter 600 Rules. It became clear that this was not the case, because the issue being considered was attorneys' fees as damages in a civil action, for pre-judgment matters, for post-judgment matters, and for matters after evidence but before judgment. The Reporter had recommended that the Rules be taken out of Title 2, Chapter 600, so that all of the Rules could be placed together. She had recommended that they be put into Title 1.

Mr. Brault commented that at another meeting, the Chair suggested that the Rules remain in Title 2, but be put into a new Chapter 700. He pointed out that this was an open place in the Rules, and it would allow all of the Rules to be placed together. At the outset, Mr. Brault had indicated that one of the very serious problems that is confronted when discussing attorneys' fees is the question of when a judgment is final for purposes of appeal. This would be when consideration of attorneys' fees is part of the prejudgment rulings that go on appeal or is after pre-judgment rulings in the rules pertaining to costs, so that they would remain with the trial court, and the rest of the case would go on appeal. He pointed out to the Subcommittee the case of *Carolina Power and Light Co. v. Dynegy Marketing and Trade*, 415 F.3rd 354 (2005) involving a stock fraud with millions of

dollars at stake. The appellate court ruled that the judgment was not final and sent the case back to the trial court, because the attorneys had misinterpreted the role of attorneys' fees.

The latest version of the Rules reflected the effort of the Subcommittee to solve these problems. He told the Committee that as they looked at each Rule, they should keep in mind that the Rules were distinguishing between prejudgment evidentiary questions, post-evidentiary but attorney-fee questions that are considered at trial, and attorneys' fees that come after judgment and are not part of the issues for appeal. After many attempts, the Rules address the necessary issues. An additional revised Committee note was handed out today to explain the Subcommittee's thought process. The Committee note addresses the American Rule of attorneys' fees, gives an example of when attorneys' fees are damages, and addresses when attorneys' fees come after judgment. The note cites some Maryland cases. This Committee note was included so that attorneys will realize the various issues.

Mr. Brault said that he had told the Subcommittee that his firm is involved in two cases in the Court of Special Appeals. The question in both cases is whether or not the matter before the Court of Special Appeals is appealable. A great amount of money is at stake in these cases. The Rule should make clear where the ruling stands in the appeal process. Most of the Rules are recognizable from previous considerations.

Mr. Brault drew the Committee's attention to Rule 2-701 (Definitions). (See Appendix 2). This explains that attorneys'

fees include related costs. The Subcommittee had deliberately put in that paralegal fees are not recoverable, which is what *Friolo v. Frankel*, 373 Md. 501 (2003) provided. Everyone presenting ideas about paralegal fees to the Subcommittee had been in favor of including them, because in modern practice, it is well known that the use of paralegals can save considerable money for the clients. It would not be a good idea to write a rule that provides the opposite. By consensus, the Committee approved Rule 2-701 as presented.

Mr. Brault drew the Committee's attention to Rule 2-702 (Scope of Chapter). (See Appendix 2). The Chair pointed out that the Committee note after section (a) would be deleted, because the Committee note that was drafted and handed out today would consolidate this with the Committee note that appears after section (b). (See Appendix 3). There would be one Committee note in Rule 2-702. The two Committee notes are very similar. The Vice Chair inquired if the Committee note in Rule 2-701 would be eliminated, and the Chair answered that it would remain, but the Committee notes after sections (a) and (b) of Rule 2-702 would be combined, and the new version would be substituted. Mr. Brault explained that Rule 2-702 pertains to prevailing parties and damages. The "actions...by law" referred to in section (a) would encompass civil rights litigation. The "actions...by contract" would be where a contract provides that the prevailing party recovers attorneys' fees. The Rule provides that a party

is or may be entitled to claim attorneys' fees from another party by virtue of prevailing in an underlying claim that is separate from the claim for attorneys' fees. This is when a lawsuit is not for attorneys' fees and is for something else, and that document or statute provides that the prevailing party can then recover attorneys' fees.

Judge Weatherly pointed out that in a family law case, a party can be awarded attorneys' fees even if the party lost the case. The Chair responded that this is an exception to the general rule. Mr. Brault added that the Subcommittee considered the exceptions of family law cases and foreclosure cases. Everyone agreed that those cases are not within the scope of the Rule.

Judge Pierson said that he had questions about Rule 2-704 that might be premature. He asked about the intent of the language that reads: "...by...contract, a party is or may be entitled to claim attorneys' fees from another party by virtue of prevailing in an underlying claim that is separate from the claim for attorneys' fees...". This issue had come up previously, and the Chair had convinced Judge Pierson that the distinction could not be drawn. There can be a contract that expressly provides that a prevailing party is entitled to get fees. Either party to the contract, whether it is the party bringing the claim for breach of contract or the party defending the claim for breach of contract, may be entitled to fees under that provision. Some contracts provide that a party is entitled to fees for enforcing

the contract, or in collection cases, a party may be entitled to fees for collecting. Does this Rule only except the specific language that is "prevailing party," or does it draw a distinction between some contract-based fee claims? To be covered by the language in section (a), does the contract have to expressly state that the prevailing party gets fees?

The Chair commented that Judge Pierson raised a good point. In the collection cases, it is usually the situation where if there is a default or breach of the contract, it is the creditor who is enforcing the contract, and he or she is entitled recover attorneys' fees from the debtor but only if the creditor wins. In referring to Judge Pierson's comment, the Chair hypothesized that the creditor sues on the basis of a default and loses. The creditor cannot get any attorneys' fees; the question is if the debtor can.

Judge Pierson clarified that his question was a technical one. Rule 2-704 is the contract attorneys' fees rule. That applies to contract-based attorneys' fees that are within the scope of this Chapter. What contract-based attorneys-fee claims are within the scope of this Chapter? He was not sure why they would not all be within the scope of this Chapter, because all that Rule 2-704 provides is that the party has to plead and prove the attorneys' fees at a certain point in time. Why does this language need to be in the Rule? Why would this Rule not apply to all contract-based attorneys' fee claims?

Mr. Brault said that he would explain his analysis. The

Subcommittee had discussed debt actions over and over. Ron Canter, Esq., who was not able to attend the meeting today and who is a specialist in debt collections, had participated in the discussion. Mr. Brault expressed the view that the note that states: "if you are in default for the amount owed hereunder, in addition thereto, you are liable for attorneys' fees" means that attorneys' fees are part of the damages. The creditor alleges that a default has occurred and avers which damages the creditor is entitled to, including the balance of the note, the interest on the note, and the attorneys' fees for collecting them. Mr. Brault commented that he put this concept in the category of damages, because in that event, the creditor would like the amount of the attorneys' fees to be pre-appeal, so that they are part of the judgment. To know the amount of the judgment, the amount of attorneys' fees is fixed.

Mr. Brault remarked that the way of adjudicating who is a prevailing party in the past is how this problem came to the Subcommittee. This question was from the Honorable Michael Mason, of the Circuit Court for Montgomery County, who noted that judges were having problems in civil rights cases concerning who is the prevailing party. How are the judges supposed to treat them, when are they supposed to treat them, and what are the guidelines for fixing attorneys' fees? Mr. Brault had looked at some federal precedents. The fees are not part of the judgment on appeal. As this Rule provides, the trial judge, when considering the question of prevailing party, can actually hold

the amount pending appeal to make sure that the prevailing party remains the prevailing party. This is part of the post-judgment type of litigation. The problem is when is the party going to appeal. There is a prevailing party in a civil rights case, and a party who loses. Does the trial judge fix the fee or not? This is where the problems with the appeal arise. The attorneys who handle these cases have told the Subcommittee that they always get the judgment for the fees in advance of the appeal.

Mr. Brault added that he was not sure how this could be done under the Maryland Rules. It could only be done if the rest of the award is not called a judgment. If the court takes a verdict from the jury, and the court states that the verdict is a certain amount but the court will consider attorneys' fees to incorporate with the judgment, then the fees can be incorporated. But if the clerk enters a judgment for the plaintiff in a certain amount, and the trial judge tells the plaintiff to then file the motion for attorneys' fees, and this will be addressed in the next three or four months, the Subcommittee's position is that generally, the case can be appealed. The litigation over the amount of the attorneys' fees at the discretion of the trial court can take place with no schedule. This is where the problems come in.

Judge Pierson said that he empathized with the difficulties in drafting the Rule because of the way this issue had been laid out by the appellate decisions. He expressed the view that equal problems exist with the contract cases because of issues relating to finality. What Rule 2-704 basically states is that it is

necessary to allege and prove contract-based fee claims before judgment. He had some problems with the structure of the Rule. Why is the distinction being made with Rule 2-702 (a)? The Rule pertaining to contract fees requires that the fees must be pleaded and proved before judgment. Why is there a distinction in Rule 2-702 (a) between prevailing-party contract-based fee claims and other contract fee claims. Why are all contract-based fee claims not within the scope of Rule 2-704? The Vice Chair expressed the opinion that Rule 2-704 is inconsistent with Rule 2-702, because Rule 2-704 refers to fees that must be proved as part of the underlying claim for relief. Rule 2-702 states that none of the Rules apply to the situation where attorneys' fees are an element of damages. Judge Pierson remarked that this was his point. The Vice Chair commented that she thought that it was almost impossible to figure out all of the permutations of when the fees are an element of the damages and when they are not. Her understanding was the Rule would not apply in the situation where the fees are part of the damages.

The Chair said that there is another distinction that is emphasized in the Committee note after section (a) of Rule 2-702. What these Rules are intended to address are attorneys' fees that were incurred in the preparation and litigation of this case, not fees that are part of the damages from something else. The distinction from an action against an insurance company for failure to defend a claim was drawn. The damages there are the attorneys' fees someone had incurred to defend a claim that the

company should have defended. That part of it is not attorneys' fees incurred in this case. The person may be able to get those fees as well. A claim was filed against the person, and the insurance company was supposed to defend the claim. They failed to do so, so the person had to get an attorney to defend the claim. The person sues the company for the amount of the attorneys' fees. This scenario is not under this Rule. The attorneys' fees are not the fees in this case. The attorneys' fees are not being shifted. The other example that was given was a malicious prosecution case, a tort case. The person had to go out and pay an attorney to defend him or her because of the defendant's malicious prosecution. This would not fall under this Rule either. It is not fee-shifting.

Judge Pierson inquired what section (a) of Rule 2-704 means. It sounds like the situations described by the Chair. The Chair responded that this is not the intent of Rule 2-704. Section (a) also makes clear that the Rules do not apply to a fee dispute between an attorney and his or her own client. It also does not apply to family law cases, as Judge Weatherly had pointed out, where it is not necessary to prevail on the underlying claim. Mr. Brault remarked that when he has tried these types of cases, one factor that is informative is whether he had to present the attorneys' fees for consideration by a jury. Is it necessary for the attorney to present the fees to the jury for them to decide if the fees are fair and reasonable? In his practice, he and his partners have done this. They had asked an expert to look over

their bills. The bills are often where the insurance company refuses to defend, and the attorney submits to the jury all of the costs of defending, including the attorneys' fees that were incurred to defend after the insurance company stated that they did not cover the case, and the plaintiff said that they should cover it. This is part of the damages. The attorney puts an expert on the stand who reviews the fees and states that they are in accordance with the ethical rules, etc.

The Vice Chair asked if the attorney would put on evidence of attorneys' fees in the same case in which the insurance company failed to defend. Mr. Brault answered that a separate suit for failure to defend would be filed. This is an easy case. In *Cohen v. American Home Assurance Company* 255 Md. 334 (1969), the Court of Appeals held that where an insurer fails to cover a case, and there is a finding of wrongful denial of coverage on a declaratory action, the insurer must pay not only the fees for the underlying case but must pay the fees incurred in trying the case to declare coverage. The Chair noted that the second part would be under this Rule.

Mr. Brault added that this would be a prevailing party concept. Is it necessary to put those fees before the jury? In his practice, to be careful, he and his colleagues put on the fees up to the date of the closing argument or up to the date that they anticipate conclusion of the trial, and they have an expert testify about those fees as well. The Vice Chair

questioned if someone would be entitled to attorneys' fees, not because the person has a contract and is a prevailing party, but because the law provides that under these circumstances, the person is entitled to fees. Mr. Brault replied that the Court of Appeals has answered this question affirmatively. The Chair commented that those would be fees in this case, not in the other case.

Mr. Brault told the Committee that the problem arises in the debt cases where the contract states that the person has to pay the balance due on the debt plus the attorneys' fees for collection. Everyone seemed to agree that whenever those cases are tried, by practice, the attorneys' fees are put in the case-in-chief of the creditor with the main case and are always included in the judgment. This is why Rule 2-704 includes the fees incurred on a default where the default calls for a payment of fees. Mr. Brault said that his interpretation of the structure of the Rule was to include the attorneys'-fees default cases with the damage cases, and anything else pertaining to "prevailing party," for whatever reason, goes in the prevailing party cases.

The Chair stated that this is a matter of case law and has not changed anything. If the goal is to fee-shift based on a contractual provision, the entitlement and the amount of attorneys' fees has to be wrapped up in a single judgment. Otherwise, the case will not be able to be appealed because of Rule 2-602, Judgments Not Disposing of Entire Action, since all

of the claims will not have been resolved. For that reason, the case may go back to the trial court, or the appellant may lose the appeal altogether in contract fee-shifting claims. Case law seems to be the other way where it is a statutory basis for the fee-shifting. Another distinction is that in the contractual fee-shifting, what would shift is the amount that the plaintiff's attorney was going to get from the plaintiff. The defendant would have to pay that, but not more than that. In the statutory fee-shifting, it can be more than what would be ethically permissible for the prevailing party's attorney to charge his or her own client. The Court of Appeals has made this very clear.

Judge Pierson expressed the opinion that the law is not that clear. The law is clear as to prevailing-party fee-shifting that is statute-based, which is that the judgment is final without regard to that fee claim. Mr. Brault added that the Rule should be clear. The Chair reiterated what Mr. Brault had said earlier -- that in a statutory fee-shifting case tried before a jury, where the jury found for the plaintiff because the defendant violated a statute, and the plaintiff suffered a certain amount of damages or was entitled to an injunction, it would be possible for the court to take up the issue of fees before a judgment is entered on that verdict. The fees and underlying claim could be wrapped up together, but in most cases, that is not how it is done. Judge Pierson pointed out that there are Court of Appeals cases where people brought claims for the attorneys' fees separate from the underlying lawsuit and allege that the claims

have to be part of the judgment, and the Court held that they do not have to be part of the judgment and are completely separate. The Chair added that this applies to the statutory cases.

Judge Pierson remarked that in a contract case, the situation is much more unclear. He expressed the view that there are certain types of contract-based fee claims which are clearly part of the merits of the case, and the judgment is not final until those claims are resolved. He believed that it is still open to debate whether a contract-based fee claim based on a provision that states that the prevailing party in an action under this contract is entitled to get fees has to be proved at trial. There are Court of Special Appeals cases pertaining to this issue including *Monarc Construction, Inc. v. Aris Corp*, 188 Md. App. 377 (2009) and *Accubid Excavation, Inc. v. Kennedy Contractors, Inc*., 188 Md. App. 214 (2009). The most recent Court of Special Appeals case *Grove v. George*, 192 Md. App. 428 (2010) was one where the defendant who had won at trial was the party claiming fees, and the case held that the attorneys' fees did not have to be proven at trial. As a practical matter, the way that this works out is that the trial courts have problems with this in the contract cases, even though Judge Mason brought up all of the problems with the statutory cases, because no one knows when they have to bring up the issue, and there is the practical problem that has been referred to in case law, which is what would a jury know about determining whether a fee is

reasonable or not. It would be better if this were decided by a court.

The Chair said that the Court of Appeals has resolved who decides the amount in the statutory cases. Judge Pierson noted that this has not necessarily been resolved in the contract cases. The Chair remarked that in a contract case, a party cannot get more than what the plaintiff agreed to pay his or her own attorney. Judge Pierson observed that even if the parties agree, the plaintiff still has to prove that the fee is reasonable. The Court of Appeals has stated this. The Chair asked if the defendant had filed a counterclaim for attorneys' fees in the case referred to by Judge Pierson where the defendant prevailed. Judge Pierson answered that he did not think so. The Chair inquired why the defendant would be entitled to fees. Judge Pierson said that he would look at the case which he had brought with him.

The Vice Chair expressed the opinion that the Rules are never going to decide what the circumstances are under which one must prove attorneys' fees at trial. This will be left up to case law to determine. If the law provides that one must prove attorneys' fees as part of his or her damages, these Rules do not apply. If the law provides that one need not prove attorneys' fees as part of his or her damages, these Rules do apply. The Chair pointed out that the Rules do apply to cases where the law requires proof of attorneys' fees as part of someone's damages, because the person still has to prove reasonableness.

The Vice Chair read from section (a) of Rule 2-702: "The Rules...do not apply to a dispute...where the entitlement to attorneys's fees is an element of damages." Her view was that the meaning of this language is that whenever a party has to prove attorneys' fees at trial as part of the party's damages prior to judgment, these Rules do not apply. The Chair suggested that this language should be deleted. By consensus, the Committee agreed with this suggestion.

The Vice Chair questioned when the Rules do not apply, other than what has specifically been excluded, such as family law cases. Judge Pierson said that when he had read Rule 2-704 earlier, he had thought that the intent of the Rule was to require that the fees be proved at a certain point in the case regardless of what the substantive law would otherwise require as to when they have to be proved. This is why he raised the question of what the Rules are intended to apply to. The Chair responded that the Rules address three different issues. One is the procedure that has been discussed today. Are the fees an element of damages that has to be folded into the judgment, or are they a separate item? This is the procedural aspect. Also, in light of this, the Rules set out an entire set of procedures, including how one makes a claim, files a motion, etc. The second issue is what standards are going to apply to the setting of the fee. This is what the Court of Appeals addressed in *Monmouth Meadows v. Hamilton*, 416 Md. 325 (2010) and other cases. The

standards differ depending on whether they are contract-based claims or statute-based claims. The third issue is what kind of evidence one needs to meet those standards. There are aspects of these Rules that do apply to all of the cases.

Mr. Brault commented that the answer is to use a simple formula: Are the attorneys' fees part of the costs, or are they part of the damages? If someone is a prevailing party, the fees are part of the costs. This is the way the cases seem to read, and this is logical, because the party has to await the judgment, verdict, post-judgment motions, etc. to know if he or she prevailed. A court may decide to hold back on the final decision until after the appeal. To prevail, the party has to finish the rest of the case. On the other hand, if the party has to prove the attorneys' fees in the course of presenting the case before the judgment is final, this is part of the damages, and it is a different situation. The Rules are trying to distinguish the two situations. He agreed with Judge Pierson that it may well be murky from case to case, and he also agreed with the Vice Chair that it is going to take case decisions as to which Rule is going to apply in a given situation.

The Vice Chair inquired why it is important that the Rules apply to attorneys' fees when they are an element of damages in a trial. Mr. Brault answered that it is to make clear to the other side when they do not have to be damages. If the Rule does not do this, the problem will not be solved. The Vice Chair asked if by Rule, the problem that is being addressed is as to when the

fees are or are not part of the damages. Mr. Brault replied that the Rule is addressing the costs rule and whether attorneys' fees are costs or not. The Chair said that initially when Judge Mason sent in his question about this, the entire focus was on statutory-based claims. The Subcommittee looked only at the federal rule. The first versions of the proposed Rule were trying to emulate the federal rule until the drafters realized that the federal rule only applied to civil rights and environmental cases. They went back and again looked only at the statute-based claims. Then the Court of Appeals decided *Monmouth*, which was not the first case addressing this issue but has been the most recent case. It clarified that in contract-based claims, very different rules apply. The Subcommittee had to figure out how to deal with this, because, particularly in the District Court, there are more of these cases than there are of the statute-based claims.

Judge Norton commented that the best procedure for the District Court is to have a truncated process where the fee is "reasonable" as opposed to defined. Mr. Brault remarked that in the wake of *Monmouth*, the debt collection bar had implored the Subcommittee to do something. The District Court had indicated that some clarification was needed to straighten out the issue of attorneys' fees because of the thousands and thousands of debt cases for any number of debts for any reason. He had been involved peripherally with one of the debt collection law firms

that went out of business over a disagreement. When they went out of business, there were 10,000 cases pending from one law firm that did debt collection work.

Mr. Brault said that what *Monmouth* held was that someone has to prove the attorneys' fees in every single debt collection case, or at least this was Judge Clyburn's view of the case. Therefore, in every debt collection case, there had to be some form of adjudication of the reasonableness of the fee. If the fee was 15% by agreement, that did not matter, because 15% for making one telephone call was different from 15% for a two-day trial.

Mr. Brault told the Committee that when they looked over the Rules, they would see where the Subcommittee put in a percentage and total dollar amount in the Rule to facilitate the handling of these debt cases. This is part of the reason that the Subcommittee left this in. The question still is whether it is damages or costs. How to prove this will have to be addressed separately. Mr. Brault added that he thought that the case that his firm currently had pending in the Court of Special Appeals would answer this question. The case was a contract note dispute, and it involved close to a $17,000,000 judgment, plus the attorneys' fees incurred to get that judgment.

Mr. Klein remarked that the Chair had said that part of this Chapter was supposed to cover cases where the fees are part of the damages. If this is so, he could not get past the first

sentence of Rule 2-702 (a), which stated the exact opposite. How did the first sentence apply to a case where the fees are an element of damages? The Chair responded that the party would have to win the case. The Vice Chair noted that the party may not have to prove damages until after he or she wins. The Chair said that his understanding was that this is not the way that case law treats these claims. A party has to prove it, and if he or she is going to get damages, they have to be inclusive. It is contract-based and has to be part of the judgment; otherwise, there is no final judgment to appeal.

The Vice Chair pointed out that two different topics were being discussed. Either party in the case could be entitled to attorneys' fees. Ms. Ogletree added that they would both put on evidence as to what they would be entitled to, and then the judge would decide. The Vice Chair remarked that she had never seen a case handled this way, but if it were, both parties would feel that they were going to win, and both would put on evidence of what their attorneys' fees were. Ms. Ogletree hypothesized that a real estate contract provides that the prevailing party gets the fees, both parties feel that they should prevail, and there are two sets of attorneys' fees.

The Vice Chair said that her experience was similar to Mr. Brault's -- in a prevailing party situation, often people think of attorneys' fees as being part of the costs of the case, because someone would have to prevail for either party to be entitled to the fees. That means that attorneys do not put on

the attorneys' fees until one of the parties prevails. The question is whether the issue of attorneys' fees is presented during one's case-in-chief, or whether the issue is not allowed to be presented until after the case is over. When someone can appeal from this is decided under case law. The Rules never address when someone has the ability to appeal, and this issue cannot be addressed in the proposed Rules.

Mr. Brault commented that Judge Pierson had explained this issue in another way, which is also a good example. A case could arise where the defendant prevails after the case went on for many years. The defendant did not make his or her claim for attorneys' fees in the case. The defendant becomes the prevailing party and files a new lawsuit to get the attorneys' fees. The Vice Chair pointed out that the once the defendant prevails, he or she could file a motion for attorneys' fees in the same case. Mr. Brault agreed, but he noted that the question is whether the defendant can file for the fees in a separate case. This helps decide whether the fees are damages. In a case with two defendants in which the jury had decided that both are negligent, the case is over, and the second defendant pays the judgment, can he or she file a separate suit for contribution, or does the second defendant have to file this in the first case? It is the same concept. It is a separate cause of action that arises by virtue of prevailing. This can be compared to the debt case where the cause of action arises in the contract itself by virtue of the default.

Ms. Ogletree questioned whether the issue of attorneys' fees has to be raised in the initial case if the fees are provided for in the contract. Otherwise, it would be splitting a cause of action and would be barred by res judicata. The Chair referred to two examples. One was a simple District Court collection case where the note or a contract states that if a party defaults and the contract is breached, the other party is entitled to attorneys' fees if it has to be enforced by going to court. This is a typical provision in many service contracts. Someone defaults, and the creditor sues in District Court, stating that the other party did not pay him $300, and he or she requests attorneys' fees. The creditor produces the contract that allows him or her to get attorneys' fees. In that case, the creditor will have to put in evidence as to his or her entitlement to the attorneys' fees, the contract that provides for them, and evidence that this is reasonable. Even if the contract provides for $300 or 5% or something else, under *Monmouth*, the creditor still has to show some evidence. This is all in the one case, and the judge will not enter a judgment until the judge finds that the party prevailed because the other party did not pay and breached the contract. The judge awards $30 in attorneys' fees. This is all part of the judgment.

The Chair said that another example would be a circuit court case decided by the Circuit Court for Baltimore County, which went to the Court of Appeals, *Diamond Point Plaza Limited*

Partnership v. Wells Fargo, 400 Md. 662 (2007). It involved a shopping center mortgage and lease. The judge tried the case, deciding in favor of the mortgagor and lessor, so that under the mortgage and lease, they were entitled to attorneys' fees and had requested them in their complaints. The judge did not enter a judgment for the damages. She stated that her finding was that the plaintiff won, and the damages were a certain amount of money. The judge then tried the issue of attorneys' fees and decided how much the plaintiffs were going to get. She entered a judgment for the entire amount. In effect, this was similar to the District Court case the Chair had just referred to, but it was much more complex. This is the way the process should work in the contract cases.

The Chair said that the case cited in the Committee note, *G-C Partnership v. Schaefer*, 358 Md. 485 (2000) provides that if the case is not handled the way the judge did in *Diamond Point*, there is no final judgment. If a party asks for attorneys' fees, and the fees have not been denied, but the judge never addresses them, then all claims have not been resolved. There is no final judgment to appeal from. This is not the rule in statutory cases. For example, in wage payment law cases, the plaintiff is not entitled to attorneys' fees if the nonpayment arose from a bona fide dispute. If the employer failed to pay the wages as required, the trier of fact must decide whether the non-payment arose from a bona fide dispute. If the answer is that there was

a bona fide dispute, there are no attorneys' fees. If there was not a bona fide dispute, the judge could award the fees along with treble damages.

Mr. Brault referred to Ms. Ogletree's comment about splitting a cause of action. In order to split a cause of action, there has to be a cause of action at the outset. Mr. Brault expressed the view that when there is a prevailing party, that party gets a new cause of action. It is a cause of action by virtue of being a prevailing party. It is not a cause of action by virtue of a default under a note. It can be argued that this is a distinction without a difference. If the prevailing party is a defendant, the defendant prevails. Under the note, the defendant is entitled to attorneys' fees. Is this a new cause of action, or did the defendant always have a cause of action because there was the inchoate chance that the defendant could prevail? Ms. Ogletree referred to a real estate contract that provides that if there is a dispute about any issue under the contract, and it goes to court, the prevailing party gets attorneys' fees. There can be a defendant, a third party, or anyone else. Her firm has had several of these cases, and they put in their bills for attorneys' fees before judgment. The judge may not decide this until afterwards, but it is all put in the case-in-chief, because otherwise it is barred. The Vice Chair remarked that she had never seen this handled this way. Ms. Ogletree responded that it is a difference in practice, because her firm does this routinely.

Mr. Brault remarked that his firm gets tort cases on the issue of statute of limitations. When does the cause of action accrue, and the statute of limitations begin to run? He said that he had always maintained that the cause of action for contribution or indemnification among defendants does not accrue until there is a judgment in the first case. However, there is always the chance that it will occur and that the possibility that there could be a contribution claim means that the cause of action has accrued. The party would have to file a cross-claim for contribution or indemnity in every single lawsuit, or the statute would run while the courts were handling the case. Mr. Brault said that he did not think that this is what the law requires. Ms. Ogletree expressed the opinion that this is a very difficult concept to embody in words. Someone would know when it feels right or not. It is likely that there is law that goes both ways on certain issues. If a party is asking for damages under the contract, then it is part of the case-in-chief, and the evidence has to come in at that point.

The Vice Chair remarked that there are differing opinions as to this issue. She expressed the opinion that if a contract provides a right to attorneys' fees to the party who prevails, there is a condition precedent to the right to attorneys' fees, which is that the party must prevail. If the contract instead provides that a party has a right to attorneys' fees if someone defaults under the note and the claimant has to pursue the fees, this contract provision does not state that the condition

precedent is that the right to attorneys' fees is dependent on who prevails. What it provides is that the right to attorneys' fees is dependent upon a default, and the party is filing a suit to enforce. One view is that the party has to win to get attorneys' fees. However, the Vice Chair noted that the language of the Rule specifically means that it refers to the type of contract that has a provision that states a party has a right to attorneys' fees if that party prevails. She did not read the Rule to include any other words in a contract that allow for attorneys' fees under different conditions.

The Chair commented that the only distinction is that if the contract has a "prevailing party" clause, then if the defendant prevails, he or she may be entitled to attorneys' fees, unless both prove defaults. Ms. Ogletree said that this was the situation in her case where all of the parties claimed that they should prevail under the contract. All of the evidence came in as part of the case-in-chief. The Vice Chair explained that her reading of the Rule was that it only applied to situations where the words of the contracts were that "the party has a right to attorneys' fees if he or she prevails." If the contract does not contain this language, the proposed Rules will not apply. The Rule does not state that it applies to a situation where a contract provides something else as one's underlying right to recovering attorneys' fees.

Judge Pierson asked what the Subcommittee's intent was as to how cases are ot be addressed in which there is a prevailing

party provision in the contract. The Chair cautioned that the Access to Justice Commission had drafted and is apparently looking to have sponsored legislation that would provide fee-shifting in any case in which the plaintiff is claiming a violation of rights "under the Constitution or Laws of Maryland." It is not limited to statutory rights only; it could include rights under the common law. That may not be the intent, but that is the language of the proposed legislation. There is a need for some guidance. The situation is very confusing, and *Monmouth* has made it a little more complicated.

Mr. Brault said that the Subcommittee provided in Rule 2-702 (a) that the Rule only applies "...by virtue of prevailing in an underlying claim that is separate from the claim for attorneys' fees...". Rule 2-704 (a) provides that the Rule applies "...where the claim is based on a contractual undertaking by a party to pay a part or all of the attorneys' fees incurred by the other party." Ms. Ogletree remarked that this is the language that has to be modified, because the contractual undertaking can provide that a party only gets the fees if the party prevails. Mr. Brault responded that in that case, there is no need for a rule. All of the claims would be for damages, and there is no fee-shifting involved.

The Chair suggested that section (a) of Rule 2-702 could be divided into two sections so that the Rule applies to "(1) actions in which by law a party is or may be entitled to claim

attorneys' fees from another party by virtue of prevailing in an underlying claim," because that is statutory language, or "(2) by virtue of or enforcing a contractual undertaking in a contract that provides for attorneys' fees in the event of success." The language referring to "prevailing" would be eliminated, but the proposed language still means that the party has to win the case to get the attorneys' fees in a contract case. A party who loses would not be entitled to attorneys' fees. If the problem is with the use of the word "prevailing," as it applies to a contract, the Rule could be reworded to clarify that it applies where someone is entitled by contract to attorneys' fees for enforcing a contractual obligation. Ms. Ogletree responded that it is not necessarily enforcing. If there is a contract of sale and one party alleges that the contract of sale was breached, the other party denies it, and the first party files a lawsuit that fails, the defendant is entitled to attorneys' fees; this is not enforcing a contractual undertaking.

The Reporter suggested that in place of the word "enforcing," the word "breach" could be substituted. The Chair said that it could be based on a breach or default. Both sides are claiming it. Ms. Ogletree remarked that in the case she had referred to earlier, there was a contract of sale, and one party alleged that the other party breached the contract of sale, and therefore the other party should pay the first party's attorneys' fees. The other side denied breaching the contract, they prevailed, and they got attorneys' fees for defending themselves

under the contract. The Chair inquired if that was because the contract provided for that. Ms. Ogletree said that the prevailing party in any dispute concerning this contract gets attorneys' fees.

Judge Pierson expressed the opinion that this is not only a matter of language. The better way to view this is to determine how to handle contract claims. What will be the language of the Rule? Mr. Brault had pointed out that part of the need to address this is to deal with the contract-based fee claims, all the District Court cases, the notes, etc. The question is what regulations should be imposed on contract-based fee claims -- this determines what the Rules apply to. The scope Rule can be drafted based on this. The Chair pointed out that under the case law, in a contract case, (a) a party has to ask for the attorneys' fees in a pleading, (b) a party has to show an entitlement to the fees under the contract, and (c) the party has to produce evidence that the fees requested are reasonable. All of that has to be done prior to the entry of judgment.

Judge Pierson responded that this is not always true based on *Grove v. George*, 192 Md. App 428 (2010), a case where more than 30 days after judgment, the defendant filed a motion for attorneys' fees based on prevailing party conditions. The defendant had never claimed nor filed a counterclaim for attorneys' fees. The defendant filed the claim after the judgment. The Chair inquired when the case was decided, and

Judge Pierson replied that it was decided on May 7, 2010.

Judge Norton commented that the District Court Rule is not subject to the same scope provisions as the circuit court Rule. The issues associated with the circuit court Rule can be addressed without having to consider how it will impact the District Court Rule, which does not get into the discussion of prevailing party. Prevailing party situations are extremely rare in the District Court. The Rule does not address this. It only gets into whether the attorneys' fees are part of the original claim on default.

Judge Pierson said that he did not have a problem with the approach of Rule 2-704 regardless of the controlling substantive law. He suggested that there be an exception added to the concept that the fees have to proved which would be that cases with "prevailing party" language in the contract would have to set forth this fact in the pleading. He remarked that the only regulation of prevailing party cases in Rule 2-704 is just that it has to be proved at trial. It has to be set forth in a pleading. There is no extensive regulation of these cases. If, as a matter of policy, the Rule should require that the fees be proved at trial, he would agree as long as the court can make an exception to this. This is not necessarily what the substantive law requires, so he was dividing this into substantive law and what the Rules Committee could do.

The Chair asked Judge Pierson to suggest some language. Judge Pierson answered that his view was that all of the language

about “prevailing party” should be eliminated. Rule 2-704 should apply to all contract-based fee claims. There would be a broad rule that provides that the fees have to be asserted and proved at trial subject to the court doing something different on motion. This gives the court the power to do what others have suggested, which is that in a complex case, if a party would like to reserve the issue of fees for after the trial, it can be accomplished based on a motion.

The Vice Chair noted that the only exceptions to doing this on motion are fees of 15% or less of the debt or foreclosure cases. Judge Pierson explained that he suggested that an exception from the requirement that the fees be proved at trial would be fees claimed by motion. This would be added in. If this is the only regulation of fee-based contract claims, then no distinction is necessary between prevailing party and other claims. The Vice Chair pointed out that part of Judge Pierson’s suggestion would be to take out of section (a) of Rule 2-702 the following language: “...by virtue of prevailing in an underlying claim that is separate from the claim for attorneys’ fees...”. Judge Pierson said that the Rule would apply to all cases in which someone was entitled under statute or contract to claim attorneys’ fees. Rule 2-703 applies when a statute allows the fees. Rule 2-704 applies when a contract allows them.

The Reporter inquired if the concept of “prevailing party” would be moved to Rule 2-703. Judge Pierson replied affirmatively. The Chair noted that this could also apply to

contract cases. Judge Pierson said that the way the Rules are drafted, this concept does not apply to contract cases. The Chair pointed out that there can be a contract that provides for attorneys' fees to the prevailing party. It cannot be left out, because someone may be entitled to the fees if the person is the prevailing party. Judge Pierson commented that the only regulation that is provided for them under these Rules is what is in Rule 2-704. The Vice Chair added that Rule 2-704 provides that the Rule applies whenever no matter what the circumstances are.

The Chair asked, if in Rule 2-702 (a), the Vice Chair had suggested that a period should be placed after the words "another party." The Vice Chair responded affirmatively. The Chair inquired if the second sentence should be retained. The Vice Chair answered that she would prefer to discuss this separately. Judge Pierson moved that a period be added after the words "another party," and the motion was seconded.

Mr. Enten told the Committee that he was present as a representative of creditors. In his earlier practice, he had handled many commercial collection cases. He wanted to make sure that he understood what had been discussed. He described a scenario where someone has a promissory note stating that he or she is entitled to reasonable attorneys' fees not to exceed 15% upon default, and there is a default under the note. The person files a complaint. Then the defendant does not answer, and the plaintiff files a motion for summary judgment, or it may be a

confessed judgment action. For the person to get the 15%, does he or she have to go to a hearing or have some separate proof in the complaint as to reasonableness of the 15% where the debt is $50,000? The Chair answered that this had been addressed in *Monmouth*. Mr. Brault added that the case is where the problem came from, not from the Rules. The Chair remarked that the intention of the Rule is to see if the Court of Appeals is willing to back off from the holding in *Monmouth* in a case with a claim for 15% or less.

Judge Norton commented that although he had not read *Monmouth* recently, he recollected that the ruling was based on the "reasonableness" clause, and there was a footnote that stated that the Court was not addressing cases with a specified percentage. The Chair agreed. He thought that the Court had held that no one can rely on a claim for 15%. Judge Norton observed that the case seemed to hold that someone cannot pick a number out of thin air even if it is reasonable. There has to be some production of evidence. The Court did not get into the issue of a claim for 15%.

Mr. Brault noted that Judge Clyburn refuses to allow District Court judges to sign off on 15% claims without some evidence that they are reasonable. Judge Norton responded that some judges are doing this anyway. The greater problem is when the judge has apparent authority to award "reasonable" attorneys' fees. The Chair said that in *Monmouth*, the circuit court

reversed the District Court for only relying on a claim of 15%. The Vice Chair questioned what the language of the contract was. Judge Norton answered that the language was "reasonable" attorneys' fees. The Court held that the amount of the fees cannot just be picked out of thin air.

The Chair said that the motion on the floor was to put a period after the words "another party" in Rule 2-702 (a). Master Mahasa inquired if the issue of prevailing party would be decided on at trial. The Vice Chair responded that this issue becomes irrelevant in the Rules. Whenever someone is entitled to attorneys' fees, the Rules would apply. Master Mahasa pointed out that there could still be a prevailing party issue. Who is entitled to attorneys' fees as decided by the court? It would be the prevailing party. The Chair observed that this may be true. The Vice Chair added that at the end, it is almost always the prevailing party, but it is better not to get into an argument over whether the language of the contract is that someone is only entitled to attorneys' fees if the person prevails as opposed to whether the language of the contract is that one is entitled to attorneys' fees if he or she has to pursue enforcement of a default.

Ms. Potter remarked that she understood that the *Monmouth* issue has to be addressed in the District Court Rule and that the fee-shifting statute has to be addressed. Why is it necessary to get into the contract situation if the District Court and fee-

shifting can be addressed? The Chair answered that the claim for attorneys' fees has to be filed in the circuit court, also. Ms. Potter noted there are many permutations arising from the *Monmouth* case. If the Rules address fee-shifting and District Court issues, would all of the other issues not come up in discovery? Is it necessary to go this far? The Chair replied affirmatively. A party would not get much discovery in the District Court. The circuit court Rules provide that in the complex cases, quarterly reports and other items have to be filed. Ms. Potter asked if the Rule has to address all of the permutations of contract cases. The Chair replied that the Rule does not have to go into all of the permutations.

The Chair called for a vote on the motion. Mr. Klein inquired if the motion addresses the second sentence. The Vice Chair answered that it did not. The motion carried unanimously.

The Vice Chair moved that the phrase "or where the entitlement to attorneys' fees is an element of damages" in the second sentence of Rule 2-702 (a) be taken out. The motion was seconded, and it passed.

The Vice Chair suggested that the language in section (a) that reads: "They do not apply to a dispute between an attorney and the attorney's client over an attorney's fee" be moved to section (b). By consensus, the Committee agreed to move this language to section (b). Master Mahasa questioned if the Rule means that practically speaking, an attorney would always put in

the fees as an element of damages. The Vice Chair answered negatively, explaining that this would be discussed later in the Rules.

The Vice Chair asked the meaning of the language in section (b) of Rule 2-702 that reads: "[t]he procedural requirements of... ." Would it be preferable to eliminate that language? The Chair responded that it would not be, because the Rules also cover what kind of evidence is needed to show reasonableness, and they do apply. Ms. Ogletree remarked that the word "procedural" would not address this. The Vice Chair pointed out that the Rule provides that there are three types of cases in which the Rules do not apply. The Chair added that one of these is actions under the Family Law Article, where it is not necessary for a party to prevail on any issue. The Rules cover the evidence one needs to present for the court to decide the amount.

The Vice Chair remarked that mostly in family law cases, entitlement to attorneys' fees is by virtue of statute. Ms. Ogletree answered that this is not always the case. The Vice Chair inquired which sections of Rule 2-703 apply to a domestic case. Ms. Ogletree replied that none apply, hopefully. Judge Weatherly said that case law usually addresses when one is entitled to attorneys' fees in domestic cases. It is usually a matter of reasonableness of attorneys' fees, and the financial ability and the economic circumstances regarding the parties. The latter are the two focuses in this type of case. The Chair cautioned that the family cases have to be excepted somewhere in

the Rules. The Vice Chair explained that she thought that they should be excepted completely. Domestic cases should not be part of this Rule. Section (b) would begin as follows: "These Rules do not apply to claims for counsel fees.." as opposed to making it appear that parts of the Rule might apply. The Chair stated that parts do apply. The Vice Chair questioned which parts of Rule 2-703 apply. Is it necessary to do a memorandum? Ms. Ogletree replied that it is not necessary. The Chair said that it may not be necessary to do a memorandum, but the person claiming the fees will have to show some proof.

The Chair pointed out that the problem is if a rule is adopted that provides that something is not covered, then the question becomes what it does cover. The Vice Chair responded that she would be in favor of drafting a Committee note that provides that in some of these excluded cases, it may be necessary to prove reasonableness. Ms. Ogletree added that it also may be necessary to prove the financial circumstances of the parties. The Vice Chair said that this would be in a domestic case, but in an attorney-client fee dispute, reasonableness would be considered, as would many other factors. Because in a domestic case, one's primary right to attorneys' fees derives from a statute, and because at this point there is not one section in the Rule that governs fees allowed by statute, that works. Ms. Ogletree remarked that the Committee had agreed to except this. Anyone who asks for attorneys' fees has to lay the groundwork that is required under the statute.

The Chair noted that the second item listed in section (b) lists proceedings under Rules 1-341 or 2-433, or any other Rule that permits the award of reasonable attorneys' fees as a sanction or remedy for the violation of a Rule or court order. The Vice Chair observed that the second sentence of section (b) could be revised to state that the court may determine reasonableness and apply the rules of evidence. The Chair said that it may be a matter of style, but the reason for that last sentence is because of the first sentence which provides that the procedural requirements do not apply.

Ms. Ogletree commented that her problem was with the broad scope of the word "procedural." What is being addressed is only certain things that are going to be required, and it may be difficult to analyze what is procedural. The Chair suggested that section (b) could begin as follows: "These Rules do not apply...". The last sentence would be retained. The Vice Chair pointed out that the Committee note needs to be revised, because it refers to "an element of damages." The Chair explained that this Committee note is going to be eliminated. Ms. Ogletree added that a new Committee note to replace the one in the Rule was handed out at today's meeting. The Vice Chair commented that the first sentence of the Committee note is accurate, because it does not refer to "prevailing." The Chair remarked that the Subcommittee wanted some of the language in the note to give some guidance. The Vice Chair pointed out that the fourth paragraph of the new note refers to "fees...as part of the damages." The

Chair said that the note will need to be conformed to the changes that were made to the Rule.

Mr. Fisher told the Committee that he was present to speak on behalf of the foreclosure bar. When he and his colleagues had attended the Subcommittee meeting, the Rules were being considered for placement in the Title 1 Rules. Now they appear in the Title 2 Rules. As a matter of doctrine, the foreclosure bar's position is that the Title 2 Rules do not apply in foreclosure proceedings. Title 14 applies in those proceedings. Mr. Fisher said that he had no problem with the language in Rule 2-702. However, he suggested that an exemption could be included in Rule 2-702 (b), and the language in Rule 2-704 (c)(2) that pertains to foreclosure actions could be moved to a Rule in Title 14.

The Vice Chair expressed the opinion that this would be a good idea. Subsection (c)(2) of Rule 2-704 provides that a claim for attorneys' fees is made to the auditor. Ms. Ogletree responded that this was the case. The Vice Chair inquired if any of the proposed Rules apply to it. The Chair pointed out that the person claiming the fees still must show reasonableness. Ms. Ogletree added that reasonableness dates from what Fannie Mae (Federal National Mortgage Association) is doing at the time.

The Vice Chair remarked that as with domestic cases, language can be included that provides that the proposed Rules do not apply to foreclosure cases with the sentence that would provide that the court can look at what is reasonable. Mr.

Fisher agreed with this. The last sentence of Rule 2-704 indicates that the determination of attorneys' fees is discretionary with the court as to what evidence is required. This means someone is not bound to file a 6-page motion to get a fee in a routine case. If the Committee is amenable to his idea, he said that he could suggest where the language from Rule 2-704 could go. Rule 14-215, Post-sale Procedures provides that the procedure to be followed after ratification is the same procedure to be followed as the procedure set out in Rules 14-305, Procedure Following Sale, and 14-306, Real Property – Recording, which pertain to judicial sales. This may be the place where the presentation to the auditor should be.

The Chair commented that he would agree to this provided that there is a cross reference in Rule 2-704 pointing out that foreclosure sales are not totally exempt concerning attorneys' fees. Mr. Fisher responded that he was not asking to be totally exempted. His view was that the language in subsection (c)(2) of Rule 2-704 belongs elsewhere and not in that Rule. By consensus, the Committee approved of Mr. Fisher's suggestion.

By consensus, the Committee approved Rule 2-702 as amended.

The Chair drew the Committee's attention to Rule 2-703 (Procedure Where Attorneys' Fees Allowed by Statute). (See Appendix 2). The Vice Chair asked how the Rules governing the pleading of damages address attorneys' fees. There is a basic requirement that if someone is asking for damages and attorneys' fees, it has to be requested in the complaint or in an amended

complaint. The Chair said that this provision was added more recently by the Subcommittee. When the Rules were before the full Committee last time, only the filing of a motion for the attorneys' fees had been required later in the case, and then a memorandum would be filed. The claim for the attorneys' fees has to be made earlier in the complaint, so at the very least, the defendant knows that the plaintiff is going to be asking for a fee. Also, this would trigger a motion to require the quarterly reports and all of the other extra information. Mr. Brault added that this was put in the Rules, because the claims for attorneys' fees may be greater than the claim for damages. The idea was to alert the defendant about how much he or she would have to pay in fees if the defendant loses a case where the damages are less than the attorneys fees requested.

The Vice Chair explained that her question concerned the general concept that a claim for attorneys' fees has to be included in the complaint. Her practice is to always put it in the complaint to begin with. What troubled her about section (b) was the language that allows someone to file an amended complaint promptly after the grounds for the claim arise. The Rules already have an amended complaint procedure. Is section (b) intended to supersede this? She suggested that section (b) could be deleted, and then language could be added to subsection (c)(1) as follows: "In any case in which a claim for attorneys' fees has been made in a complaint or answer, and due to the ...". Ms. Potter inquired if the claim could be made by motion. The Vice

Chair answered that this can be done by motion, but only if someone has raised the issue in a complaint or an answer. Mr. Brault remarked that this may beg the question of what happens if the person claiming the fees does not put it in the complaint. The Vice Chair responded that the motion cannot be filed. The person will not get the fees if he or she does not claim them. Mr. Klein noted that someone could game the system in terms of providing quarterly reports by waiting until the last possible minute to amend to avoid that obligation.

The Vice Chair said that Rule 2-341, Amendment of Pleadings, allows certain amendments up front without needing leave of court, but down the line, the person filing would need either consent of the parties or court approval. Ms. Ogletree added that in most scheduling orders, there is a cut-off date for amendment of the pleadings. Ms. Potter asked if this could be discovered later through the course of discovery. Someone may not have realized that the claim was available. The Vice Chair responded that the person would have to amend his or her complaint or answer to include it. Ms. Ogletree noted that the person could always ask for leave of court. The Vice Chair said that if someone had just discovered this, the court may very well allow it.

The Vice Chair pointed out that there are other problems with section (b) of Rule 2-703. She assumed that the term "initial pleading" was intended to mean "complaint or answer." Ms. Ogletree suggested that the words "complaint or answer"

should be added in place of the words “initial pleading.” The Vice Chair reiterated that she thought that section (b) should be deleted and that subsection (c)(1) should be amended to begin as follows: “[i]n any case in which a claim for attorneys’ fees has been made in a complaint or answer...”. The Chair commented that this would be appropriate for subsection (c)(1). This rest of the Rule would have to be conformed to this.

The Vice Chair said that section (d) would read as follows: “... a claim for attorneys’ fees in a complaint or answer...,” and the language “...pursuant to section (b) of this Rule” would be taken out. Ms. Potter noted that this could also be in a counterclaim. The Vice Chair acknowledged this. Ms. Potter suggested that the language could be “...a claim for attorneys’ fees in a pleading...”. The Vice Chair responded that this language would work. The Chair pointed out that section (b) does add that an amended pleading has to be filed promptly after the grounds for the claim arise. The Vice Chair inquired how this comports with Rule 2-341. Someone may have a right to amend under Rule 2-341, but section (b) appears to change this.

The Chair commented that Rule 2-703 differs from Rule 2-341 in that subsection (c)(1) of Rule 2-703 introduces the idea of keeping records in accordance with subsection (c)(3), which is much more onerous for attorneys to do than normally. The thought was that the party claiming the fees should know about the need for record-keeping as early as possible. This was to avoid the trap of halfway through the case having to go back and figure out

what should have been recorded.

The Vice Chair said that she was having some doubt about taking out section (b), but she would prefer that section (b) conformed to Rule 2-341. Mr. Leahy inquired if it was intended that if the plaintiff fails to ask for attorneys' fees, for whatever reason, the plaintiff is estopped from getting them. The Chair responded that someone can file an amended complaint, but the judge may deny it on that ground. There are two issues addressed. One is for the purpose of special record-keeping. The judge may decide not to make the person go back and figure out the records. It may suffice for the purposes of ultimately claiming the fees.

Mr. Leahy remarked that in these type of cases, the Rule provides that if the person claiming the fees does not do so in the initial pleading, he or she may not be able to get the fees, regardless of Rule 2-341. A judge could read this Rule to mean that if the person missed claiming the fees initially, he or she cannot get them. The Vice Chair remarked that this was her concern. Rule 2-341 provides that someone can file an amendment without leave of court by the date set forth in the scheduling order, or if there is no scheduling order, then no later than 30 days before a scheduled trial date. If it were not in the scheduling order, and the defendant did not include it in the original answer, and the defendant learned about the claim for fees two months before the date in the scheduling order, does this mean that the defendant's ability to amend is denied,

because it was not done "promptly?" Ms. Ogletree replied that it should not be denied.

Judge Pierson asked if section (b) should be changed to state: "...in an amended pleading filed in accordance with the requirements of Rule 2-341." The Chair responded that this may be too late for the purpose of section (c). The Vice Chair inquired how the date for amendment relates to everything else in the scheduling orders around the State. The Chair said that when the Subcommittee had discussed this, it involved two issues. One was the problem of this special record-keeping. If the claim is going to be made, it must be done early. The other is the terms of settlement. If no one has claimed attorneys' fees, and then suddenly two months before trial, the issue comes up, this could be the entire case.

The Vice Chair remarked that at a bare minimum, a cross reference to Rule 2-341 should be added to this Rule. She expressed the view that section (b) will still be misleading unless Rule 2-504, Scheduling Order, is changed to require that it set forth a claim for attorneys' fees promptly, or similar language. It will be very misleading for practitioners to get this scheduling order that states that no amendments have to be filed until a certain date, that this is not really true in the attorneys' fee situation.

Ms. Potter commented that Rule 2-703 pertains to where attorneys' fees are allowed by statute. Would the attorney not know up front, such as in a civil rights case, that the attorney

will be claiming the fee? This is provided for by statute. The Chair noted that the problem is that the way the Rule was drafted before, the pleading requirement in section (b) was not in the Rule. The Rule only required that a motion be filed late in the case. He and the Reporter felt that this was a trap, and the person should file the claim for attorneys' fees in the pleading.

Ms. Gardner expressed the opinion that Rule 2-703 is much improved over prior drafts. The specific concern that section (b) raised for her was the possible unintended consequence that every attorney filing a civil action will now plead a claim for attorneys' fees because this Rule requires it even in the case where there is no possible entitlement to attorneys' fees, and this may stress the parties very early in the case over whether to invoke the procedure in (c). The Chair said that if there is no basis for a statutory claim, he assumed that the defendants would move either to strike or dismiss that part of the complaint or for a partial summary judgment. Ms. Gardner commented that generally, a party does not worry about the fees until the party prevails. When she sees it, she thinks that if there is no basis for a claim for fees, she ignores it, assuming it was included as boilerplate. Under this new Rule, she would be thinking very seriously about pressing the plaintiff's attorney to give her quarterly statements and other information as a way of figuring out the fee situation. The Chair pointed out that the quarterly statements are only for the exceptional case, and the Rule indicates this. Mr. Klein remarked that the defendant's attorney

could call the other attorney and ask if he or she is planning to file a claim for attorneys' fees. Ms. Gardner said that she thought that most plaintiff attorneys would put in the claim just to cover themselves and would not acknowledge that is why the claim is in the pleading.

Mr. Brault noted that the attorneys' fees have to be allowed by statute. No one would be allowed to make up a claim for fees. He puts in claims for attorneys' fees in interesting cases, such as disputes between millionaires fighting over the business of real estate. In one case, the attorney charged $1,500,000 in fees, and discovery had not even been completed. Ms. Potter commented that she had an issue with the way the Rule is drafted. Section (b) states as follows: "A party who intends to seek attorneys' fees from another party pursuant to this Rule...". She said that an attorney is not "seeking" the fees but claiming them. An attorney is not claiming them "pursuant to this Rule" but pursuant to the statute. She suggested the language: " A party who is intending to claim attorneys' fees shall...". It could be a plaintiff or a defendant. The Vice Chair suggested the language "A party who claims attorneys' fees from another party as allowed by statute...". The Chair pointed out that section (a) already provides this. Judge Pierson proposed the language: "A claim for attorneys' fees shall be asserted in the initial pleading."

Mr. Klein inquired if the statutory basis for the claim should be cited. The Vice Chair remarked that she had seen a

fair amount of complaints that simply state at the end "and attorneys' fees as allowed by rule or statute." This happens in a potentially complex case where someone does not know all of the potential statutes that might be involved yet. There are many cases when attorneys' fees are requested when there is no knowledge of what they may be. The Chair noted that the defendant has remedies to ferret out this information.

Mr. Klein asked why the Rule should not require that the statute be cited. Ms. Ogletree answered that all of the statutes may not be known at the time the pleading is filed. Mr. Klein responded that the person could cite the known statutes. What is the harm of requiring this information? The Chair questioned whether there is any other Rule that requires a complaint to state the statutory basis of it. In a motion, points and authorities have to be stated. Ms. Gardner said that she already sees complaints claiming attorneys' fees for which there is no conceivable basis. The Chair noted that claims for many items which have no basis are made frequently. If this is included in the Rule, attorneys are going to forget to do it, and then there will a motion to dismiss the complaint, because the statutory reference was left out. Ms. Ogletree remarked that the good attorneys will include the statutory references.

The Chair asked the Committee how they wanted to proceed. The Vice Chair responded that to address the comments made today, the first sentence of section (b) should read as follows: "A party who claims attorneys' fees from another party shall include

the claim in the party's initial pleading...". Judge Pierson suggested that the word "claim" be changed to the word "demand" to avoid arguing over what a claim is. Does it have to be in a separate count? Ms. Potter explained that she suggested the word "claim," because it is in section (a). The Vice Chair pointed out that the word is used loosely in section (a), but not in terms of pleading. When the word is put into section (b), it has a slightly different meaning.

The Chair asked why the claim would have to be in a separate count. The Vice Chair replied that claims have to be in separate counts. Ms. Potter inquired if it could go into the ad damnum clause. The Vice Chair observed that it is not a claim in that sense. The Chair pointed out that it is not a cause of action. Mr. Klein suggested that the wording could be: "A party who seeks attorneys' fees shall demand the fees...". The Chair asked if the same changes would have to be made in the Rules that address interests and costs. The Vice Chair suggested that the wording could be " A party who seeks attorneys' fees from another party shall demand the fees in the party's initial pleading...". Ms. Gardner said that this would comport with current practice, which is to include it in the prayer for relief.

Master Mahasa asked what happens if someone initially does not think that he or she is entitled to attorneys' fees and later the person finds out that he or she is entitled to them. Has the person lost the chance to get the fees if they are not in the initial pleading? The Vice Chair responded that she was not

suggesting that the second clause in section (b) should be deleted. The language would be "in an amended pleading filed promptly after the grounds for the demand arise." She agreed with keeping this language as long as the cross reference to Rule 2-341 is added and a cross reference to Rule 2-703 in Rule 2-341 is added. She also suggested that Rule 2-504 be amended to include in it advice to people that despite that language in the scheduling order requires them to file amended pleadings by a certain date, Rule 2-703 (b) requires that this has to be done promptly.

The Chair asked if this would go into the Rule or into a Committee note. The Vice Chair replied that the scheduling order itself should have this advice in it. Otherwise, the scheduling order is misleading when it provides that someone can file amended pleadings by a certain date. This may not be true. The Chair said that this would be the case if the person is going to make a demand for attorneys' fees. Rule 2-703 (b) states that an amended pleading can only be filed if the grounds for it arise later. The demand has to be put in the initial pleading unless the grounds for the demand arise later in which event an amended pleading has to be filed promptly after the grounds arise. The entire purpose of this provision was to encourage demanding the attorneys' fees as early as possible. The Vice Chair responded that she did not disagree with this, but her point was that other rules conflict with this concept, such as Rule 2-504, which provides that the person's amended pleadings can be filed by a

certain date. Rule 2-703 states that the amended pleading may have to be filed earlier.

The Chair commented that he had no problem with a cross reference, but he asked what would go into the scheduling order that is issued early in the case. The grounds for the amended pleading may arise after the scheduling order is issued. The Vice Chair answered that language similar to "but see Rule 2-703..." could be added. The Chair reiterated that it would be difficult to put the possible conflict with Rule 2-703 in the scheduling order. When the order is entered, there may no claim for attorneys' fees, because there is no basis for a claim. After the scheduling order is issued, a basis arises. The Vice Chair noted that where the scheduling order provides the date by which all amended pleadings have to be filed, the language "except as provided in Rule 2-703" would be added. The Chair remarked that there may be other rules that conflict. The Vice Chair responded that she was not aware of any others.

Mr. Brault observed that Rule 2-504 does not allow frivolous amendments to be filed. There has to be a legitimate basis for the amendment. The Vice Chair agreed, but she pointed out that in terms of timing, the Rule gives someone the ability to file an amended pleading at any time until the date in the order. Judge Pierson added that it allows the filing of amended pleadings without leave of court. A party is always subject to the other provisions of Rule 2-341, which allows the other party to file a motion to strike the amended pleading even if the pleading is

filed before the deadline in the scheduling order. The Chair noted that this is also subject to the relation-back doctrine. If someone is pleading a new cause of action, and the statute of limitations has run, the pleading cannot be filed. The Vice Chair said that this applies to the viability of the claim. The Chair responded that section (b) of Rule 2-703 does also. The Vice Chair countered that this applies to the timing of the claim, not to whether someone is going to win on it or not. Ms. Ogletree said that this applies to the viability of the claim, because if the filing of the amended pleading is not properly timed, it will not be allowed.

The Chair inquired what the harm would be if a cross reference were added. Ms. Ogletree remarked that in Rule 2-504, people will know that this could be an outcome. If a reference to Rule 2-703 is in Rule 2-504, and there is a cross reference to Rule 2-341, this is sufficient. Master Mahasa suggested adding to Rule 2-703 the language “notwithstanding Rule 2-341" instead of changing Rule 2-341. It would be an exception. Ms. Ogletree expressed the opinion that a cross reference should be added to Rule 2-504. The Chair hypothesized a situation where someone files a breach of contract action, and later realizes that it falls under the Wage Payment and Collection law, Code, Labor and Employment Article, §§3-501 et. seq. The person files an amended complaint. The breach of contract action does not allow for fee-shifting, but the Wage Payment law does. This is when it first arises. The scheduling order may be long gone by then. The Vice

Chair remarked that the scheduling order may have been issued the day before. The attorney looks at the scheduling order and thinks that he or she can file amended pleadings for another six months.

The Chair asked the Committee if they wanted to make any more changes. Section (b) of Rule 2-703 had already been amended as follows: "A party who seeks attorneys' fees from another party shall demand the fees in the party's initial pleading, or if the grounds for such a demand arise after the initial pleading is filed...". He asked if anyone had any other changes to this. Ms. Ogletree pointed out that a cross reference to Rule 2-504 is to be added. The Chair added that it would be at least a cross reference. Master Mahasa expressed the opinion that only adding a cross reference does not help the issue pointed out by the Vice Chair. A cross reference may point out that a conflict exists. Mr. Michael responded that it alerts the practitioner that there is more than one rule concerning amendments, including Rule 2-504 as well as this Rule.

Master Mahasa said that she thought that the Committee wanted to eliminate this as an exception to Rule 2-341. The Chair pointed out that it is not necessarily an exception. Master Mahasa countered that a party would not have to comport with Rule 2-341 if the cause of action arose sometime later outside of the scheduling order. That would be the purpose of putting the clause, "notwithstanding Rule 2-341" in here to get rid of any ambiguity. Ms. Ogletree said that Rule 2-341 also

contains a provision where someone can object to the amended pleading. She did not see the harm in adding the suggested language. If the amended pleading is too late, it will certainly be raised by objection.

Mr. Leahy noted that this Rule applies to specific statutes. If someone does not know that he or she is entitled to attorneys' fees in the initial pleading, then he or she should not be able to file for them later. The Chair agreed with Mr. Leahy as long as the person is going to plead the statutory claim. The Vice Chair stated that the goal of drafting rules is that when a rule potentially affects a different rule, a reader should be alerted to it by a cross reference. For example, if the court stated that the amended pleadings had to be filed by the end of July, and the person first learned about his or her claim for attorneys' fees on August 15, would this Rule allow the person to file the amended pleading after the date in the court's order, since the Rule requires that the amended pleading be filed promptly? Is this despite the court's order, or must the person get leave of court? It raises some questions.

The Chair said that his view was that if the scheduling order does not allow the filing of an amended complaint after a certain date, it cannot be filed after that date. Ms. Ogletree commented that a person could get leave of court, because the circumstance does not arise until later. The Wage Payment law scenario cited by the Chair is a good example of this. A person may be involved in a work dispute and then get terminated. The

person's wages are withheld, and this may be after the scheduling order.

The Vice Chair suggested that the Rule could read as follows: "...in an amended pleading filed promptly after the grounds for the claim arise and otherwise in accordance with Rule 2-341." Mr. Brault pointed out that this makes the situation worse, because if, as has been suggested, the grounds arise later, under Rule 2-341, an amended pleading would be allowed to be filed. He did not see a problem with the Rule as it reads now. If the grounds arise later than the scheduling order, then the party resists the other party's motion to strike and indicates that he or she just found out that the court has discretion to allow the amended pleading. Scheduling orders are amended all the time. A scheduling order could be routinely changed if something new happened.

The Chair asked how the Committee wished to proceed. He said that there had been no substantial objection to putting in a cross reference in Rule 2-504 to Rule 2-703. The Vice Chair added that a cross reference to Rule 2-703 should be added to Rule 2-341. The Reporter inquired if a cross reference to Rules 2-504 and 2-341 should be added to Rule 2-703. The Vice Chair answered that the cross reference to Rule 2-703 would only go in Rules 2-504 and 2-341. Since it is not known how this Rule would relate to those two Rules, it can be determined after Rule 2-703 is in effect. By consensus, the Committee agreed to adding a cross reference to Rule 2-703 to Rules 2-504 and 2-341.

Mr. Klein inquired if there are other places in the Rules that the word "claim" should be changed to the word "demand" as it was changed in Rule 2-703. The Chair responded that the Rule will need to be checked to see where the word "claim" appears.

Mr. Brault drew the Committee's attention to section (d) of Rule 2-703. Judge Pierson expressed the view that the language in subsection (d)(1) that reads: "[u]pon resolution of the underlying cause of action" is confusing. Subsections (d)(2)(A) and (B) set forth deadlines. The first subsection provides for a deadline to file the motion for attorneys' fees of 15 days after the entry of judgment or of an order disposing of post-judgment motions. The second one provides for a deadline to file a motion for attorneys' fees for an appeal, application for leave to appeal, or petition for certiorari of 15 days after entry of the last mandate or order disposing of the appeal, application, or petition. Judge Pierson suggested that the first clause of subsection (d)(1) be deleted, and language should be added to the effect that a motion shall be filed within the time set forth in subsections (d)(2)(A) and (B). Subsection (d)(1) would read as follows: "A party who has made a demand for attorneys' fees pursuant to section (b) of this Rule and seeks an award of such fees shall file a motion for an award of attorneys' fees within the time allowed by subsections (d)(2)(A) and (B)."

The Chair noted that the third sentence of subsection (d)(1) is not necessary, because this Rule only applies to circuit court. The Reporter said that this sentence is needed, because

of the situation where the case goes up on appeal and then comes back, and more attorneys' fees are incurred. The motion would not be filed in the appellate court. The Vice Chair commented that the ordinary practitioner will not necessarily get that point from this sentence, because nothing in the Rule indicates that it applies after the case has gone up on appeal and gone back down. The Reporter pointed out that subsection (d)(2)(B) provides for this.

The Chair observed that the second sentence of subsection (d)(1) is probably not necessary. He suggested that it be deleted. He also suggested that the words "in the circuit court" could be added to the first sentence of subsection (d)(2)(B) after the word "filed" and before the word "within." By consensus, the Committee approved these changes.

Ms. Ogletree asked if the second sentence of subsection (d)(2)(B) should be taken out. The Chair said that it would not hurt to keep that sentence in. Ms. Ogletree remarked that the motion will be filed in the circuit court, but the proceeding will take place somewhere else. The Chair pointed out that notices of appeal are filed in the circuit court, but the Vice Chair responded that there are no proceedings on it. The Chair commented that there could be proceedings, such as a motion to strike it, because it is too late.

Ms. Gardner said that it is a question that comes up for inexperienced practitioners fairly often. They assume that their motion for attorneys' fees should be filed in the appellate

court. The Vice Chair agreed, and she expressed the view that it is appropriate to provide that the motion has to be filed in the circuit court. Once the Rule states that the motion has to be filed in the circuit court, it is necessary to state that any proceedings pursuant to that motion are in the circuit court. The Chair remarked that most good practitioners will understand this, but a situation could arise in which some judge feels that since the motion has been filed, it should go up to the appellate court, because it concerns fees incurred in that court. What is the harm in keeping the last sentence of subsection (d)(2)(B) in the Rule?

Mr. Brault told the Committee that section (e) of Rule 2-703 had been approved at prior meetings. The Vice Chair asked if the Committee note at the end of section (e) was new. She said that she did not understand its meaning. The Chair pointed out that this was added at the request of one of the Subcommittee members. It is somewhat substantive, and it is case law. The Vice Chair expressed the opinion that the Committee note seems to be out of place. Mr. Brault said that Mr. Maloney, who was not at the meeting today, had requested the addition of the note. He had cited a case, *Weichert v. Faust*, 191 Md. App. 1 (2010) and sent out a copy of the opinion. The case held that even if someone loses on certain claims, if they are all interrelated, fees can still be recovered.

The Chair noted that the language in subsection

(e)(3)(D)(iii) requires that the memorandum has to contain a detailed description of the work performed, which must include specifying the work allocated to claims permitting fee-shifting as to which the moving party prevailed. Mr. Brault observed that the moving party has to specify the claims upon which he or she had prevailed. The Chair added that the claims have to be fee-shifting claims. Judge Pierson expressed the opinion that the Committee note is a practice hint on substantive law and should not be included. Mr. Michael pointed out that it has a procedural aspect to it. Judge Pierson moved to strike the Committee note after subsection (e)(3)(D)(iii). The motion was seconded, and it failed on a vote of six in favor and nine opposed.

Mr. Brault drew the Committee's attention to section (f) of Rule 2-703. There were no comments. Mr. Brault drew the Committee's attention to section (g). Judge Pierson inquired why a hearing is mandatory. Only a limited number of rules require a hearing if one is not requested. Even Rule 2-311, Motions, provides that someone has to request a hearing to get one. The Chair noted that a party can waive a hearing under section (g). Mr. Brault commented that the wording of section (g) may be inadvertent. The intent was that a hearing only has to be held if someone asks for one. The Vice Chair suggested that the wording of section (g) could be: "[i]f requested by a party, the court...". The language "[u]nless waived by both parties" would be deleted. By consensus, the Committee agreed with this

suggested change.

The Vice Chair said that she questioned the use of the word "judgment" in section (i), because she was not certain that in all circumstances the resolution of the motion with respect to attorneys' fees is going to be a judgment. There could be some other outstanding claim that has not yet been decided. Mr. Brault agreed, noting that the word "judgment" is defined as an appealable order, but section (j) of Rule 2-703 provides that it does not have to be appealed. Ms. Ogletree suggested that the word "judgment" be changed to the word "decision." Mr. Brault proposed that the language should be: "The court shall enter an order either granting...In the order...". The beginning of section (j) could read as follows: "[u]pon the filing of an appeal...". Ms. Gardner questioned whether the order awarding attorneys' fees is an appealable judgment. The Vice Chair answered that it may not be. It cannot be a judgment if there is another outstanding claim that has not yet been resolved for some reason. Ms. Gardner asked if it would raise the question in the ordinary case about whether an order granting fees where there is nothing else remaining outstanding in the case can actually be a judgment. The Vice Chair remarked that it may raise this question.

Mr. Brault suggested the language "Upon the filing of an appeal of the order, the court may stay the entry of a judgment...". The Vice Chair responded that it would be appropriate to use the word "judgment" as suggested by Mr.

Brault. She proposed that the language should be “[u]pon the filing of an appeal from the judgment...”. The language “entered in the underlying action” should be taken out, because this assumes that there are two proceedings going on, the underlying proceeding and the separate one for attorneys’ fees. Mr. Brault noted that this is what was intended. The Vice Chair inquired if this is always true. The Chair responded that this is not always true, but it is generally true. Ms. Gardner remarked that section (j) is intended to address the issue of where a party prevailed on the merits, and therefore is entitled to fees, but the party has to move for the fees. Then the defendant appeals, and if the plaintiff loses on appeal, the plaintiff is no longer the prevailing party. It is not an appeal from the attorneys’ fees but an appeal on the merits.

The Chair said that in most statutory claims, there are two separate judgments. The attorneys’ fees are addressed later; judgment is entered on the underlying claim. Then the issue of attorneys’ fees is addressed, and another judgment is entered. The whole point of this provision is to indicate that the attorneys’ fees are considered separately. Both issues can be appealed. The Vice Chair added that either could be appealed. The Chair observed that this is why section (j) states: “...the court may stay the entry or the enforcement of a judgment...”. The word “judgment” is appropriate. The order is necessary, but that order is going to be a judgment. None of the case is left.

Ms. Gardner commented that she had a related concern about

section (j). All it permits the court to stay is entry or enforcement of the judgment awarding attorneys' fees, but what it does not do is to permit a stay of proceedings on the fee motion which would certainly be reasonable where the appeal could resolve that the plaintiff has not prevailed and is not entitled to fees. It would completely obviate the need for proceedings on the motion. The Vice Chair added that it would obviate the need for two hearings, after someone goes up on appeal and wins, and then there is a hearing in the lower court.

The Chair remarked that he believed that what happens in the statutory cases, particularly if it is a significant amount, is that an appeal is taken from the underlying judgment. Once the issue of attorneys' fees is resolved, an appeal is taken from that, too. To the extent that the appellate court can do so, both actions are consolidated. This may not be possible if too much time elapses. The Vice Chair noted that the appeal on the merits is decided first to determine whether the prevailing party will still be the prevailing party. Then the case goes back to the trial court, and there is the first hearing on the attorneys' fees. The Chair pointed out that the Rule allows this. The Vice Chair disagreed.

Ms. Gardner expressed her concern about the way section (j) is worded. The language of Rule 2-703 seems to mean that the attorney files a case and then wins. He or she is required to file a motion for attorneys' fees within 15 days after entry of judgment on the merits. Then within another 15 days, the

attorney notes an appeal on the merits. The attorney has to file the memorandum, and the court has to hold a hearing on the attorney's original fee claim even though an appeal is pending as to whether the attorney is actually going to be the prevailing party. Ms. Gardner suggested that section (j) should permit the court to stay proceedings on the motion for attorneys' fees, not just entry or enforcement of the judgment awarding fees. No one wants to have to jump through all of the hoops if the appellate court is going to reverse who the prevailing party is. The Vice Chair said that what Ms. Gardner was suggesting was to add the language, "the court may stay proceedings on the demand for attorneys' fees, stay the entry of an order relating to attorneys' fees, or stay enforcement..." to section (j). By consensus, the Committee agreed to this change. The Vice Chair also suggested taking out the language "of the judgment entered in the underlying cause of action" from section (j). Is this necessary? The language could be "[u]pon the filing of an appeal, the court may...".

The Chair said that he thought that what the Vice Chair wanted to delete was the language "entered in the underlying cause of action." One can only file an appeal from a judgment. The Vice Chair commented that there could be circumstances in which there are two judgments in a case, one in the underlying action and one in the attorneys' fees action. She suggested that section (j) read as follows: "Upon the filing of an appeal, the court may stay proceedings on the motion for attorneys' fees,

stay the entry or enforcement of a judgment awarding attorneys's fees...". Ms. Gardner expressed the view that all of this is unnecessary. If the court stays proceedings on the motion, there is not going to be a judgment. The Chair pointed out that the court may not want to stay proceedings. The court may want to go forward. Judge Weatherly added that it may depend on how long the proceedings are. If the hearing only takes one day, the court may want to go forward.

The Reporter remarked that the appellate court may want to decide the issues. The Chair said that the court may not enter the order, but simply stay the enforcement of it, until the appellate court decides the case. The Vice Chair noted that the court may take three actions. It may stay proceedings on the motion itself, stay the entry of an order awarding attorneys' fees, or stay enforcement. The Chair suggested that the language should be: ..."stay the proceedings on the motion for attorneys' fees or the entry or enforcement of an order awarding attorneys' fees." By consensus, the Committee agreed to this suggestion.

By consensus, the Committee approved Rule 2-703 as amended.

After lunch, Mr. Brault drew the Committee's attention to Rule 2-704 (Procedure Where Attorneys' Fees Allowed by Contract). (See Appendix 2). He told the Committee that Rule 2-704 has an exception for cases with attorneys' fees of 15% or less of the principal amount of the debt due and not exceeding $4,500. Ron Canter, Esq., a debt collection practitioner who had surveyed the bar, had indicated that this Rule will improve the situation for

attorneys who do this type of work. Judge Pierson said that he had comments on sections (a) and (b). He expressed the opinion that the first part of subsection (b)(1) which now reads: "A claim for attorneys' fees under this Rule shall be regarded as part of the underlying claim for relief." should be deleted. The Rule should read as follows: "Except as provided in subsection (c)(2) of this Rule, or as otherwise ordered by the court, the claims for attorneys' fees must be asserted and proved prior to...". The Chair responded that one problem with the language "or except as otherwise ordered by the court" is that these kinds of claims need to be totally resolved in the judgment, or there is no judgment. Judge Pierson noted that the rest of the Rule does not apply prior to judgment; it reads: "prior to entry of the jury's verdict" which should be "prior to return of the jury's verdict." He also pointed out that the language "court's findings" was incorrect. The concept is that this has to be done before verdict. It is not necessary to address the judgment problem as this Rule is currently styled.

Mr. Brault said that the Subcommittee had debated whether the judge is going to decide independently of the jury, and this is where the language comes from. If the jury is going to enter a verdict, but it is going to include attorneys' fees, some people felt that the judge should independently determine the attorneys' fees. Mr. Brault remarked that he had not agreed with this view. The Chair noted that in *Friolo*, the court held that

the amount of the attorneys' fees is for the judge, not the jury to decide. The jury may need to determine the entitlement to the fees. Judge Pierson said that he thought that *Friolo* was a statutory case. The Chair responded that he did not think that this would make any difference. The theory was that was a reasonable attorney's fee is for a judge to decide, and not a jury. Judge Pierson said that he thought that the way the attorneys' fees cases have gone through the appellate courts is a problem. There are many substantive nuances that the Rule cannot address.

The Chair noted that Rule 2-704 applies to contract claims. He asked what would happen as between the plaintiff's attorney and the client if the attorney charges a fee that the Court of Appeals finds to be unreasonable and violative of the Maryland Rules of Professional Conduct. Should the jury then be allowed to determine the fee? Judge Pierson answered affirmatively, noting that this is the logical conclusion. This is one of the problems with some of the appellate case law. Realistically, how these cases usually happen is that either the attorneys think of it before trial and decide to set the attorneys' fees aside to be determined after trial, or they do not think of it before trial, and someone is ambushed or claims to be ambushed when they try to bring the issue up after trial.

The Vice Chair remarked that this Rule does not address whether the jury gets to decide the amount of the fees. Judge

Pierson observed that the Rule provides that the issue has to be brought up before the end of the trial. The Vice Chair agreed, but she pointed out that the Rule does not provide that the jury will be deciding the fees.

The Chair commented that the jury may have to determine the entitlement to the attorneys' fees. Mr. Brault inquired if taking the issue of determining the amount of attorneys' fees away from the jury has any constitutional implications. There is a trial by jury on all other issues. The Chair said that the theory of the Court of Appeals was that the 7th Amendment does not apply, because it is a State court. The issue is the right of jury trial under the State Constitution. The Court has its own independent constitutional authority to regulate attorneys and their fees, and they have done so.

Judge Pierson noted that none of the Maryland cases have ever dealt with the situation. All of the Maryland contract cases hold that the court must determine the reasonableness of fees under the contract. None has posed that question. None of them came up based upon a jury trial. They were all summary judgments. The Chair disagreed, pointing out that there was a case in which the issue was flatly raised. The court said that determination of amount is not for the jury. Judge Pierson responded that he thought that this was a statutory case under the Wage Payment law. The Chair agreed, adding that it was the *Friolo* case. He asked what difference it would make if it were a

statutory case. Judge Pierson responded that taking a logical position, it is part of the underlying cause of action. How can a party be deprived of his or her right to a jury trial? The Chair pointed out that Judge Pierson had suggested dropping this part from the Rule. Judge Pierson explained that his position was that it is not necessary to get into that. The Chair agreed, adding that the Rule leaves it open.

The Vice Chair commented that her review of subsection (b)(1) indicates that it does not leave the issue open. The Rule provides that a claim for attorneys' fees must be proved prior to the verdict. What does this mean? The language is "a claim for attorneys' fees ... must be asserted and proved prior to entry of the jury's verdict or court's findings in the action." Mr. Brault said that he was not sure where that language came from. Judge Pierson remarked that the intent seems to be that a party has to raise the issue and present evidence before the entry of the jury's verdict or court's findings. The Vice Chair noted that what it really means is that the party has to raise his or her attorney's fees as part of the party's case. Ms. Potter referred to the language in subsection (b)(1) that reads "as part of the underlying claim for relief," and she observed that the claim is being tried on the merits during the case-in-chief.

Judge Pierson proposed striking the first clause, because he did not think that it was helpful. Mr. Brault said that this is partly repetitive from the language in section (a). He suggested that subsection (b)(1) could read as follows: "Except as provided

in subsection (c)(2) of this Rule, a claim for attorneys' fees must be asserted... ." The language "and proved" should be taken out. The Chair said that he did not have a strong feeling about changing the language of subsection (b)(1), but he pointed out that the claim for attorneys' fees is really part of the underlying claim. One only gets the fees by contract if there is a contract that provides for the attorneys' fees. It is part of the underlying claim. Judge Pierson remarked that if that is so, then language stating that it is part of the underlying claim is not necessary. It is already part of the underlying claim by operation of law.

The Chair explained that it was drafted this way because people wanted guidance about the attorneys' fees as to when they have to prove them. They could not have the jury decide that a default occurred and that there was a certain amount of damages but say nothing about attorneys' fees which would be raised later. So that this would not happen, the claim for attorneys' fees was part of the underlying claim, because it was part of the contract. Judge Pierson pointed out that it is not necessary to require a party to state that it is part of his or claim; it is only necessary to require that the party allege and prove the issue prior to the entry of verdict.

The Vice Chair inquired whether Rule 2-704 could state that unless subsection (c)(2) or the court provides otherwise, a party would have to prove his or her attorney's fees as an element of the damages in the case, which is language that was previously

used. She was not sure of the meaning of the language "asserted and proved" prior to verdict or decision. It sounds as if the attorneys' fees come first, and the rest of the case comes later.

Ms. Potter suggested that the Rule provide that the attorneys' fees be tried in the case-in-chief and not raised post-trial. The Vice Chair asked whether this means that part of this goes to the jury. The language would not affect this. The fees are proven as part of the case-in-chief as an element of the damages.

The Chair suggested that the Rule could read as follows: "Except as provided in subsection (c)(2) of this Rule, an entitlement to attorneys' fees must be asserted and proved prior to the jury's verdict or the court's decision." Mr. Brault inquired if the language should be: "must be asserted as part of the case-in-chief...". He was not sure what the Court of Appeals would hold as to who decides the fees. The Chair said that his understanding was that if the question is whether someone is entitled to the fees, that is for the trier of fact. So far, the Court has held that the amount is to be decided by the court.

Mr. Brault questioned whether the jury does not hear a case where an attorney is sued for malpractice if the rationale is that the Court of Appeals controls attorneys. The Chair noted that the Court controls attorneys through the Attorney Grievance Commission. Mr. Brault commented that if there is an issue regarding attorneys' fees, where the attorney is not supposed to get too much, the court has to make sure that this is fair, but

the person who is paying the attorney's fee has a right to have a jury determine this. The Vice Chair responded that she thought that this was the case.

The Chair clarified that this is not like a statutory claim where it is not necessarily dependent on what the plaintiff's attorney and the plaintiff have agreed to, because it could be more. In a contract claim, what is being requested is that the defendant pay the fee that the plaintiff has incurred. Ms. Ogletree added that it is not necessarily the defendant. The Chair said that the fee would be up to, but not more than the fee that the plaintiff has incurred, unlike a statutory claim that could be more than that fee. If the plaintiff's attorney has hired a well-known attorney and agreed to pay $1000 an hour and the attorney worked 100 hours, the fee would be $100,000. This is what the plaintiff would be asking the defendant to pay, but not more than that. The question is whether the judge will hold that this is unreasonable. If it is unreasonable for the plaintiff's attorney to charge his or her client that, it is unreasonable to make the defendant pay it.

Judge Norton asked whether this is beyond the scope of this Rule. It is what a judge is going to have to do at some hearing. The Chair pointed out that for the District Court, it is all wrapped up in the one proceeding. In the circuit court, it could be bifurcated. The jury could come in with a verdict as to entitlement, a judgment is not entered on the verdict, the judge hears that the jury has decided someone is entitled to a fee, and

the judge decides whether the requested free is reasonable. The Vice Chair said that she had thought that the overall point was not to decide who it was that was going to determine the attorneys' fee issue or even entitlement to it, but rather to state that as a general rule, unless an exception applies, or unless the court provides otherwise, a party has to bring of all of his or her evidence to the trial. This is the usual scenario. The Chair asked how the court would decide that a party need not do this. The Vice Chair replied that it would not make any sense to the person. One may only get the fees if the person prevails. Judge Pierson noted that there are cases where both parties agree that it does not make sense to try the issue of fees during the trial, so the fee issue will be tried later. This is not uncommon. Ms. Potter added that it is not uncommon in Montgomery County to waive a jury. It may be a non-jury trial.

The Chair commented that the judge can always decide the amount if it turns out that the plaintiff is entitled to recover that from the defendant. If the issue is whether the plaintiff is entitled to that relief, that would be for the jury to decide. The Vice Chair remarked that everyone seems to agree that entitlement could very well be decided by the jury, but some believe that the amount of the attorneys' fees could also be determined by the jury.

Judge Pierson said that he had presided over cases in which both attorneys agree that the case should be tried on the merits before the jury. The attorneys were not certain who would be

entitled to attorneys' fees or how much the fees would be. They agreed that this should be decided by the court. The Chair responded that this would be proper. Judge Pierson countered that the Rule would not permit this. As this Rule was originally drafted, it did not permit the parties to agree to this procedure. The Vice Chair remarked that this is why she was going to vote for Judge Pierson's incorporation of the following procedure: a motion allows the court to decide a different way of handling attorneys' fees. The Chair inquired if the judge can do this over the objection of the parties. What if the parties ask for the jury to hear the issue of attorneys' fees? The Vice Chair noted that this is for the court and the parties to decide when the motion is argued.

The Chair told the Committee that the problem he had with this was that to the extent that the issue is entitlement, the Rule could provide for this. The parties can always agree otherwise to let the judge and not the jury decide entitlement. The Vice Chair asked if there is a contract entitlement case that holds that a jury may not decide the amount of damages. The Chair answered that this was the holding in a statutory claim case. The basis of the ruling was that it is for a judge to decide the reasonableness of attorneys' fees, and not a jury. He did not see what the difference would be between a statutory claim and a contract claim as to the issue of attorneys' fees.

The Vice Chair remarked that what seemed strange to her is that she associates reasonableness of attorneys' fees usually

with the relationship between the attorney and the client. When it becomes a matter of damages, in the context of the court's authority over attorneys, the court is exercising jurisdiction over the damages of someone else who is not even an attorney. The Chair disagreed, pointing out that in a contract case, no more money can be shifted than what the plaintiff has agreed to pay his own attorney. The Vice Chair noted that it could be less than this amount. The Chair hypothesized that the amount could be unreasonable under Rule 1.5, Fees, but the jury decided that the fee was appropriate. The contract states that the fees would be 75% of any recovery. The Court of Appeals has held that this is impermissible.

Judge Pierson commented that he agreed conceptually with the Chair that it does not seem to make sense for a jury to determine reasonableness, but this is one possible outcome of engrafting a reasonableness requirement on recovery of contract-based fee claims, which the Court has clearly done. An argument could be made that this is not like a statutory fee. To the extent that it is an element of damages, a party has the right for a jury to decide it. The Vice Chair noted that it may be subject to a later review by the judge as to reasonableness if the jury verdict is too high. Mr. Brault pointed out the added problem of whether the matter goes directly to Bar Counsel, regardless of whether it is a jury or a court that decides that the fee is unreasonable, to find out if it is a violation of the ethical rules. That is an issue to be determined later.

Mr. Klein inquired if Rule 2-704 should be drafted in the alternative for the Court. The Chair said that the Rule could be drafted as Judge Pierson had suggested if the wording is: "Except as provided in subsection (c)(2) of this Rule, the issue of entitlement to an attorneys' fee must be asserted and proved prior to...". It is clear that this issue is for the trier of fact. The Rule would not refer to the amount of the fees. The Vice Chair asked what the language "only entitlement must be asserted and proved" means if the Rule only refers to entitlement. If the Rule provides that it is only entitlement that has to be considered, this implies that the issue of the amount of the fees cannot go to the jury. Mr. Brault observed that the issue of entitlement is generally not in controversy. If the document provides entitlement, how could someone argue there is no entitlement? It is in the contract. The Chair noted that it may be in question. It may be a question of contract construction, or it may be that the contract does not refer to fees. The Vice Chair pointed out that the issue is usually who won the case. Was there a default or not?

Mr. Brault suggested that subsection (b)(1) of Rule 2-704 may not be necessary. He drew the Committee's attention to subsection (b)(2). It could read as follows: "[e]xcept as provided in section (c) of this Rule, (i) a claim for attorneys' fees subject to this Rule shall be made in a complaint or other appropriate pleading; and (ii) must be asserted and proved prior to the entry...". Subsections (b)(1) and (2) seem to be

duplicative. In a separate paragraph, the language of the Rule would be "(iii) the court may require evidence in the form set forth in Rule 2-703 (e)(3)...". The Chair said that this is proper as a matter of style, but it does not solve Judge Pierson's problem. Mr. Brault responded that it would be left open. The Rule would simply provide that the proof has to come in and leave open who is going to make the decision. The Chair remarked that he thought that this is what the Committee had decided at the last meeting. In the contract claims, a party needs to present all of his or her evidence in the case itself.

The Vice Chair commented that she would approve of the Rule if it read that way. It would provide that the party has to present all of the evidence relating to the attorneys' fees in the case-in-chief. The language of subsection (b)(1) does not state this. The Chair cautioned that if this is taken too far, and if the Court of Appeals decision on the statutory claims, which is that determining the reasonableness of the amount of the fee is for the judge whether it is a jury trial or not, would apply as well to contract claims, it may not be necessary to include all of the information as to how many hours were spent, etc. coming in for the jury, because they are not going to decide this. The Vice Chair pointed out that this situation could be handled by the language "unless the court orders otherwise." The Chair noted that the court should always order otherwise in that situation. The Vice Chair observed that Judge Pierson disagreed with this interpretation.

The Chair suggested that the Committee decide the way the Rule is going to read, and then it will go to the Court of Appeals for the final decision. Mr. Klein remarked that this is why he asked if this part of the Rule should be stated in the alternative. Is the Rule going to reflect the implication of *Monmouth*, or is the possibility that a jury could determine reasonableness in a contract case being left open?

The Chair asked the Committee how they wanted to handle this. The Vice Chair answered that two versions of Rule 2-704 can be presented to the Court of Appeals. One would read as follows: "Except as provided in subsection (c)(2) of this Rule, or as otherwise ordered by the court, a demand for attorneys' fees shall be proven in the case-in-chief," or something similar. Mr. Brault noted that this is a "claim," not a demand. The Vice Chair corrected her suggestion to "...a claim for attorneys' fees shall be proven as an element of damages in the case-in-chief." Mr. Brault responded that he approved of that language.

The Vice Chair said that the second Rule would read as follows: "[e]xcept as provided in subsection (c)(2) of this Rule or as otherwise ordered by the court, a claim for attorneys' fees...". Mr. Brault remarked that it is not necessary to state that the claim ought to be in a pleading. The claim will not exist if it is not in the pleading. The Vice Chair said that she thought that this language had been deleted. The Chair said that the Vice Chair was back to requiring that all of the evidence

regarding the amount of the fee would be presented to the jury as part of the case-in-chief. The Vice Chair agreed, noting that the Rule would provide that the court could order otherwise. This is one alternative. The second alternative is that the issue of entitlement to attorneys' fees is presented to the jury or the court, if the court is the finder of fact. There should at least be some version of language that makes it clearer that evidence of attorneys' fees is not supposed to be submitted to a jury.

Judge Pierson inquired if there were any cases in which evidence of attorneys' fees should be presented to the jury in another rule. The Chair referred back to the example of the malicious prosecution case in which someone paid his or her attorney a certain amount of money to defend the client against a malicious claim, and this amount is the damages. The Vice Chair remarked that she did not see how this differs. The Court of Appeals had already stated that reasonableness of attorneys' fees is always subject to the Court's jurisdiction. The Chair noted that this refers to fee-shifting.

Judge Pierson asked about the indemnity cases where someone had to pay fees to defend himself or herself against something, and the person is seeking to recover those fees. Would this be included in the Rule? Mr. Brault answered that he thought that it would be covered. Mr. Klein remarked that he did not see how this is different from the reasonableness of a medical expense. The Vice Chair said that if reasonableness has to be proven for

indemnity cases, why would it not have to be proven in malicious prosecution cases? Mr. Brault responded that reasonableness has to be proven for car repair expenses and all medical expenses. The Chair stated that the difference is that so far, the Court of Appeals has carved out attorneys' fees as something that a judge should decide. The theory is that this is something that the Court controls, and they do not want a jury to decide what is reasonable.

Mr. Brault remarked that the language of the Rule could be written simply as the Vice Chair had stated. Subsection (b)(1) could be changed as the Vice Chair had suggested. Subsection (b)(2) could read as follows: "a claim for attorneys' fees subject to this Rule shall be made in a complaint or other appropriate pleading, and the evidence thereof submitted as part of the case-in-chief." Subsection (b)(2)(B) shall be stated separately.

The Vice Chair asked if the discussion of subsection (b)(2) could be deferred, and if anything had been decided about subsection (b)(1)? The Chair and the Committee agreed that nothing had been decided. The Vice Chair suggested that subsection (b)(1) could read as follows: "Except as provided in subsection (c)(2) of this Rule, or as otherwise ordered by the court, a claim for attorneys' fees shall be proven as an element of damages in the case-in-chief." Then language could be added as follows: "Except that in a jury trial, only entitlement shall be submitted to the jury." This language could be bolded as

something to present to the Court of Appeals for discussion purposes. The Chair pointed out that the Court had already spoken on this issue. This issue could be held until everyone has had a chance to read the Court's opinion. It was a very clear holding.

The Vice Chair commented that even the language she had suggested before about the evidence being submitted as part of the case-in-chief does not preclude the court from telling the jury that although the jury has heard evidence about attorneys' fees, it is not their job to decide the amount of the fees, and this will be the job of the judge. The Chair agreed, as long as the judge gives that instruction, and the evidence as to amount is not 2/3 of the case. The Vice Chair responded that this would be the case where the motion can be decided by the court. If it is decided that this issue cannot be determined by the jury, because of the nature of the case, then it would not be handled this way.

The Vice Chair repeated the language suggested for subsection (b)(1): "Except as provided in subsection (c)(2), or otherwise ordered by the court, a claim for attorneys' fees shall be proven as an element of damages in the case-in-chief." The Chair asked for a vote on this language. Mr. Johnson commented that subsections (b)(1) and (2) should be reversed. They seem to be backwards. The Vice Chair agreed. The Chair said that the intent of subsection (b)(1) was to make clear that this is part of a claim, and it is not something separate. The Subcommittee

thought that this was in important point to make, because it distinguishes it from a statutory claim. Subsection (b)(2) relates to timing and what kind of evidence is needed to put in the purposes of establishing reasonableness. He cautioned the Committee to keep in mind that in a complex case, the person making the claim would have to comply with the requirements of the form set forth in subsection (e)(4) of Rule 2-703. This requires a tremendous amount of information. Would all of this go before the jury?

Mr. Michael noted the threshold question of whose function it is to decide entitlement to and amount of the fees. He said that he preferred to look at the *Friolo* case before this weighing in on these issues. The Chair reiterated that the case involved a statutory claim, not a contract claim, and it was a jury case. Mr. Michael asked if the Chair's view was that the case preempts the contract claim consideration as well. The Chair replied that this is an open question, because that case was not a contract claim. The reasoning that the Court of Appeals gave for holding that amount of attorneys' fees is to be decided by a judge would apply to both types of cases, because it addresses who is going to decide the reasonableness of an attorney's fee.

The Vice Chair inquired what the language was in the statute as to what someone is entitled to. The Chair answered that the language was "reasonable fee." The Vice Chair remarked that this may make a difference, but then she acknowledged that it may not.

Mr. Michael commented that the issue is whose role it is to decide reasonableness and entitlement. The Vice Chair reiterated that the statute provides for a reasonable fee. The Chair pointed out that *Monmouth* states that the issue of reasonableness is a question for the court.

Mr. Brault suggested that Rule 2-704 provide that the court determines reasonableness, and the Court of Appeals can decide. In place of the language "assertion and determination" in subsection (b)(2), the reference to "assertion and" could be deleted, and the following language could be added "In a trial by jury, entitlement to an award of attorneys' fees shall be made by the trier of fact, but in all cases, the amount thereof shall be made by the court." This makes the rest of the Rules flow. The Chair suggested that to fudge this a little and give the Court an opportunity to consider this issue, subsection (b)(1) could apply only to entitlement and a Committee note would be added that would provide that under *Monmouth*, the Court seems to have decided that the reasonableness of the amount of the fee is for the judge to resolve. He was not sure that the Rule should be sent to the Court in alternatives. Mr. Klein responded that he did not feel strongly about the alternatives, but the Rule should be set up in a way that is not ambiguous as it currently is. It is not definitive. As long as the issue is there, it should be framed for the Court to indicate that there may be a different interpretation of *Monmouth*, but the draft is the Committee's best

attempt to comply with the Court's holding. He agreed with Mr. Brault's language, which provides that the issue of entitlement goes to the finder of fact and the issue of amount is made by the court.

Ms. Ogletree moved to add language as described by Mr. Klein. He explained that his language was to make clear that the issue of entitlement is decided by the finder of fact and that the issue of reasonableness of the amount is decided by the court. The motion was seconded, and it passed with one opposed.

Mr. Leahy inquired if a Committee note referring to *Monmouth* would be added, and the Chair replied affirmatively.

The Vice Chair expressed her concern about making this kind of determination by rule. Judge Pierson remarked that it may be clearly outside of the power of the Committee, but it is worthwhile, because it clarifies what the rule is. The Vice Chair commented that even though the Court of Appeals has always held that the judge is to determine reasonableness, the change could be made to the Rule unless the case (which she would like to read, also, before making this decision) holds that the jury cannot ever decide the whole amount when the damages are attorneys' fees and must be decided by the judge, so that the award is reasonable. The case could be interpreted as: the jury decides upon an award of $500,000, which was the amount that was proven in the case-in-chief, and then the judge having also heard the evidence decides whether this meets the reasonableness

requirement. The Rule would be taking away a right to a jury trial, and the Vice Chair said that she was not comfortable with that.

The Vice Chair expressed the view that section (a) of Rule 2-704 should end after the language "by the other party." The language "upon a default or breach by the obligated party on a contractual obligation" is not necessary. This is because, for example, there could be an indemnity provision, and the language may not cover the entire scope of what might be at issue. Judge Norton pointed out that the title of the Rule contains the words "by contract." If the suggested language is taken out, does this keep it in line with the rest of the Rule? Ms. Ogletree noted that the language in section (a) that reads: "...based on a contractual undertaking by a party to pay a part or all of the attorneys' fees..." would remain in the Rule and is very clear. By consensus, the Committee approved the deletion of the language suggested by the Vice Chair.

Mr. Enten told the Committee that he had an issue concerning subsection (b)(2)(A)(ii), which also impacts the language in subsection (c)(1). He had read *Monmouth* when these Rules were considered by the Committee previously. He expressed his appreciation that the case had been included in the meeting materials, so that he could review it. The case clearly states in footnote 15 at the bottom of page 343: "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 very clear that this decision does not impact the contracts with a specific percentage in them. The facts of the case make sense, because in the four cases that *Monmouth* addresses, none of those cases specify an amount. The case dealt with the situation where the underlying claim was $300 or $400, and the attorneys' fees claimed by the plaintiffs' attorneys were four or five times the amount of the underlying claim.

Mr. Brault remarked that this would be very logical except for the fact that one judge awarded 15%. Mr. Enten responded that the problem was that one judge awarded 15%, and there was nothing in the contract that referred to 15%. The judge pulled the 15% figure out of thin air. If Rule 2-704 is being conformed to the holding in *Monmouth*, then the court may need to clarify that case. The argument is that there is conflicting language in that case, but this should not be addressed in the Rule. That language is crystal clear.

The Vice Chair asked Mr. Enten if his comments addressed section (c) of the Rule. The Chair pointed out that the comments address both sections (b) and (c). Mr. Klein noted that subsection (b)(2) begins with the exception: "[e]xcept as provided in section (c)." Section (c) does not apply. Mr. Enten disagreed, commenting that subsection (b)(2)(A)(ii) provides that the court may require the party making the claim to present evidence in support of it in the form set forth in Rule 2-703

(e)(3). Mr. Klein noted that the beginning of that provision is "[e]xcept as provided in section (c)."

Mr. Enten explained what his problem was. Section (c) does not allow for the recovery of more than $4500, which is to apply to the District Court. Mr. Canter's debt collection practice involves District Court claims. Mr. Enten said that he was concerned about the claims that are around $50,000 or $60,000 and that have a contractual provision where the obligor has agreed to pay 15% of the underlying debt. Nothing in section (c) would apply, because there the fees are capped at $4500 based on the jurisdiction of the District Court. Subsection (b)(2)(A)(ii) states that the court may require the party making the claim to present the long list of items set forth in Rule 2-703 (e)(3), including hourly charges by the fraction of the hour. To recover a case, even though there is a default judgment where the borrower has agreed to pay the fees on a $100,000 note, the attorney would have to itemize everything listed in Rule 2-703 (e)(3). The Chair pointed out that the court can excuse the attorney from having to do this. Ms. Ogletree also noted that subsection (b)(2)(A)(ii) provides that the court "may" require this evidence.

Mr. Enten responded that he had no problem with the fact that it is not mandatory. The conundrum is in subsection (c)(1) pertaining to the language: "the court may dispense with the need for evidence in the form set forth in Rule 2-703 (e)(3) provided that evidence is admitted establishing...". This implies that

the language in subsection (b)(2)(A)(ii) is required; otherwise if it is permissive, why is the language in subsection (c)(1) that states that the court may dispense with the evidence necessary?

The Chair commented that Mr. Enten was reading *Monmouth* as if the contract provides for 15%, that is all, and the court cannot weigh in on this. Mr. Enten explained that he was reading *Monmouth* as holding that this decision does not address that situation or any other. The Chair argued that the case does address this. He acknowledged the language of the footnote, but the following language is on page 336 of the opinion: "Our rejection of the lodestar approach [for contract cases] does not mean that the time spent by the lawyers and a reasonable hourly rate should not be an important component of a court's analysis. Indeed, Rule 1.5 (a) of the Maryland Lawyers' Rules of Professional Conduct, which lists factors that should be considered in determining the reasonableness of a fee..." The case goes on in the text of the opinion. The Vice Chair pointed out that this is not in the context of a case where someone had agreed to pay 15%. The Chair responded that the case does not state this.

Mr. Enten said that the case has relevant language on page 336. Then on page 343, there is language which states that the language on page 336 does not apply where there is a percentage stated. The Vice Chair added that especially in connection with

confessed judgments or perhaps even default judgments, when the contract provides for 15%, the courts award it, and they have been doing this for as long as she has been practicing law and probably for longer than that. To change that in connection with a case that does not clearly state that the person agreed to pay 15%, but he or she cannot get that 15% until the reasonableness of the fee is determined, would change hundreds of years of practice. Mr. Enten commented that if this is addressed in a reported decision, it should not be handled by rule. The Chair responded that the Committee is not doing anything by rule. The question is whether the Court of Appeals will be doing something by rule.

Mr. Brault remarked that an inherent problem exists pertaining to this issue that attorneys have been overlooking. If the court is going to assess the reasonableness of a percentage fee, then every plaintiff attorney is subject to review for every contingent fee in every case the attorney ever handled. This applies particularly in the big cases. The Chair noted that the Court has already addressed this in *Attorney Grievance Commission v. Korotki*, 318 Md. 646 (1990) where they held that the fees cannot be more than 50% -- an attorney cannot have a greater stake in the case than the client. The Vice Chair said that she had not read that case, but the holding implies that charging less than 50% is proper. The Chair responded that the case only holds that the attorney cannot charge more. Many

of the judges, particularly on the District Court, read *Monmouth* differently than Mr. Enten is reading it. It is not clear whether the Court of Appeals will even approve Rule 2-704 as stating that if the contract provides for 15%, that is the end of the matter. Many of the collection cases are based on statutes that permit 15%. An argument can be made that the public policy set by the legislature is that this is reasonable at least in cases based on those statutes. He did not know that the Court would apply this beyond what the statutes provide.

The Vice Chair hypothesized that the loan is $5,000,000, and the debtor agreed to pay the 15% in the event that the debtor defaults. There is no question that the debtor has defaulted, and has consented to a confessed judgment clause. This is at the beginning of the case, but 15% of the amount owed seems huge. However, the attorney may be working on this for the next five years. How can the fees be judged? The Chair commented that the Court addressed this obliquely in *State of Maryland v. Maryland State Board of Contract Appeals and Law Offices of Peter G. Angelos, P.C.*, 346 Md. 446 (2001). The Court has looked at this in several different respects. If the case is $10,000,000 with a 15% attorneys' fee, and the attorney spent three hours on that case, the court can look at this and decide that it is unreasonable in this case. Judge Norton inquired why the Court included the footnote. The Chair answered that he did not know. The opinion was issued in July; there was a motion for

reconsideration, and the Court added a few items. The opinion was reissued in October. They put the footnote in, but they left the text. The Vice Chair noted that the text comes in the context of where the law provides that is reasonable. If that is what it provides, then it is necessary to go through the factors to determine whether the fee is reasonable.

Judge Zarnoch drew the Committee's attention to page 338 of the *Monmouth* opinion. He read the following: "Trial courts are not bound by the monetary amounts in such contracts, however, and need not cleave to the contracts at all if they improperly influence the fee award." The Court has jumped from statutory claims to contractual claims. This part of the opinion would indicate that the Court will apply the same rule in a contract situation. The Vice Chair asked why the Court included the footnote if that is the case. The Chair pointed out that the footnote simply states that this case did not involve a contract, and the Court does not have to resolve that. The Vice Chair remarked that the Committee would attempt to resolve it based upon a Court opinion that did not resolve it.

The Chair explained that what the Rule is stating is that in the District Court, there is a basis to apply a percentage such as 15%. It is appropriate, because there are statutes that authorize it. The same rule ought to apply in the circuit court to the extent that the District Court has jurisdiction. The Subcommittee was looking at a situation such as a District Court

case for $5000, the 15% is applied, and an appeal is taken. The same case would go to the circuit court. Why should it be any different? In the $10,000,000 case where the attorney does five hours of work and then settles the case, the court will probably not adhere to the 15% figure.

The Vice Chair questioned how the trial judge can evaluate what is reasonable when all that has happened so far in the case is that a confessed judgment is being entered against a defendant who has not paid. The Chair responded that the judge would not see the confessed judgment unless it is stricken and put in for trial. The Vice Chair said that the fee could be $500,000 on a debt where the attorney has not done much work yet. The attorney does not know whether collection of the amount will ever occur or will take six months or six years or 12 years. There is no way to evaluate how much effort the attorney will have to put into this at that stage. It would be unfair to take a written agreed-upon provision by the debtor and cast it away under these circumstances. She acknowledged that there are time when the fee is a windfall to the attorney, but she expressed the view that this probably does not happen very often. Mr. Enten remarked that he had gotten a windfall in a plaintiff's case.

The Chair said that the Vice Chair's argument was that if the fee is 15% of the debt, and not $500,000, which unquestionably is for the judge to determine, the judge can deny this, but Mr. Enten's point was that if the contract is 15%, that is as far as it is necessary to go, no matter how much the debt

is. Mr. Enten commented that the Rule could be silent as to the case where there is an agreed-upon percentage fee in the District Court, but he expressed the concern about the larger cases that are in the circuit court; it is huge leap to discount the language that is in the opinion and establish a rule that would require all these bells and whistles in a circuit court case where there is a percentage fee. If the court wants to clarify *Monmouth*, they can do so. The Chair noted that they will have an opportunity to do that when they consider Rule 2-704. The Vice Chair pointed out that the Court can make this determination by rule. The Chair added that the purpose of the Rule is to give guidance, particularly in the circuit court. The Rules that the Committee sends to the Court will be the guidance that they give.

Judge Norton remarked that everyone seems to be happy with the Rule as it applies to what are "reasonable" determinations. The issue is when the fee is a fixed amount. A version A and B could be sent to the Court, and they will have to decide the issue. The Vice Chair remarked that this is what Mr. Klein had suggested. The Chair asked if this should be done for the District Court Rule as well. Judge Norton replied affirmatively. The current District Court Rule accomplishes what the proposed Rule provides for. Mr. Brault requested a vote on whether the judge will totally determine the amount. Ms. Ogletree responded that the language of the Rule had been changed to address this. Mr. Brault suggested that subsection (b)(2)(A)(ii) of Rule 2-704

be changed to “in determining the amount, the court may require...”. The Vice Chair inquired if the Committee had decided to send to the Court two alternatives relating to percentages fees. The Chair answered that this had been discussed but not decided. Mr. Brault suggested that the language could explain how claims for 15% or less are to be established.

The Chair stated that there are three alternatives. One is that 15% is never changed. If this is in the contract, it would be the only standard for both the District Court as well as the circuit court. Ms. Ogletree questioned whether this would include a ceiling of 30%. The Chair replied that this is not included. Alternative two would be that nothing specific is the standard. It can be 15%, but the attorney would have to show reasonableness in both courts which would be very difficult for the District Court judges. Judge Norton remarked that this would cause at least 200 hearings a week. The Chair said that the third alternative is to provide that in the District Court, 15% is appropriate, because the fee can only go up to $4500, and leave it up to the circuit court whether to provide for a $4500 limit or not.

Judge Norton commented that another alternative that had been discussed was that the 15% procedure is applicable without change for cases where it is reasonable in terms of the contract. However, in cases where the percentages have been defined, that would not be changed. The other alternative is if the contract

specifies a percentage, that would also not be changed. The Chair's reading was that this is not what the Court meant in *Monmouth*; the footnote states that the Court never reached this issue. Sending up alternative versions will force the Court of Appeals to reach the issues of whether a contract can be for a certain percentage, or whether it remains to be determined unless it is demonstrated to be reasonable additionally.

The Vice Chair remarked that she remembered a very old case that provides that 15% is presumed to be reasonable. Judge Pierson commented that *Mortgage Investors of Washington v. Citizens Bank and Trust Co.*, 278 Md. 505 (1976) provides that because the parties agreed to the fee by contract, the parties were bound by the percentage in that contract. The Court of Appeals has held many times since then that even where the fee is stated in the contract, it is necessary to measure reasonableness. The Vice Chair asked if this is so, even when the fee is stated as a percentage. Judge Pierson replied affirmatively. The Court has not always held that the percentage is 15%, but they have repeatedly held that even if there is a contract, it is still necessary to measure reasonableness. The Vice Chair responded that she was in agreement with this. If the percentage goes up, she thought that the law provides that if the fee is 15% in a contract, that is presumed to be reasonable. If the percentage is 35% to 50%, it should be necessary to go through some hoops. Judge Norton said that he would retract his

prior statements, because he was satisfied with how the District Court Rule looked.

Mr. Brault suggested that in subsection (c)(1), the Rule could end with the words "Rule 2-703 (e)(3)," and the balance of the Rule could be stricken. The Chair noted that this would make the 15% or less of the principal amount of the debt due and owing apply all of the time. The Vice Chair added that this would be up to $4500. Mr. Brault responded that it is limited to $4500. The Chair said that it is limited in the District Court. Mr. Brault noted that subsection (c)(1) limits it as well. The Chair pointed out that this limitation was added, because the decision was to make it equivalent. Mr. Enten had expressed his opposition to this, and the Vice Chair had said that she also disagreed.

Mr. Enten remarked that he understood that the District Court would like to have a hard and fast rule, so that it is not necessary to have thousands of hearings in attorneys' fees collection cases. This is sensible. For the circuit court, the language of the Rule could be that in a case that is above $30,000, the court has to determine reasonableness. However, Mr. Enten said that he was not sure whether the cases that require determination of reasonableness had a specific amount in the contract. The Chair suggested that alternatives based on all of the discussion today on this issue would consist of bracketing in subsection (c)(1) the following language: "and the requested fee does not exceed $4500." This would be the alternative. The

Court will decide if this language should stay in the Rule or not. The language could be left the way it is, but a bracket around the condition of the $4500 could be added. This would be the alternative as to whether to delete this language.

The Vice Chair commented that this was one alternative, which she agreed with, but another way to present this to the Court would be to put a period after the word "Rule 2-703 (e)(3)," because the legal basis for the parties' right to recover the attorney's fee is always in the complaint, anyway. Subsections (B) and (C) present the problem she had referred to previously. The issue with subsection (B) is that the party does not know what will be a reasonable fee, because the scope of work is unknown. Subsection (C) is similar to the problem that arose in *Gay v. State of Maryland Deposit Insurance Fund Corp., Receiver for Old Court Savings and Loan*, 308 Md. 707 (1987) where the bank had agreed to pay the attorneys on an hourly basis. There would be no way for the attorney to know whether the fee does not exceed the fee that the claiming party has agreed to pay that party's lawyer.

Judge Pierson responded that the Vice Chair was reading too much into the phrase, "facts sufficient to demonstrate that the requested fee is reasonable." It assumes that this means that the attorney is always required to show an hourly rate, but there are other ways to prove this. Rule 2-703 (e)(3) does not have only hourly rates, it has many other factors. With other factors

applying, the attorney may be able to prove that the requested fee is reasonable.

The Chair remarked that he could not see how subsection (c)(1)(C) of Rule 2-704 could be dropped. This involves fee-shifting. If a party has agreed to pay his or her attorney 10%, the party cannot collect 15% from the other side. The Vice Chair responded that she agreed with this, but she noted that if the client has agreed to pay the attorney on an hourly basis, and the debtor has agreed to pay 15%, there may no relationship between the two. It is not known at this point in time. The Chair said that he did not see how the defendant could be required to pay more than what the plaintiff has agreed to pay his or her own attorney. The Vice Chair said that she would agree with the Chair as a general rule after an entire trial which is of unknown length, but most of these cases come up in the confessed judgment situation.

Mr. Enten told the Committee that when he used to handle GMAC collection cases, he had 50 cases per day in the District Court. The arrangement involved a $25 suit fee, and then the attorneys got a percentage of what they collected. In that case, the fee that the claiming party had agreed to pay could be an agreement to pay the attorney 15%. Would the attorney still be able to get his 15%? The Chair answered affirmatively. Mr. Enten inquired how this would work in real terms. What the client agreed to pay was a $25 out-of-pocket fee, and the rest would be on a contingent fee basis for 15% or 20% or whatever.

The Chair said that a judge could tell the attorney that if his or her client has agreed to pay the attorney $100, and the attorney has a $5000 claim, the judge will probably not make the defendant pay a fee of 15% of that. This is not fee-shifting. The attorney cannot shift more money than what the attorney was entitled to collect from the client. Ms. Ogletree remarked that this happens frequently. The Chair responded that even if this is how it is done, it is not what fee-shifting is about.

Judge Weatherly commented that she sometimes spends 10 hours of time on these cases. Judges are not awarding the $60,000 in attorneys' fees for a complaint and a default judgment. Mr. Enten noted that the attorney may never collect a penny of the fee. Judge Weatherly added that the arrangement should be between the attorney and the client.

The Chair asked the Committee if there was a motion to drop subsections (A),(B), and (C) of subsection (c)(1). The Vice Chair said that as a way of putting this issue before the Court of Appeals, she would so move, so that in a case where there is a 15% agreed-upon fee and contract, this would be the fee that the attorney would get. The Chair cautioned that this would be no matter what the party has agreed to pay his or her attorney. It would be pure profit. Master Mahasa pointed out that this is what the party contracted for. If it is not illusory or violative of contract law, why would the court look behind this fee? The Vice Chair added that it is only the 15%. If the percentage agreed in the contract is more than 15%, then this

would not apply. The Chair asked if there were a second to the Vice Chair's motion. The motion was seconded, and it failed.

Mr. Enten pointed out the language in subsection (c)(1) that reads: "the court may dispense with the need for evidence...". This implies that the language in subsection (b)(2)(A)(ii) is mandatory. This language is not necessary, because that requirement is permissive, but it implies that it is mandatory by the language "the court may dispense." Judge Pierson suggested that the word "may" could be changed to the word "shall" in subsection (c)(1). He agreed with Mr. Enten that the word "may" in both subsections (b)(2)(A)(ii) and (c)(1) is inconsistent. It would make more sense to change the word "may" to the word "shall" in subsection (c)(1). Mr. Enten remarked that it would be up to the court to decide whether the party has to list all of the information required in Rule 2-703 (e)(3), because it is permissive. The Vice Chair agreed that changing the word "may" to the word "shall" is a good idea, and she also suggested deleting the language "the need for" from subsection (c)(1). The wording would then be: "..the court shall dispense with evidence in the form...". Taking out the language "the need for" eliminates the connotation that it was a requirement in subsection (b)(2)(A)(ii).

The Chair said that he would not have a problem with these changes if the $4500 limit stays in the Rule. If that limit is taken out, and the court must dispense with evidence any time the fee is 15% of the principal amount of the debt, the Chair did not

think that the Court of Appeals would agree to this. Mr. Enten commented that he did not necessarily want the word "may" to be changed to the word "shall," but he wanted to get rid of the implication that states that the language "the court may dispense with the need" implies that subsection (b)(2)(A)(ii) is mandatory. The language "the court may dispense with" should be taken out of the Rule, because it has the discretion under subsection (b)(2)(A)(ii) to ask for it if the court wants it. The Vice Chair inquired if Mr. Enten's point was resolved by changing the language to: "the court may dispense with the evidence in the form set forth in Rule 2-703 ...". Mr. Enten reiterated that it is already permissive in the other provision. What is being implied is that the evidence is mandatory. The Chair noted that subsections (c)(1)(A), (B), and (C) are still in the Rule. It is necessary to prove reasonableness. Judge Pierson inquired if the bracket around the language: "and the requested fee does not exceed $4500" stays in. The Chair replied that the Committee had decided to send the Rule to the Court as an alternative.

The Reporter asked about the wording of subsection (c)(1). Is the wording of the Rule, "the court shall not require evidence in the form set forth in Rule 2-703 (e)(3) if evidence is admitted establishing (A)...(B)... and (C)..."? This is one alternative. The other alternative would be the way the Rule is written now. Mr. Enten reiterated that the language in subsection (c)(1), which reads: "..the court may dispense" is not

necessary. The Vice Chair inquired how the Rule is supposed to read. Mr. Enten answered that it would read as follows: “If the claim for attorneys’ fees is based on contractual undertaking to pay, on default, an attorneys’ fee of 15% or less of the principal amount of the debt due and owing provided that the evidence is admitted establishing...”. Nothing prevents the court from requiring the party making the claim to present this other evidence. At a minimum, the party would have to state what is in subsections (A),(B), and (C).

The Chair asked if the word “may” should be changed to the word “shall.” Mr. Enten said that he approved of that. The Rule has to be clear that the language in subsection (b)(2)(A)(ii) is still permissive. The Vice Chair moved to change the word “may” to the word “shall” in subsection (c)(1). Judge Pierson seconded the motion, provided that the tagline of subsection (c)(1) is changed to read: “Claims for 15% or Less Where the Requested Fee Does Not Exceed $4500.” This would indicate that the two changes are linked to each other. The Chair responded that this will not address the problem if the text does not do so.

Mr. Klein suggested that there should be two separately drafted provisions rather than using brackets in one provision. One would include the $4500 limitation and substitutes the word “shall” for the word “may.” The other has no limitation with the $4500 limit as an option, and the word “may” stays in. The Chair commented that Mr. Enten’s point is that the word “may” in subsection (c)(1) conflicts with the word “may” in subsection

(b)(2)(A)(ii). Mr. Johnson remarked that he did agree with the way Mr. Enten read the two provisions. The two are not inconsistent. The first provision states that the court may require the party making the claim to present evidence, and the second provision states that the court may dispense with evidence if the factors set forth in the Rule are complied with.

Mr. Enten inquired why the language "the court may dispense" with the evidence when subsection (b)(2)(A)(ii) states that the party may not have to provide the evidence. Mr. Johnson reiterated that subsection (c)(1) provides that the court may dispense with the evidence if the factors in (A),(B), and (C) are shown. Mr. Enten said that this implies that if those factors are not shown, the court cannot dispense with the evidence. The Vice Chair noted that the first line of subsection (b)(2)(A)(ii) is that the court may require the party making the claim to present evidence in support of it. This means that the evidence may never be required. Mr. Johnson said that the evidence is set forth in Rule 2-703 (e)(3), but subsection (c)(1) is not about that. The Vice Chair explained that subsection (c)(1) is about the evidence set forth in Rule 2-703 (e)(3). She suggested that the Rule should refer to "Rule 2-703 (e)(3)(iii)."

Mr. Klein suggested that subsection (c)(1) could be reworded to state that in a 15% situation, the party must at least prove subsections (A), (B), and (C). The word "dispense" could be taken out. Mr. Enten commented that the judge has discretion as to how to interpret subsections (A), (B), and (C), and this is

appropriate. The District Court judges will look at those factors, and they will decide whether the plaintiff's attorney met that burden or not. The Chair noted that subsection (c)(1) is identical to the District Court Rule. Judge Norton remarked that the District Court Rule should be conformed. The Chair said that the reason that the $4500 amount was put in for the District Court is because in landlord-tenant cases, there is no limit on civil jurisdiction. There could be a huge landlord-tenant matter between commercial clients with damages of millions of dollars on a default, and the idea is that the party would not get the free ride of 15% even in the District Court. It is even more important that the $4500 limitation be in the circuit court Rule as well as what is in subsections (A), (B), and (C). If the Rule 2-703 (e)(iii) evidence is going to be dispensed with, at least the party has to show facts establishing that the fee is reasonable. This is absolutely clear in *Monmouth*.

The Reporter remarked that she liked Mr. Klein's suggestion to provide in the Rule that the party must at least prove the following, and then if the court in a particular case thinks that all of the information in Rule 2-703 (e)(3) is necessary, the court can ask for it. Regardless of whether there is a $4500 cap or not, the language could be changed to state that a party must at least prove subsections (A), (B), and (C). Mr. Enten said that the standard has always been what is reasonable. No one has objected to it. *Monmouth* does not object to it, because the 15%

was not provided for in the contract.

Mr. Klein moved that the language that reads: “and the court may dispense ... Rule 2-703 (e)(3)” should be stricken. In its place, language would be added to the effect that provided that the party claiming fees should comply with subsections (A), (B), and (C). The Vice Chair asked about the language in subsection (b)(2)(A)(ii) that reads, “the court may require the party making the claim to present evidence in support of it in the form set forth in Rule 2-703 (e)(3).” Subsection (e)(3) contains a very long list of items. Is this what the Rule is requesting? The Chair answered that this is what the Rule means.

Mr. Leahy remarked that this Rule includes prevailing party contract cases which can get very complicated. Ms. Gardner asked what the exact language was that was being proposed. The Reporter replied that the language “and the requested fee does not exceed $4500" will be bracketed, so that it will be the 15% clause with or without the $4500 clause for the Court of Appeals to decide how they want it to read. The language that reads: “the court may dispense with the need for evidence in the form set forth in Rule 2-703 (e)(3)” is deleted, and the following language is added in: “provided the party seeking the fees proves at least the following: (A) the legal basis...party’s lawyer.”

Ms. Gardner said that she had a question to raise. She asked if the same change would be made to the District Court Rule, and the Reporter answered affirmatively. Is it the Committee’s intention that the opposing party would be able to

contest a matter and put on their own evidence so that the court can make a determination? The Chair pointed out that there is a consumer protection issue in both the circuit court and the District Court. These cases involve debtors who may have defaulted on notes, service contracts, and similar items. If the debt is going to be loaded up with attorneys' fees without any ability to assure that the fees are reasonable, it may really hurt people. The Vice Chair expressed her agreement with the Chair's comments. She said that she always tries to look out for the consumer, but the other side of the story is the multi-millionaire developer who has defaulted and wasted all of the assets of many people.

Judge Weatherly observed that she and other judges see hundreds and hundreds of people who have not paid their loans or other debts. They owe this, and now, these enormous attorneys' fees have been added to the debt. Mr. Enten noted that the language deals adequately with this, because the language in subsections (A), (B), and (C) of subsection (c)(1) gives the judge the discretion to require whatever proof the judge needs to establish that the fee is reasonable. Mr. Brault commented that a judge may have a stack of these judgments and signs every single one without necessarily looking carefully at them. The Chair told the Committee that the Rules will be sent to the Court with alternative language.

Ms. Gardner said that she had a comment about Rule 3-741. The Chair had made an earlier statement that the fees are to be

proven during trial. Subsection (d)(1) provides for this. There are wage and hour cases (under Code, Labor and Employment Article, Title 3, Subtitle IV) as well as wage payment cases filed in the District Court where the fee claim is the collateral matter after judgment. It would not be appropriate for this language to apply to those cases. The Chair said that his recollection was that the Committee felt that it should apply. In the District Court, both the contract and statutory claims are being put together, and they will be resolved at one time. The court may decide whether there is a claim under the Wage Payment Act and if it was the result of a bona fide dispute. This is unlike the procedure in the circuit court. The thought was that there should not be two hearings in the same case. Ms. Gardner responded that the plaintiff's attorney will have to be prepared with all that fee detail and all that information even before knowing whether the plaintiff prevailed.

The Chair pointed out that the trial in the District Court is going to take one day. The Committee made that decision for the District Court. Otherwise, all of the parties would have to be called back into court a second time. The Reporter remarked that an attorney should not be putting in $50,000 worth of hours in a District Court case. Ms. Gardner noted that under the Wage Payment law and the Wage and Hour law, that may very well be the case, because they are remedial statutes and are intended to provide a strong deterrent for defendants from withholding people's wages wrongfully. There can be an attorneys' fee that

eclipses the wages, because the legislature does not want employers to be withholding people's wages.

The Chair said that in a wage payment case, a party can be awarded treble damages plus attorneys' fees if the party can show the lack of a bona fide dispute. Would the treble damages take the case out of the civil jurisdiction of the District Court? Ms. Gardner replied that if the party pleads for the treble damages, and the total amount exceed the jurisdiction of the District Court, the case should not be filed there. Unfortunately, it is all too common that despite the fact that no bona fide dispute exists, the court will only award the wages due, and not the treble damages. The Chair observed that if the court does not find a bona fide dispute, a party is not entitled to attorneys' fees. Ms. Gardner noted that the treble damages are discretionary even where no bona fide dispute exists. There can be a $1000 wage claim and a $5000 or $6000 attorneys' fee.

By consensus, the Committee approved Rule 2-704 as amended.

The Chair stated that the next item for discussion was Rule 3-741. (See Appendix 2).

The Reporter remarked that this Rule should be conformed to the changes made to the circuit court Rule. The Chair asked if Rule 3-741 should be conformed including the alternative versions, one without the $4500 limitation. Mr. Brault replied that Rule 3-741 should not have the alternative. The Reporter said that the alternative would have to be included, because of the landlord-tenant situation. Judge Norton noted that 99% of

the cases have the 15% amount in the contract which is under the jurisdictional amount. The Reporter said that Rule 3-741 will be conformed to the circuit court Rule. Mr. Klein added that subsection (e)(2) will also have to be conformed. By consensus, the Committee approved Rule 3-741 as amended.

By consensus the proposed changes to Rules 2-305, 2-341, 3-302, 3-305, 3-306, 3-341, and 3-611 were approved as presented.

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