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 and Education Conference Center, 2011 Commerce Park Drive, Annapolis, Maryland on October 9, 2015.

Members present:

Hon. Alan M. Wilner, Chair

A. Gillis Allen, II, Esq.
H. Kenneth Armstrong, Esq.
Robert R. Bowie, Jr., Esq.
Hon. Yvette M. Bryant
James E. Carbine, Esq.
Hon. John P. Davey
Mary Anne Day, Esq.
Christopher R. Dunn, Esq.
Hon. JoAnn M. Ellinghaus-Jones
Alvin I. Frederick, Esq.
Bruce L. Marcus, Esq.
Donna Ellen McBride, Esq.
Hon. Danielle M. Mosley
Hon. Douglas R. M. Nazarian
Sen. H. Wayne Norman
Hon. Paula A. Price
Scott D. Shellenberger, Esq.
Del. Joseph F. Vallario, Jr.
Dennis J. Weaver, Clerk
Robert Zarbin, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
David R. Durfee, Jr., Esq., Assistant Reporter
Sherie B. Libber, Esq., Assistant Reporter
Donald B. Tobin, Esq., Dean, University of Maryland Francis King Carey School of Law
Cam Mears, Strategic Capital
Craig Ulman, Esq., Hogan Lovells US, LLP
Eric Vaughn
Henry L. Strong, JMW Settlements, Inc.
Gregory Hilton, Esq., Clerk, Court of Special Appeals
Elyse L. Strickland, Esq., Offit Kurman
Ralph S. Tyler, Esq., Venable, LLP
Hon. Sheila R. Tillerson Adams
Pamela Ortiz, Esq., Executive Director, Access to Justice Department
Kim Doan, Esq., Circuit Court for Anne Arundel County
Kelley O'Connor, AOC, Government Relations
Carol L. Vassallo, Esq., Vassallo Law Group, LLC
Kenneth A. Vogel, Esq., Metro Legal Solutions
Patricia LaBorde, Esq., President, National Association of Settlement Purchasers
Michael Croxson, Seneca One Company

The Chair convened the meeting. He announced that any guests who wished to speak at the meeting should sign up on the sheet that was being passed around at the meeting. On behalf of the Committee, the Chair welcomed Dennis J. Weaver, Clerk of the Circuit Court for Washington County, who had been appointed to the Committee to fill out the term of the late Derrick Lowe.

The Chair said that the 187th Report of the Committee had been heard by the Court of Appeals recently and, with two exceptions, was adopted. The first exception was that the Rules permitting attorneys to advertise as certified specialists had been deferred without any discussion of the merits. The reason had nothing to do with the content of the proposal, but was solely for budgetary reasons. The Rules provided for a judicial committee or commission to make recommendations to the Court pertaining to which areas of the law should be regarded as specialties and to propose accreditation of entities to certify attorneys as specialists. The Rule provided that this committee or commission would have a reporter and a clerical person to assist. There were no funds in the Judiciary's Fiscal Year 2016 budget to fund these two positions. After discussion with the Honorable Mary Ellen Barbera, Chief Judge of the Court of Appeals and Pamela Harris, State Court Administrator, they agreed to put in the judicial budget for FY 2017 contractual positions for those two people. They will not know until April whether those two positions will be funded, however. This is why the Court deferred consideration of the proposal until the legislature

makes a decision as to the funding.

The Chair commented that Mr. Frederick had brought an issue to his attention. Mr. Frederick had said that the Association of Professional Responsibility Lawyers has made a report to the American Bar Association ("ABA") recommending some more far-reaching changes to the rules on attorney advertising. To the best of the Chair's knowledge, the report was filed in June, 2015, and no action has been taken on it by the ABA or by any States. The Chair and the Committee staff will keep track of any action taken on this report. As the Chair had read the report, it would not change any rule that the Committee had submitted to the Court of Appeals with respect to specialization. Some of the text of the Rules on attorney advertising would be eliminated, and with one or two exceptions, only the command that the advertising cannot be misleading, false, etc. would be retained. It would move the comments that are currently under the other Rules into Rule 7.1, Communications Concerning a Lawyer's Services.

The Chair noted that the other exception to the 187th Report was that the Court did not go along with the recommendation that all of the briefs and other filings in the appellate courts be in the Times New Roman font. The Court left in place what is currently in Rule 8-112, Form of Court Papers, which is that the Court of Appeals will decide what fonts are acceptable. Some time ago when this issue first came up, the Court of Appeals approved 16 different fonts, only nine of which are available on

the judicial computers. The other seven fonts are available in the market. Some attorneys may have them on their computers, but the judges do not. The Court may change some of what they have already approved. In any event, attorneys are not limited to using only Times New Roman font.

The Chair said that the 188th Report was filed with the Court on October 6, 2015. It has a 30-day comment period. The Court will take up this Report when the comment period expires. The Chair had sent a memorandum to the Committee noting that as a special item, the Rules on Professionalism have been handed out and will be discussed later today.

Agenda Item 1. Consideration of proposed new Title 15, Chapter 1300, Structured Settlement Transfers

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The Chair explained that Agenda Item 1 consists of draft Rules pertaining to structured settlement assignments. The impetus for drafting these Rules was two articles. The main one was an article in the August 28, 2015 edition of the Washington Post by Terrence McCoy, who is present at the meeting. There was also an article in the May-June 2015 issue of the Maryland Bar Journal. The Post article focused primarily on the conduct of one company in one court with one judge. The Bar Journal article was broader in scope but narrower in circulation. Both exposed some very significant gaps in the judicial procedure that was mandated in 2000 by the General Assembly in Code, Courts Article, §5-1101 et seq., and that put some people at risk. Because the problem that was exposed directly involves judicial proceedings,

it can be fixed by rule. Chief Judge Barbera would like it fixed by rule on an expedited basis. The Chair was sure that the General Assembly would be addressing this issue in its upcoming session. But the order from the Chief Judge means that the Judiciary needs to clean up the judicial piece of this by rule and do it quickly.

The Chair said that notwithstanding some earlier warnings, some as early as 2005, few of those in the judicial branch had any idea as to what was going on in Maryland until these articles appeared. Those gaps that had been exposed should have been picked up by the Committee back in 2000 when the Maryland statute was enacted. In response to that, the Chair commented that review by the Judiciary of pending and enacted legislation was much less robust 15 years ago than it is now. If this bill had been in the legislature more recently, it may not have come out quite the same way that it did, and rules would have been adopted very promptly to fill in any gaps.

The Chair remarked that following the exposes in the Post and the Bar Journal, much information was collected, including copies of documents that are used in structured settlements and in assignment transactions, rules and statutes in other states, the bill file from the 2000 legislation, and articles in legal journals. The Subcommittee met with experts in the field who served as consultants to the Subcommittee. The Chair said that he had received a letter from the National Association of Settlement Purchasers ("NASP") stating that they had not been

present at the Subcommittee meeting at which this subject had been discussed. The reason was that the Chair and the Subcommittee were totally unaware that this organization existed. Had they been aware of it, the organization would have been invited. They are present at the meeting today, and they will be able to speak. A letter that came in yesterday has been circulated to the Committee. It is from Ralph S. Tyler, Esq., counsel to NASP. (See Appendix 1).

The Chair told the Committee that the proposed Rules are a result of what had been taking place and the product of a five-hour meeting between the Subcommittee and the consultants, plus some post-Subcommittee meeting comments. A couple of handouts have to be considered.

The proposed Rules address three basic issues. The first is the petition for approval – who has to file it, where it is to be filed, what it has to contain, and ensuring service on interested parties of the petition and notice of the hearing. The interested parties have the opportunity to speak at the hearing. The second issue is the hearing itself. It includes the required presence of the parties and the independent professional advisor. The articles had exposed the fact that some of these hearings were really sham, because no one was present except the attorney for the purchaser. The judge was getting little information. The Rules address who has to be at the hearing, the factors that the court has to consider, and the findings that the court has to make.

The Chair pointed out that the third issue that the Rules address is the ability of the court to appoint a guardian ad litem or require an independent mental health evaluation if any question arises regarding the payee's cognitive ability to understand the nature and consequences of the proposed transfer of the annuity benefits. The objective is to give the court sufficient information to allow it to make informed findings that are required by State and federal law. Four findings have to be made under State law, Code, Courts Article, §§5-1101 et seq., before any of these transfers can be approved. One is whether "the transfer is necessary, reasonable, or appropriate." The second is whether "the transfer is not expected to subject the payee, the payee's dependents, or both to undue or unreasonable financial hardship in the future." The third is whether the "payee received independent professional advice regarding the legal, tax, and financial implications of the transfer." The Chair said that he was emphasizing the word "independent." The fourth is that the "transferee disclosed to the payee the discounted present value" of what is being transferred.

The Chair noted that federal tax law , 26 U.S.C. §5891, requires two other findings. One is that the transfer "does not contravene any Federal or State statute or the order of any court or responsible administrative authority." The other is that the transfer "is in the best interest of the payee, taking into account the welfare and support of the payee's dependents."

The Chair said he would like to explain the basic parts of

the Rules. Then anyone who wishes to speak can do so, after which the Committee can consider each Rule.

The Chair presented Rule 15-1301, Applicability; Definitions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 – OTHER SPECIAL PROCEEDINGS

CHAPTER 1300 – STRUCTURED SETTLEMENT TRANSFERS

Rule 15-1301. APPLICABILITY; DEFINITIONS

This Chapter applies to transfers of structured settlement payment rights governed by Code, Courts Article, Title 5, Subtitle 11. In this Rule, the definitions in Code, Courts Article, §5-1101 shall apply.

Source: This Rule is new.

The Chair explained that Rule 15-1301 provides what the Chapter applies to and states that the definitions in the statute apply to the Rules. All of the definitions are important, but the principal definitions are those of the terms "payee," "interested party," and "discounted present value."

The Chair presented Rule 15-1302, Petition for Approval, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 – OTHER SPECIAL PROCEEDINGS

CHAPTER 1300 – STRUCTURED SETTLEMENT

Rule 15-1302. PETITION FOR APPROVAL

(a) Petitioner

A petition for court approval of a transfer of structured settlement payment rights pursuant to Code, Courts Article, Title 5, Subtitle 1100, shall be filed by the proposed transferee of the structured settlement benefits.

(b) Venue

(1) If the payee resides in this State, the petition shall be filed in the circuit court for the county in which the payee resides.

(2) If the payee does not reside in this State and one or more prior petitions for approval of a proposed transfer have been filed in this State, the petition shall be filed in the circuit court for the county in which the most recent of those petitions was filed. If the payee does not reside in this State and no prior petitions for approval of a proposed transfer have been filed in this State, the petition may be filed in any circuit court.

(c) Contents of Petition

In addition to any other necessary averments, the petition shall:

(1) include as exhibits:

(A) a copy of the structured settlement agreement;

(B) a copy of any order of a court or other governmental authority approving the structured settlement;

(C) a copy of each annuity contract that provides for payments under the structured settlement agreement;

(D) a copy of the transfer agreement;

(E) a copy of any disclosure statement provided to the payee by the transferee;

(F) a written Consent by the payee substantially in the form specified in Rule 15-1303; and

(G) an affidavit by the independent professional advisor selected by the payee, in conformance with Rule 15-1304;

(2) if the petitioner is not an individual, state (i) the legal status of the petitioner, (ii) whether it is registered to do business in Maryland; and (iii) the name, address, e-mail address, and telephone number of any resident agent in Maryland;

(3) state the names and addresses and, if known, the telephone numbers and e-mail addresses of all interested **parties**, as defined in Code, Courts Article, §5-1101 (d);

(4) state whether, to the best of the petitioner's knowledge, information, and belief, the structured settlement arose from (A) a claim of lead poisoning, or (B) any other claim in which an allegation was made in a court record of a mental or cognitive impairment on the part of the payee;

(5) state whether there have been any prior transfers or proposed transfers of any of the payee's structured settlement payment rights, and for each prior transfer or proposed transfer:

(A) state whether the transferee in each transfer agreement was the petitioner, an affiliate or predecessor of the petitioner, or a person unrelated in any way to the petitioner;

(B) identify the court and the number of the case in which the transfer was submitted for approval;

(C) state the disposition of the requested approval; and

(D) include as an exhibit a copy of (i) the transfer agreement, (ii) any disclosure statement provided to the payee by the transferee, and (iii) a copy of any court order approving or declining to approve such transfer or otherwise finally disposing of an application for approval of such transfer.

(6) state the amounts and due dates of the structured settlement payments to be transferred and the aggregate amount of these payments;

(7) state (A) the total amount to be paid under the transfer agreement; (B) the net amount to be received by the payee, after deducting all fees, costs, and amounts chargeable to the payee; (C) the discounted present value of the payments that would be transferred as determined in accordance with Code, Courts Article, §5-1101 (b); and (D) the annual interest rate implied in the transfer, treating the net purchase price as the principal amount of a loan, to be repaid in installments corresponding to the transferred payments;

(8) state whether there have been any written, oral, or electronic communications between the petitioner and the independent professional advisor selected by the payee with respect to the transfer and, if so, the dates and nature of those communications; and

(9) state whether, to the best of the petitioner's knowledge after making reasonable inquiry, the proposed transfer would not contravene any applicable law, statute, Rule, or the order of any court or other government authority.

(d) Exhibits

If a settlement agreement, court order, or other document contains sensitive personal financial or medical information or information subject to a non-disclosure obligation, it **shall** be filed under seal.

(e) Oath

The petition shall be under oath.

(f) Hearing Date and Notice

Upon the filing of a petition under this Rule, the court shall set a hearing date no earlier than 40 days after the date of filing. The clerk shall send to the petitioner a written notice of the date, time, and location of the hearing.

(g) Service on Interested Parties

(1) The petitioner shall serve on each interested party:

(A) subject to subsection (g)(2) of this Rule, a copy of the petition and **the transfer agreement;**

(B) a copy of the notice of the hearing issued by the clerk pursuant to section (f) of this Rule; and

(C) a separate notice substantially in the following form:

[Caption of case]

IMPORTANT COURT NOTICE

_____ has filed the enclosed
(Name of Petitioner)

Petition requesting court approval of a transfer of some or all of the structured settlement payment rights of _____.
(Name of Payee)

You are named as an "interested party" in the petition. As an "interested party," you are entitled to support, oppose, or otherwise respond to the petition, in person or by counsel, by submitting written comments to the court or by participating in the hearing.

Notice of the date, time, and location of the hearing is

enclosed.

> **(2) Unless otherwise ordered by the court, the petitioner shall not serve a copy of any exhibit that was filed under seal.**
>
> (h) Method of Service and Proof of Service
> The method of service on interested parties required by section (g) of this Rule shall be as provided in Rule 2-121. Proof of service shall be filed in accordance with the method described in Rule 2-126.
>
> Source: This Rule is new.

Section (a) of Rule 15-1302 requires that the petition be filed by the transferee. Section (b) requires the petition to be filed in the county where the payee lives. This addresses one of the problems that exist now. Section (c) lists what must be in or attached to the petition as exhibits. There is some controversy over some of these items. The intent is to require the petitioner to lay out the full nature and consequences of this transfer, to give the court all of the relevant information that it needs to make the required findings and to require actual notice to other interested parties, so that they can participate if they wish.

The Chair noted that section (d) of Rule 15-1302 requires that documents may be filed under seal to protect personal, financial, or medical information. There is a question as to whether the word "may" should be the word "shall." Also before the Committee is Mr. Tyler's question as to what happens if documents exist no longer or cannot be found. There is room to amend, so that if a required document is unavailable, the

petitioner has to state that as well as the efforts made to locate the document. Other Rules, such as Rules 2-122, Process -- Service – In Rem or Quasi In Rem and 2-611, Confessed Judgment, contain similar provisions. This is not in the present text of the proposed Rule before the Committee, but it can be added.

The Chair presented Rule 15-1303, Consent by Payee, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 – OTHER SPECIAL PROCEEDINGS

CHAPTER 1300 – STRUCTURED SETTLEMENT TRANSFERS

Rule 15-1303. CONSENT BY PAYEE

A Consent by the payee shall be substantially in the following form.

CONSENT TO PETITION FOR APPROVAL OF TRANSFER OF STRUCTURED SETTLEMENT PAYMENT RIGHTS

Identifying Information

1. My name is _____.
2. I live at _____.
3. My telephone number is _____.
4. [ ] My e-mail address is _____.

   [ ] I do not have an e-mail address.
5. [ ] I do not have a guardian of the person, guardian of the property, or representative payee.

[ ] I do have a guardian of the person, guardian of the property, or representative payee, whose name, address, and telephone number are _____

_____.

Employment

6. [ ] I am employed by _____.

[ ] I am not currently employed.

Dependents

7. I am [ ] married [ ] divorced [ ] single.

8. I have [ ] ____ children under the age of 18 [ ] no children under the age of 18.

9. I am [ ] under an order of the _____ to
(Name of court(s))
pay a total of $_____ per _____ in spousal support
(week/month)
[ ] not under a court order to pay spousal support.

10. I am [ ] under an order of the _____
(Name of court(s))
to pay a total of $_____ per _____ in child support
(week/month)
[ ] not under any court order to pay child support.

Structured Settlement Agreement

11. In _____:
(year)

[ ] a case was filed [ ] by me] [ ] by my parent or

guardian on my behalf in the _____

_____.
(Name of court)

The case number is _____.

[ ] a claim was made [ ] by me [ ] by my parent or guardian on my behalf. No court case was filed and the claim was settled without litigation.

12. I was represented in that case or claim by _____

_____.
(Name of attorney)

13. In or as a result of that case or claim, I received a structured settlement pursuant to a structured settlement agreement.

Independent Professional Advisor

14. I have selected _____ as my independent professional advisor to explain the terms and consequences to me of the transfer and advise me regarding whether it is in my best interest to accept those terms.

15. My independent professional advisor has:

[ ] met with me in person on _____ occasion(s);

[ ] explained the terms and consequences of the proposed transfer agreement;

[ ] answered all my questions;

16. I learned about _____
(Name of independent professional advisor)

from:

[ ] TV, radio, or other advertising

[ ] Personal solicitation by the independent professional advisor

[ ] Other: _____ (explain)

17. [ ] I have not previously transferred any of my structured settlement payments.

18. [ ] I have made _____ previous transfers of some of my structured settlement payments and I have

[ ] disclosed to my independent professional advisor the details of each such transfer and

[ ] given to my independent professional advisor copies of the transfer agreements from each such transfer.

[ ] I used the money I received from the prior transfer(s) for the following purposes: _____

_____

19. If the current transfer is approved, I intend to use the money that I receive for the following purposes: _____

_____.

20. I have been advised by my independent professional advisor:

[ ] that I am presently entitled to receive from my structured settlement $ _____ each [ ] month [ ] year; and that those payments will continue

[ ] for the rest of my life or

[ ] until _____, 20_____.

[ ] that I am entitled to receive lump sum payments due

on the dates and in the amounts specified below:

_____

_____

[ ] that the payments I now propose to transfer, in exchange for a net purchase price of $_____, have a discounted present value of $ _____, as determined for federal tax purposes, and

[ ] that the "effective annual interest rate" of the proposed transfer is _____%. Based on the net amount that I will receive and the amounts and timing of the structured settlement payments that I am transferring, I will, in effect, be paying interest at a rate of _____% per year so that I can get money now rather than later.

21. [ ] I have agreed to pay my independent professional advisor a fee of $_____ for the services rendered by him/her.

[ ] My independent professional advisor has told me that he/she will receive no other compensation from anyone with respect to this transaction, except as follows: _____.

My Understanding

22. I understand that, if the proposed transfer is approved:

[ ] the aggregate amount of the future payments I would be transferring and would no longer be entitled to is $_____;

[ ] the discounted present value of the future payments that I would be transferring and would no longer be entitled to receive is $_____; and

[ ] as consideration for the transfer, I would receive from the transferee the sum of $_____; which is ___% of the discounted present value.

[ ] From that sum, [ ] fees and other charges in the amount of $_____ will be deducted or [ ] no fees or other charges will be deducted.

23. I understand that the proposed transfer cannot proceed unless approved by the Court and that a petition for Court approval has been or will be filed by the transferee _____.

24. I have received a copy of the petition and

[ ] have read it.

[ ] had it read to me by _____.

Consent

WITH THIS KNOWLEDGE, I HEREBY CONFIRM THAT I UNDERSTAND THE PROPOSED TRANSFER AND ITS CONSEQUENCES TO ME, AND I CONSENT TO THE PETITION.

_____ _____
Signature of Transferor Date

_____ _____
Signature of Witness Date

Source: This Rule is new.

The Chair told the Committee that the intent of Rule 15-1303 is to make sure that the payee really understands the nature and consequences of the proposed transfer. The language in the consent form is very simple, but this is what the Subcommittee felt was important for the court to have to make sure that the payee has been told what he or she needs to be told and understands what he or she is getting and what he or she is giving up.

The Chair presented Rule 15-1304, Affidavit of Independent Professional Advisor, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 – OTHER SPECIAL PROCEEDINGS

CHAPTER 1300 – STRUCTURED SETTLEMENT TRANSFERS

Rule 15-1304. AFFIDAVIT OF INDEPENDENT PROFESSIONAL ADVISOR

The affidavit of the independent professional advisor shall include an affirmation that the affiant's compensation is not affected by whether the proposed structured settlement transfer occurs and shall state:

(1) The full name, address, e-mail address, and telephone number of the affiant;

(2) The status of the affiant as an attorney, certified public accountant, actuary, or other licensed professional advisor, including:

(A) each state in which the affiant is licensed in that capacity; and

(B) each state in which the affiant has been the subject of any disciplinary proceedings regarding such a license.

(3) The number of times in the past five years that the affiant has acted as an independent professional advisor with respect to a proposed transfer of structured settlement payment rights to the petitioner or to an affiliate or predecessor of the petitioner.

(4) The nature and extent of personal contact by the affiant with the payee regarding the proposed transfer, including the date and place of each such contact and whether the contact was in-person, by telephone, or by e-mail.

(5) The fee charged by the affiant for the services rendered to the payee and the name, address, e-mail address (if any), and telephone number of each person, other than the payee, from whom any compensation for services rendered with respect to the proposed transfer has been or will be sought.

(6) The amount of any fees, costs, expenses, or other charges that will be deducted from the amount payable to the payee under the transfer agreement and a particularized explanation of the nature of each such fee, cost, expense, or other charge.

(7) Whether there have been any prior transfers or proposed transfers of any of the payee’s structured settlement rights and, if so, as to each such transfer or proposed transfer, whether the affiant acted as an independent professional advisor for the payee.

(8) Whether the structured settlement arose from a claim of lead poisoning or a case in which an allegation was made in a court record of a mental or cognitive impairment on the part of the payee, and, if

so:

(A) The nature and extent of the affiant's investigation into the ability of the payee to understand the nature and economic consequences of the proposed transfer, including any contact with the payee's attorney in the claim or case leading to the structured settlement;

(B) The basis for the affiant's conclusion that the payee is capable of understanding, and does understand, the nature and economic consequences of the transfer, and

(C) A list of any documents upon which the advisor relied in reaching that conclusion.

(9) The discounted present value of the payment rights being transferred and the and the applicable federal rate used in determining that value;

(10) The annual interest rate implied in the transfer, treating the net purchase price as the principal amount of a loan, to be repaid in installments corresponding to the transferred payments; and

(11) Whether the affiant investigated and advised the payee about possible alternatives to the proposed transfer, including any option for acceleration of future annuity payments; and

(12) That the advisor has advised the payee concerning the legal, tax, and financial implications of the transfer of settlement payment rights, to the extent permitted by the advisor's professional license.

Source: This Rule is new.

The Chair explained that the intent of Rule 15-1304 is to make sure that the advisor is truly independent. Some of what

the published articles have exposed is that this is not always the case. The intent is that the advisor has made a sufficient investigation of the consequences of the proposed transfer and other options. The Subcommittee had looked at the advertisements that are on the Internet. The companies are telling the payees: "We will tell you what your options are and advise you as to what you ought to do." Code, Courts Article, §5-1102 requires an independent professional advisor, and the Subcommittee's view was that this is the person who should be giving the independent advice, not the companies who are trying to buy the structured settlements or annuities.

The Chair presented Rule 15-1305, Hearing, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 – OTHER SPECIAL PROCEEDINGS

CHAPTER 1300 – STRUCTURED SETTLEMENT TRANSFERS

Rule 15-1305. HEARING

(a) Required

The court may not act on a petition under this Chapter without holding a hearing.

(b) Personal Attendance

Personal attendance at the hearing is required by:

(1) the payee, unless, for good cause, the court excuses the payee's personal attendance;

(2) if a person serves as a (A) guardian of the person of the payee, (B) guardian of the property of the payee, or (C) representative payee of the payee, each such person;

(3) the independent professional advisor; and

(4) the petitioner or a duly authorized officer or employee of the petitioner.

(c) Examination

The court may examine under oath the payee, any guardian of the payee, the independent professional advisor, and the petitioner or representative of the petitioner, and any other witness.

Source: This Rule is new.

The Chair said that the intent of Rule 15-1305 is to have a meaningful hearing and not just a rubber stamp. It would require the personal attendance by the payee or the guardian of the payee, the independent advisor, and a representative of the transferee, so that the court can question everyone and find out if the payee has any question about this transaction. One of the findings that the court has to make is whether this transfer is in the best interest of the payee. There has to be some basis for the court to do this.

The Chair presented Rule 15-1306, Guardian Ad Litem; Independent Evaluation, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 – OTHER SPECIAL PROCEEDINGS

CHAPTER 1300 – STRUCTURED SETTLEMENT

TRANSFERS

Rule 15-1306. GUARDIAN AD LITEM; INDEPENDENT EVALUATION

If the structured settlement arose from a claim of lead poisoning or a case in which an allegation was made in a court record of a mental or cognitive impairment on the part of the payee, or if it otherwise appears that the payee may suffer from a mental or cognitive impairment, the court, at the expense of the petitioner, may:

(1) appoint a guardian *ad litem* for the payee; or

(2) require the payee to be examined by a qualified and independent mental health specialist designated by the court.

Source: This Rule is new.

The Chair noted that Rule 15-1306 permits the court to appoint a guardian ad litem if the court has any question about whether the payee is capable of understanding what he or she is doing. The court can also require an independent mental health evaluation of the payee. This is self-explanatory. The Subcommittee had heard evidence, particularly in the lead paint cases, but not exclusively in those, that many of the payees are not sufficiently deficient in cognitive ability to require a guardian of the person or property but have IQ's of 80 or less. They may need a guardian ad litem in those situations where the evidence shows that to be the case.

The Chair presented Rule 15-1307, Findings, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 – OTHER SPECIAL PROCEEDINGS

CHAPTER 1300 – STRUCTURED SETTLEMENT TRANSFERS

Rule 15-1307. FINDINGS

In deciding whether to grant the petition, the court shall consider the standards set forth in Code, Courts Article, §5-1102 and Internal Revenue Code, §5891 (b)(2)(A), and make a finding upon a preponderance of the evidence as to each. Committee note: Internal Revenue Code, §5891 (b)(2) requires that, to avoid imposition of an excise tax on the transfer of structured settlement payment rights, there must be a final order of a court that finds that the transfer (i) does not contravene any federal or state statute or order of any court or responsible administrative authority, and (ii) is in the best interest of the payee, taking into account the welfare and support of the payee's dependents.

Source: This Rule is new.

The Chair told the Committee that Rule 15-1307 lays out the findings that the court has to make. They are required by Code, Courts Article, §5-1102 and Internal Revenue Code, 26 U.S.C. §5891.

The Chair presented Rule 1-101, Applicability and Citation, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 100 - APPLICABILITY AND CITATION

AMEND Rule 1-101 (o) by adding references to coram nobis and structured settlement transfers, as follows:

Rule 1-101. APPLICABILITY

. . .

(o) Title 15

Title 15 applies to special proceedings relating to arbitration, catastrophic health emergencies, contempt, coram nobis, habeas corpus, health claims arbitration, injunctions, judicial releases of individuals confined for mental disorders, mandamus, the Maryland Automobile Insurance Fund, name changes, structured settlement transfers, and wrongful death.

. . .

Rule 1-101 was accompanied by the following Reporter's note.

To conform to the addition of new Chapter 1300 (Structured Settlement Transfers) to Title 15, a proposed amendment to Rule 1-101 (o) adds structured settlement transfers to the list of the types of proceedings to which Title 15 applies. Additionally, a reference to coram nobis is added to section (o) to correct the omission of that topic from the list.

The Chair said Rule 1-101 had been handed out at the meeting. The Chair pointed out that he had very recently discovered the need for a conforming amendment to Rule 1-101 to point out that Title 15 is now going to apply to the petitions for structured settlement transfers.

The Chair said that he would ask the guests present to speak. He asked Mr. Tyler whether he wished to address the

Committee.

Mr. Tyler remarked that he had previously been a member of the Committee, which he had enjoyed. He was present at the meeting as counsel to the NASP, which is a national trade association of companies that fund settlement agreements and transfers and of attorneys who practice in this area. Understandably, this is a topic of great interest to the Association and its members. The objectives described by the Chair as well as the concerns that there be robust and effective judicial review are certainly objectives that the Association and its members share. In their view, however, there are some significant practical problems with the proposed Rules, and they would hope that there would be a full opportunity to participate in the Subcommittee or any work group assigned by the Committee to work through these issues, so that the end product accomplishes what the Court of Appeals would like accomplished and what the Committee is seeking to do, while at the same time being practical and able to be implemented in the real world, so that the interests of payees are being protected.

Mr. Tyler commented that a number of people had signed up to speak on this issue. They are practitioners in this area as well as persons who are in this business. They will speak directly to the issues of how this proposal would operate, and the difficulties with it from their perspective. He asked that the Committee hear from four people, Elyse Strickland, Esq., Carol Vassallo, Esq., Michael Croxson, and Patricia LaBorde.

Ms. Strickland told the Committee that she is an attorney with the law firm of Offit Kurman in Maryland. She had been practicing law since 1995. She had been representing companies that purchase structured settlement payments since about 1996 or 1997 up through today. She also has a large family law practice and a business law practice. She is most experienced in structured settlement practice. She thanked the Committee for letting her speak. She had been doing this kind of work before any statute on the subject had been enacted. When the federal and State structured settlement protection acts were enacted, she was instrumental in helping courts to figure out procedures as to what happens when a petition is filed, because the courts did not have an outline for a petition. She educated the judges about the statute and about the concept of structured settlements. She has also educated other practitioners. The work she has done in this area has been to obtain with best practices the best orders that she and her colleagues can possibly obtain.

Ms. Strickland said that she wanted to clarify that she represents a very large part of the industry. Her clients are not looking for her to obtain approval of court orders. Her clients are looking for her to obtain orders that are not going to be subject to collateral attack and that are not going to be voidable. She had read the articles in the Washington Post and in the Maryland Bar Journal, and her understanding was that this may happen sometimes. At times, people do not use best practices, but those instances are absolutely not representative

of what the industry does and how the industry practices in this forum. She could tell the Committee this, because this is the nature of her practice. Should there be some changes to the statute? She is in full agreement with this. She said that people may not know that the gaps that the Chair had referred to had been picked up by practitioners, such as herself, Ms. Vassallo, who will speak later, and the judges. For example, she said that she would explain how a structured settlement is done in practice, and how they actually ensure that a judge can make the findings that the judge is required to make under the law.

Ms. Strickland told the Committee that she gets the file, and she files the petition with all of the information in it. She files the disclosure statement that is required by the Maryland act. Many, many times, the company over-discloses. Many different states have different disclosure requirements that ask for disclosure of much more information than Maryland asks for. Maryland should require more disclosure, because certain kinds of disclosure will help the judges. However, the judges ask Ms. Strickland and her colleagues for information anyway. They disclose to the judges, so that the judges have the information. The payee then gets independent professional advice. The one aspect of this that is very important to understand is that in Ms. Vassallo's and Ms. Strickland's practices, and at least in 95% of the industry if not more, the people who are selling the structured settlement payments have come to court already. The judges have already asked them the

questions that they believed needed to be asked to make the determination whether the transfer is in the payee's best interest.

Ms. Strickland remarked that as an example, the judges ask what the nature of the injury is. The judges are very well aware that if it is lead paint exposure, there may be, but not necessarily would be, a problem. But it might be that the person is getting a structured settlement from a wrongful death. The person may have no physical injury at all. The person may have inherited the structured settlement. It may be an attorney who has his or her fees structured. The court asks about the nature of the structured settlement. Then, the court asks the payee about himself or herself. This can involve the asking of very personal questions, which the potential payees do not like to answer. The questions may be about the payee's educational background, about the payee's family, about the payee's other income. It may be a question about whether the payee can still provide for his or her family if the payee sells the structured settlement payments. One question asked is whether the payee understands what he or she is doing. As much as possible, the judges make sure that the payees understand what they are doing. The judges ask about other transfers. The attorneys give the judges all of the information that is requested.

Ms. Strickland noted that much of what is in the proposed Rules is what is being done already, but there is a way to codify this that does not put as big of a burden on the consumer and on

the pursuit of structured settlements. This is a consumer protection law. The goal is to protect the customer, but it not be so burdensome that the person does not have access to the financial services Ms. Strickland and her colleagues are offering. In her opinion, this proposed set of Rules makes it that burdensome.

The Chair inquired whether Ms. Strickland had seen Mr. Tyler's letter to the Committee. She replied negatively. The Chair said he was going to ask Ms. Strickland whether she endorsed what was in the letter. She said that she wanted the Committee to know how important timing is for the people who would like to get their structured settlement payments. They have an immediate need for money. She had been doing this type of work for so long that she had heard many reasons. One woman needed the money to be able to move out of her apartment, because her children were being bitten by rats. Or people want to move to get away from living with crack addicts. In Ms. Strickland's opinion, they need to allow people to be able to use the money that they are getting for the purpose that they need it. If the process is overly cumbersome and lengthy, they will not be able to do this.

Ms. Strickland referred to the language in the statute referring to the independent financial advisor. As an attorney, what concerns her is that some of the provisions in the Rules seem to compel the attorney in these cases to reveal attorney-client privileged information and attorney work product. The

Chair pointed out that the statute does not require that the independent financial advisor be an attorney. He or she could be a certified public accountant, a financial planner, etc. Ms. Strickland responded that she thinks that the statute has a flaw. Code, Courts Article, §5-1102 provides that the advisor has to give advice about the legal, tax, and financial implications of the transfer. Section 5-1102 provides that the advice can be given by an attorney, certified public accountant, actuary, or other licensed professional advisor. Ms. Strickland noted that an accountant cannot give legal advice. This is a glitch in the statute that Ms. Strickland had taken care of by the following scenario. Someone comes to see Ms. Strickland, and he or she has a letter written by an accountant. Ms. Strickland tells the person that the letter is not enough, because the accountant cannot give the person legal advice. The statute specifically references legal advice, so Ms. Strickland tells the person to go see an attorney. In every case that Ms. Strickland handles, she requires that the payee see an attorney, because that is strict compliance with the statute.

Ms. Strickland commented that she assumes that in every case, the attorney will be filling out one of the affidavits referred to in Rule 15-1304. In these affidavits, especially in section (8), it requires the attorney to reveal attorney-client work product, privileged information, and other information that in any other area of law would not be required. Ms. Strickland said that she thought that the person who gives the independent

professional advice is like an attorney in other areas. Ms. Strickland is a family law attorney. Her job is to make sure that the client understands what he or she is doing. Then, the client can choose to do whatever he or she would like to do. If Ms. Strickland had to tell a court that she advised her client to settle or not settle, or take the alimony offer or not, that would be against the Maryland Rules and would be a problem.

Ms. Strickland noted that the other aspect of this that would be important for the Committee to look at is the cost of many of the items listed in the proposed Rules. One is the idea that the independent professional advisor has to come to every hearing. This is a big expense. This effectively raises the interest rate. The more burdens that are put on people to get documents and to have the independent advisor come to court, the more the cost to the payee is being increased. The amount that the person will actually get is being lowered. In Ms. Strickland's opinion, there should be a balance protecting the customer and the cost.

The Chair observed that Mr. Tyler had indicated this same point in his letter - that the independent professional advisor should not have to be in court and should not have to file an affidavit. Ms. Strickland responded that sometimes they do file an affidavit. If a payee needs extra help, then this is appropriate. Ms. Strickland added that she would be happy to work with the Committee and answer any questions.

Mr. Zarbin inquired how someone would find the independent

professional advisor. He asked Ms. Strickland if she gives the payees a list that they can choose from. Ms. Strickland answered that there are several different ways. Many times people have their own attorney. She had recently conducted a search on the last 10 transactions for her last 10 clients. There were 20 different independent professional advisors. Some people do this routinely. Mr. Zarbin asked how the payee gets matched up with that independent professional advisor. Ms. Strickland responded that the payee may get a list from the company buying the settlement.

Mr. Zarbin inquired whether the company who is buying the settlement tells the payee to talk to one of the people working for the company. Is that an independent advisor? Ms. Strickland replied that she was not referring to one of the people who work for the company. If the payee were to get any kind of list, Ms. Strickland's advice to her clients is to give them the telephone number of the bar association, or a list of attorney groups. The reason why there are so many repeats of independent professional advisors is because people do multiple deals. This is because if there is a very large structured settlement, someone could be receiving $1000 a month for 25 years. People are not selling their full structured settlement at once, because they would be getting so much money that there would not be the need at that point. It would be very difficult for a judge to find that it is in someone's best interest to get $500,000. The companies match the need. They buy a part of the settlement, so

the person is getting possibly $30,000.

The Chair said that there is some evidence that some of the payees cannot afford to pay the independent professional advisor and that the transferee company advances that fee. Sometimes, they never get reimbursed other than through the price the company is willing to pay for the transfer, so that the actual fee is being paid by the transferee company. Ms. Strickland responded that this is not what happens with her clients. The seller might authorize the company to pay out of the proceeds, but if the deal is not approved, the independent professional advisor has to chase down the person to get paid. There is no financial relationship between the company and the independent professional advisor. The Chair inquired whether the independent professional advisors that Ms. Strickland deals with require payment of their fee up front. Ms. Strickland answered that sometimes they do, and sometimes they do not. The Chair asked what happens if they do require a fee up front. Who pays them? Ms. Strickland replied that as far as she knew and in her experience, the companies do not advance payment.

Ms. McBride asked whether what Ms. Strickland had described creates an incentive for the independent professional advisor to approve the transaction, because if the advisor recommends against approval, then it is likely that he or she will not get paid, and the advisor will have to chase down the payee to get paid. Ms. Strickland explained that she had been an independent professional advisor, and, in her experience, many times the

payee does not agree to the transaction. People may agree to the transaction even if the independent professional advisor does not approve it. It does not matter. What matters is that the independent professional advisor can make the person understand what they are doing and ensure that the person understands and actually has a legitimate reason for needing the money. The advisor informs the payee that he or she would not be getting the amount of money that had been awarded initially. The advisor asks whether the payee has looked at other alternatives to get money and whether he or she has looked at other companies. The advisor may tell the payee that the transaction is not a good deal for him or her.

Mr. Zarbin inquired where the affidavit form that is in Rule 15-1304 and that is filled out by the independent professional advisor asks for attorney-client privileged information. It appears that it asks only whether the payee had conversations or whether the payee was informed; it does not ask what the actual conversation was about. Ms. Strickland referred to subsections (8) (A), (B) and (C) of the affidavit description in Rule 15-1304. Section (8) reads: "[w]hether the structured settlement arose from a claim of lead poisoning or a case in which an allegation was made in a court record of a mental or cognitive impairment on the part of the payee...". How could any independent professional advisor could ever know that unless he or she was able to get the underlying documents from the underlying lawsuit? Mr. Zarbin inquired whether it would not be

important to know if the payee has sufficient mental capacity. He pointed out that it is a lawsuit filed in a courthouse, and it is a public record. Ms. Strickland responded that this was not necessarily the case. Mr. Zarbin asked why. Ms. Strickland replied that structured settlements are not necessarily a result of filing in court. Mr. Zarbin said that this would not be true if it was a minor's claim. The Chair pointed out that the matter could be settled without litigation. Ms. Strickland added that many times it is settled without litigation.

Ms. Strickland commented that an allegation of a mental or cognitive impairment is just an allegation. The Chair asked if Ms. Strickland thought that this was a disclosure problem. Ms. Strickland explained that she thought that this was a problem, because in almost every case, the independent professional advisor could not know about this impairment. It would be very difficult for the advisors to glean that information. She also believed that whatever allegation had been made some years back is not as important as what actually ended up happening and what the condition of the person is today. When a personal injury claim is made, the attorney alleges that the client suffered certain damages. This is especially true in lead paint exposure cases. No one knows what is going to happen with the children of lead paint exposure victims 15 or 20 years later. It can only be known what the damages are at the time of the settlement.

Ms. Strickland expressed the opinion that subsection (8)(A) of the affidavit form in Rule 15-1304 asks for attorney-client

privileged information. An attorney should not have to state what he or she has done. She thought that subsection (8)(B), the basis for the affiant's conclusion that the payee is capable of understanding and does understand, also asks for attorney-client privileged information.

The Chair asked whether the explanation requested in subsection (8)(A), which is explain the "nature and extent of the affiant's investigation into the ability of the payee to understand the nature and economic consequences of the proposed transfer" is not allowed. Ms. Strickland said that this would be stated in an affidavit and admitted in court.

The Chair commented that the advisor is simply stating what he or she did to investigate. Ms. Strickland responded that this should be considered as an attorney doing something different. When she advises her family law clients as to whether they should take an alimony deal or not, she could consult an accountant, send the client to an accountant, look at all kinds of bank records, etc., to advise the client. The Chair pointed out that Ms. Strickland would not have to disclose that, but if she did, all she would have to say is that she consulted an accountant, or she looked at court records. How is that giving away anything prohibited? Is there a case that provides this? Ms. Strickland answered that she had not researched this issue. She would be willing to do the research. However, she was concerned about the proposed Rules. It is important to make sure that there will be attorneys who will act as independent professional advisors.

The Chair remarked that maybe the advisor should not be an attorney. Mr. Zarbin said that he would prefer that a financial advisor give him financial advice rather than an attorney give him that advice.

The next speaker was Ms. Vassallo. She told the Committee that she had been practicing law for 30 years and practicing in the area of structured settlements for the last seven years. Before that she had been a medical malpractice defense attorney. Since Ms. Strickland had covered many of the issues, Ms. Vassallo said that she wanted to inform the Committee about the venue issue, because when she had read the article in the Bar Journal and also the Washington Post articles, she did not recognize the situations described there. Ms. Strickland and Ms. Vassallo represent 94% of this industry. Ms. Vassallo emphasized that the issue of forum-shopping and judge-shopping is absolute nonsense. She does not choose the venue because of the judge.

The Chair asked Ms. Vassallo if she agreed that the current statute permits venue-shopping. Ms. Vassallo answered affirmatively. The Maryland statute does not have a venue provision in it. The Chair asked whether she objected to requiring that if the payee is a Maryland resident that the petition be filed in the county where he or she resides. Ms. Vassallo replied that she had mixed feelings about that. The Chair inquired whether it would be appropriate for a lead paint case from Baltimore City to be filed in Prince George's County. Ms. Vassallo responded that lead paint cases should be filed in

Baltimore City. She had filed a case in April in Baltimore City that was not a lead paint case, and she had gotten a hearing in October. The payees have to be protected. If someone's house is in foreclosure, and neither parent of the family is working, they should not have to wait 10 months for a hearing date.

The Chair noted that proposed Rule 15-1302 provides in section (f) that when a petition is filed, the court shall set a hearing 40 days later. Ms. Vassallo responded that she was not sure that Baltimore City would be able to accomplish this. The Chair reiterated that the Rule requires it. Ms. Vassallo expressed some doubt. Mr. Zarbin commented that if the Rule requires the court to do this, the court will do so. He asked whether Ms. Vassallo had checked off the box for an expedited hearing when she had filed the lawsuit. Ms. Vassallo replied that there is no such box. Mr. Zarbin disagreed, noting that it is on the cover sheet. Ms. Vassallo said that no one is required to file a cover sheet in Baltimore City. The Chair clarified that an information report is required to be filed. Ms. Vassallo said that she had initially filed a cover sheet in Baltimore City, but because these are one-party cases, she had been told that the cover sheet was not required for a structured settlement case. Mr. Zarbin remarked that she should have asked for an expedited hearing. Ms. Vassallo responded that an expedited hearing could be six months later.

Ms. Vassallo reiterated that there is no forum-shopping; there is no judge-shopping. The Chair commented that Ms.

Vassallo may not do this, but the articles exposed that it is happening. Ms. Vassallo said that she accepted this and added this is why she is endorsing changes in the Rule. She did not want the Committee to get the impression that this is an industry-wide situation with practitioners such as Ms. Strickland and her trying to railroad these cases through. The Chair stated that no one had accused them of anything. Ms. Vassallo commented that she wanted the Committee to know that she would be available to discuss this issue or help in any way in restructuring this if it is necessary.

Mr. Croxson spoke next. He told the Committee that he was not an attorney and not in the media. He was the President of the Seneca One Company located in Bethesda. The company has about 150 employees and is one of the largest structured settlement purchasers in the country. They have been in business for 13 years. He wanted to reiterate that the actions that were represented in the Washington Post article are not the norm. He understood the assignment given to the Committee, and he said that the way the Committee had taken it on was lawful. His company may be the second largest provider in the industry. When he saw the proposed Rules, he was taken aback as to what they will do to the process if the Rules were put in place. Fundamentally, he and his colleagues are in absolute agreement in terms of how people should file, where they should appear, whether they should be examined by a judge. This happens in virtually every other state in the country. But in the proposed

Rules, three areas are deeply concerning.

Mr. Croxson said that the first area relates to the depth and breadth of personal information that is being required. He understood that the court has ways to shield that information. Whenever that much information that can be used intrusively is in the public domain, it makes him very nervous for his customers. Mr. Dunn asked which information Mr. Croxson was referring to. Mr. Croxson answered that it is the telephone number and e-mail address, more than anything else. The Chair inquired whose telephone number and e-mail address Mr. Croxson was referring to. Mr. Croxson answered that it is the payee's telephone number and e-mail address. Mr. Bowie asked if there should be any less information provided than what would be required in a normal courtroom proceeding. Mr. Croxson replied that he did not know that having that information is necessary for the person to go through the process. It opens up information that is not necessary.

Mr. Zarbin asked whether many of the lead paint victims have e-mail addresses or telephone numbers. Mr. Croxson replied that although he could not completely substantiate it, of all the cases his company has done in Maryland over the last 13 years, substantially less than 15% of the cases involve lead paint victims. Do they have this kind of information? Some do; some do not. Mr. Zarbin questioned whether it is any harder getting this information than using an online service for which one pays a small amount of money. It is all public information.

This is why Mr. Zarbin was curious as to the concern about an e-mail address. He could understand if it was a person's Social Security number that was being made public. Mr. Croxson responded that his customers, if asked, would agree about the e-mail addresses and telephone numbers being made public. They get harassed with e-mails and telephone calls. Judge Price remarked that these customers are getting a lump sum of money, and people are interested.

The Chair said that section (d) of Rule 15-1302 provides that any document that has identifying information in it shall be filed under seal. It is a question of what the judge has to look at. Judge Mosley noted that in certain proceedings, the courts have to build in locks to secure information so that it is not open to the public. She asked Mr. Croxson whether he would be comfortable if this type of mechanism would be added to the Rules pertaining to structured settlements. Mr. Croxson answered affirmatively, noting that if the information was truly sealed, that would be appropriate. If the information did not have to be available, it would be better for his company's customers.

Mr. Croxson told the Committee that the second area of concern had been touched on earlier. Frequently, time really is of the essence for these consumers. The minimum 40 days after filing provided for in section (f) of Rule 15-1302 is extending this more than it needs to be extended. The payee has met with the independent professional advisor, submitted the affidavit, and then 40 days after that there is a hearing. This process is

extended more than is necessary. The Chair noted that the courts have to deal with domestic violence cases and all kinds of family law emergencies. These are more important than the assignment of rights in a structured settlement.

The Reporter pointed out that Code, Courts Article, §5-1103 (b) provides that service on the interested parties has to be at least 20 days before the hearing. Assuming the statute does not change, time has to be allowed for that service to occur.

Mr. Croxson said that the last and probably most important area of concern is that some of the required documentation being proposed in the new Rule is difficult to obtain. An example is settlement agreements from 20 years ago that have to be a part of the file. The Chair commented that this point had been made in Mr. Tyler's letter. Mr. Croxson remarked that he appreciated the Committee's efforts in drafting the Rules. He believed that if the proposed Rules were enacted today, it would block Marylanders from being served. The Rules are absolutely well-intentioned. The people in the industry would do whatever they can to make sure that the Rules work for the courts as well as for the customers, but the Rules, as proposed, would create undue expense, and he was not certain that all of the procedures in the proposed Rules can actually be done.

The Chair said that one possible solution to the problems raised by Mr. Croxson is, with respect to required exhibits, to provide that if a document is unavailable, the person who had been requested to furnish it simply states that it is unavailable

and explains what efforts had been made to locate it. This has been done in other Rules, such as Rule 8-303, Petition for Writ of Certiorari - Procedure and Rule 9-103, Petition. There is no intent to require production of a document that no longer exists.

Mr. Zarbin asked how the companies can buy a structured settlement or part of it without seeing what the structured settlement provided. He could not believe that a company could buy a structured settlement or part of it without finding the original agreement or contract. Mr. Croxson responded that if the company has the history or benefits letter, one would know the current status of the agreement. Mr. Zarbin inquired how a company can buy something without having a copy of the structured agreement. Mr. Croxson answered that this is a question for the attorneys. Mr. Zarbin questioned whether Mr. Croxson's company had ever bought a structured settlement without having a copy of the settlement agreement. Mr. Croxson replied that he did not know. The attorneys who work on this would not buy one without a copy of the original agreement. Mr. Zarbin commented that this means the companies do have access to the original agreement. Mr. Croxson agreed. Mr. Zarbin asked why Mr. Croxson had stated that this documentation was unavailable. Mr. Croxson responded that this had not been what he had said.

The Chair noted that in his letter, Mr. Tyler had said that if the structured settlement was very old or there were other reasons, this could be a problem. Ms. LaBorde told the Committee that she was the President of the NASP. She responded to Mr.

Zarbin's question by saying that she and her colleagues do buy transactions when the settlement agreement is not available if they can unequivocally prove that it no longer exists. They routinely buy transactions that are over 35 years old. They often ask the settlement attorney for a copy of the record, and the answer is that under the Code of Professional Responsibility, the attorney destroys his or her records every five years. The settlement agreement does not exist. The companies go to the courts to see if it was filed there. In many cases, it was not filed. The courts themselves destroy court filings. Maryland has a retention policy that if the court record is 12 years old, it is destroyed.

The Chair asked Ms. LaBorde whether it would be sufficient if the Rule were to provide that if any of the documents are unavailable, for whatever reason, it is not necessary to produce them, but the person who is supposed to supply them has to say that they are unavailable, explain why they cannot be produced, and say what the person has done to try to locate them. Ms. LaBorde said that it would solve the problem, but she wanted to explain the process of buying structured settlements. She and her colleagues contact the settlement attorney to ask for the documents and if they are not available, go to the court. She noted that 30% of courts nationwide are not electronic, which means that someone has to go to the courthouse to look for the documents. It may require a look at the archives. If she is required to attach to the petition the court order creating the

settlement, it will delay the filing of the petition. If she cannot file the affidavit until she has made all the attempts, including first talking to the attorney, going to the courthouse, going to the archives, and talking to the insurance company, which may have changed many times due to merger or acquisition, it will take some time. The companies often ask Ms. LaBorde for a copy of the settlement agreement.

Mr. Zarbin inquired whether someone is writing a check to the recipient of the annuity. Ms. LaBorde answered affirmatively. Mr. Zarbin asked whether that check identifies who the maker is. Someone is not writing a check without an agreement. Ms. LaBorde responded that she has been doing this line of work since 1997, and Mr. Zarbin would be surprised about the lack of written agreements. Mr. Zarbin asked whether there was no information as to when the agreement stopped or started. Ms. LaBorde answered that this was not the case. The computer systems note when the payments were being made, and a letter of benefits can be issued stating what the benefits were, but if Ms. LaBorde asked for the settlement file, she would be told that she has no right to it. The Chair pointed out that Code, Courts Article, §5-1101 (d) includes the annuity issuer as an interested party. The company would have to know who the annuity issuer is. Ms. LaBorde replied that they do know that.

The Chair asked whether the annuity issuer will not give out the necessary information. Ms. LaBorde responded that the annuity issuer will tell the companies the payment string and the

name of the beneficiary (which is not in the records today). The Chair questioned whether the annuity issuer will send the companies a copy of the annuity. Ms. LaBorde replied that the annuity issuer will send a copy of the benefits letter. The Chair asked about providing the annuity contract. Ms. LaBorde answered that the issuer may or may not provide it. Every company has a different policy. Ms. LaBorde's company's underwriting requirements, which are greater than the statute, include a copy of the settlement agreement, if available, and a copy of the annuity policy, if available. The Chair said that it appeared that Ms. LaBorde did not want to have to disclose that even if she could get it. Ms. LaBorde responded that she did not want to delay filing a petition to wait to obtain a copy. The Chair remarked that it seemed that Ms. LaBorde did not want the Rule to require it even if it is available, because she did not want to have to go and look for it. Ms. LaBorde clarified that she and her colleagues have to look for it. No company in this industry would not go and look for this documentation.

Ms. LaBorde explained that if the documentation is not available, she and her colleagues do not want to have to produce something that does not exist or is unavailable, which has already been addressed. The second point is that they do not want to delay the filing of the petition, because it may take five or six months to find the documents. The Chair asked what percentage of Ms. LaBorde's transactions pertain to structured settlements more than 10 years old. Ms. LaBorde answered that it

is over 50%. An example is a lead paint victim, whose parents are given a settlement when the child is three years old. The child does not approach Ms. LaBorde's company until he or she is 18 years old, which means that the settlement is 15 years old. The median age of settlement for their company is 10 years.

Judge Nazarian said that he wanted to address Mr. Zarbin's earlier comment and his later one. Judge Nazarian noted that he understood the issues regarding the availability of documents and insurance policies. He used to represent insurance companies, and he had been surprised at what the companies did not know about their own exposures. He also knew that the purchasing companies would not be having this discussion in offering money if they could not reach some degree of professional underwriting certainty about the value of the settlement, which has to be backed up with some documentation other than an e-mail from a bank.

Judge Nazarian remarked that he was not as concerned about what specific documents should be required, but if he were a trial judge, he would want to have the same basis to understand how the input into the underwriting process works. If there is a way to describe that information or those documents in a different way, he would agree to a Rule that reflects this. It has to be the case that there is reliable information about the stream that the purchasing companies have. That information would be helpful to understand whether a settlement that pays X cents on the dollar as opposed to Y cents on the dollar is fair

in this case and whether there is certainty about the stream and the reliability of the stream. These are items that a trial judge might want to know.

Ms. LaBorde remarked that one of the best indicators of how serious the injury was is the settlement itself. One settlement might be that someone is getting $100 a month for 30 years, and another might that someone is getting $10,000 a month for 30 years. It is a reasonable conclusion that the latter is more serious. Mr. Zarbin noted that this may not be true. If there was $1,000,000 of coverage, and it is a $5,000,000 value claim, the person is only getting $1,000,000, which is put into a structured settlement to hopefully stretch it out longer. Another person who has a $2,000,000 settlement may not necessarily have a more valuable claim, because there was only $1,000,000 in coverage. The coverage dictates how the person will get paid.

Judge Nazarian commented that there has to be some way to describe the universe of information that bears on the underwriting decision. To the extent that there is information that the purchasing companies are relying on to value these claims and make this commitment, how that is captured could be reflected somehow in these Rules, so that the judges are not making decisions blindly. Mr. Zarbin had asked Ms. Strickland whether the purchasing companies provide lists of independent professional advisors to the payees and how that works. Judge Nazarian said that he had worked with accountants and attorneys

personally. This is not universally true among the professionals. This process is designed to provide backstop for people who are vulnerable. The idea of getting a list of "independent" people that the purchasing companies work with regularly is not reassuring to Judge Nazarian.

Ms. LaBorde responded that she understood Judge Nazarian's concerns. She said that she would explain how the process works. Her company sends out their contracts and asks the payee to give them the name and contact information of the advisor that they had spoken with. This is where it starts. Many times the answer from the payee is that he or she does not have an advisor. Judge Nazarian asked whether the payees come to the purchasing companies in response to some sort of marketing. Ms. LaBorde replied affirmatively. Judge Nazarian said that there cannot be many people who come to Ms. LaBorde's company having previously spoken to a financial advisor. Ms. LaBorde agreed. Judge Nazarian questioned how the payee would find an independent professional advisor if the payee has to consult with one to get through this process.

Ms. LaBorde answered that she wanted to explain one aspect of this. Her company's financial services product is different from a mortgage, a payday lender, etc. For them, the contract is the first document that they sign. Because of the court-ordered process, any individual can cancel or amend the structured settlement transaction any time before the judge signs it. Judge Narzarian inquired whether the first step is that the payee

signs a contract to sell his or her settlement for an amount before the person ever talks to a financial advisor. Ms. LaBorde responded that the payee is given a contract, but the contract is definitely not binding. Judge Nazarian asked again whether the person signs without getting financial advice. Ms. LaBorde replied that the payee can ask for an increase in the purchase price or ask that the transaction be restructured. The contracts are not binding on the customers.

Judge Nazarian commented that what Ms. LaBorde had just told him undermines any confidence he has in the role of an independent professional advisor. She had just stated that the advice comes completely after the contract is signed. Mr. Bowie remarked that along these lines, Ms. Strickland had said that it would be appropriate to have affidavits of the independent professional advisors in place. The judge has to decide on this transaction. Should he or she not be able to ask questions of the witness, an independent professional advisor, rather than just seeing an affidavit? Ms. LaBorde answered that if the judge feels it is necessary, he or she will ask for the opinion of an independent professional advisor. They routinely do ask for it. They can call the advisor on the telephone. The Chair questioned a judge calling an advisor on the telephone. Judge Nazarian noted that this would mean that the advisor is not present at the hearing. The judge is faced with the dilemma of making the decision blindly without the advisor present or delaying the matter, upsetting the petitioner who may lose his or her house to

foreclosure. Ms. LaBorde explained that the hearings are often delayed, sometimes pushed to a week later. Judge Nazarian remarked that it sounds as if this may be a good idea but not very often. Ms. LaBorde responded that this is not true. She pointed out that 90% of people with structured settlements never sell at all. They would never call her company or any other similar company. The settlements work well, and they serve an excellent purpose to assure that individuals actually get income.

The Chair noted that some members of the Subcommittee went online and obtained the advertisements of some of the purchasing companies. They are mostly all the same: "Call now for a free quote." The payees do this and get a price. Ms. LaBorde had stated that then a contract is sent to the payee presumably with that price in it. There had been no professional advisor at that point at all. Ms. LaBorde responded that there may not have been one. The contracts are sent out with a cover letter telling the payee to seek a professional advisor, and the payee is given the contact information. Often, the contract comes back with no advisor listed on it. The company then tells the person that they cannot file the contract under Maryland law, and it is not an enforceable contract. Judge Nazarian asked whether the company gives the payee a list of financial advisors to consult. Ms. LaBorde answered that the first question to the payee is whether he or she has an attorney. The person is asked whether he or she has spoken to the original settlement attorney. Judge Nazarian hypothesized that the answer to all those

questions is negative.

Ms. LaBorde said that the payee is asked whether he or she has spoken to someone in the past. It is necessary that the purchasing companies go through all of these steps. Judge Nazarian commented the answer to all of the questions may continue to be "no." Ms. LaBorde said that they have a list of people who have sold the settlement. The discussion as to what the charge is or what happened is between the professional advisor and the customer. The purchasing company does not participate. Judge Nazarian inquired whether the company provides them direct affidavits. Ms. LaBorde replied that her company does not. They provide to the independent professional advisor the documents that they had provided to the attorneys. This includes the contract and the disclosure statement.

Judge Nazarian inquired whether Ms. LaBorde's company gives out any information as to what they based the underwriting decision on. If there is a settlement for $1,000,000 over a period of time, and the company is proposing to pay $25,000 in a lump sum for it, how will the independent professional advisor have any basis to understand whether this is a reasonable arrangement or a horrendous arrangement or somewhere in between? Ms. LaBorde answered that Maryland does not require disclosure. Her company provides a disclosure statement in every transaction, and they provide the full-refund contract. In it, in every Maryland transaction, they disclose what the discount rate is. It includes how much they discounted the payments to come up with

a purchase price. Her company already does what the Rules Committee has suggested should be done. The disclosure statement that they give states: the amount of the payment the company is attempting to purchase, the discounted value according to the Internal Revenue Service, the purchase price, and any deductions. Judge Nazarian inquired whether this is given to the payee or the advisor. Ms. LaBorde answered that both get it.

Ms. LaBorde said that she wanted to clarify that the ultimate fact-finder is the judge. The purchasing companies rely on the judges to make these decisions. As the President of the trade association, she stated to the Committee that the worst thing that can happen to a structured settlement purchasing company is not the denial. Denials happen every day of the week, and her company goes along with that. The worst thing that can happen to a structured settlement purchasing company is that a court approves a transaction with a contract that is voidable or subject to collateral attack. Her company has underwriting guidelines. This is the way they operate. They want to know what they can do to make sure that the transaction is valid. They have institutional investors who provide funds to her company, so that they can purchase these transactions. If they had a systemic problem with the underwriting, their funds would go away completely, and they could not operate, or they would be less competitive in the marketplace. Every time her company is sued, or they get a letter stating that there is a problem with the transaction, the institutional investors see this and make

decisions as to whether Ms. LaBorde's company can operate as a business. They take this very seriously, and their standards are higher than what the statute requires, which is why she looks at every transaction. This is the right way to do this, the right way to operate. When someone calls about selling a structured settlement, the chances are that the answer will be that the person should not sell the structured settlement.

The Chair noted that the advertisements state that the companies will advise the payees as to what is in their best interest. However, the companies are not independent professional advisors. Ms. LaBorde responded that because this is a court-ordered process and because the process is robust, and it should be robust. It costs her company several thousand dollars to go to court. It makes no sense for any company to write a transaction that she and her colleagues do not believe will get approved. If the payee tells the judge that he or she is selling the monthly payments that he or she gets, because the person does not have a job, the judge will deny the transaction. But if the payee sells $100.00 in payments, and he or she can resolve an issue within five years, this will be appropriate. This is how her company constructs their transactions. They routinely talk people out of transactions, because they have to. The NASP held an educational conference. The company that had been written about in the Post was not a member of the Association. Her company had invited judges to the conference, who were very helpful in their presentations.

Mr. Ulman told the Committee that he practiced law with Hogan, Lovells in Washington, D.C. He had told the members of the Subcommittee at the meeting on September 24, 2015 that the trade association for structured settlements had talked him into drafting the model legislation on which the Maryland Structured Settlement Protection Act and similar statutes in 47 other states are based. He represents the National Structured Settlements Trade Association ("NSSTA"). It comprises property and casualty insurers that use structured settlements to resolve claims against their insureds, life insurance companies that write the annuity contracts for structured settlements, and licensed insurance brokers who specialize in putting structured settlements together. The members of the NSSTA are dedicated to producing the product that NASP members take apart. The NSSTA deplores the events reported in the Post articles. It deplores the abuses represented in those articles. It has been dedicated for the better part of the last 18 years to promoting statutory frameworks to protect structured settlement payees and to protect structured settlements.

Mr. Ulman said that had been very grateful to have the opportunity to meet with the Subcommittee on September 24, 2015. It was a lengthy meeting at which many issues had been addressed. He commended the Subcommittee and the reporters, particularly the Chair of the Rules Committee, for all the efforts that went into the proposed Rules.

Mr. Ulman said that he had three points to address. The

first was independent professional advice. As long as 17 years ago, the NSSTA concluded that this requirement that was already in place in a few states was so susceptible to being corrupted that it did not make sense to have it as a statutory requirement. Indeed, it is not part of the model legislation on which most of the States' statutes are based. Most of them include a provision requiring a finding only that the payee either has obtained independent professional advice or has knowingly waived the right to obtain such advice. Even this is possibly susceptible to corruption, but it least it is not as susceptible.

Mr. Ulman noted that the Maryland statute, Code, Courts Article, §5-1101 has to be considered. It requires a finding of independent professional advice. All of the skepticism that has been demonstrated in the questioning at the meeting possibly is warranted. Perhaps, some fine-tuning of the proposed Rules can be done in this area, but particularly when the advisors are attorneys, it potentially could put discredit on the profession and on the courts if there is the opportunity for independent professional advice to be anything other than independent and professional.

The Chair remarked that Mr. Ulman had made this point at the Subcommittee meeting. Other States have been reluctant to have this requirement, but some are reluctant to get rid of it, because it looks good. Mr. Ulman said that he was not sure whether he had indicated this at the Subcommittee meeting. There has been discussion of legislation that will probably be

introduced in Maryland. Legislation professionals recognize that this kind of statutory requirement is difficult to argue against, because it looks good on paper. In theory, who could argue against independent professional advice? The problem is that in practice, it does not live up to expectations. Mr. Bowie asked whether Mr. Ulman's point was that a safety net with holes is a bigger problem than no safety net. Mr. Ulman answered that he was afraid that in practice it will not be a safety net at all. Mr. Bowie inquired whether this is not covered by cross-examination of the independent professional advisor. That testimony is as close to the issue that the judge has to decide as any other witness. Mr. Ulman said that the answer is that it could be if the independent professional advisor is there, and the court can cross-examine him or her. The problem is that Mr. Ulman did not know of any place where that occurs systematically. The Chair noted that it is in proposed Rule 15-1305.

Mr. Carbine asked Mr. Ulman whether his clients use anti-assignment clauses in their structured settlements. Mr. Ulman said that he represented the trade association, but he could answer the question on behalf of the members of the association. The members do use those clauses. One reason is for federal tax reasons. There are Internal Revenue Service rulings dating back to 1979 and recently as 2010 that indicate that having anti-assignment provisions in settlement agreements is necessary to avoid constructive receipt as an economic benefit. In addition, most property and casualty companies insist upon anti-assignment

provisions, because they want to minimize future issues about whether they are paying the right people. The best way they can do this is by putting it in the contract. Unfortunately, contracts are not self-enforcing. As a consequence, payment rights are commonly assigned notwithstanding any anti-assignment provision.

Mr. Ulman noted that there had been a good deal of discussion about the availability of settlement documents. He agreed with what some of the NASP representatives had said that there certainly are cases in which settlement documents simply cannot be located. He referred to a discussion that occurred at the Subcommittee meeting, which Judge Adams had been a part of, pertaining to the fact that the judge making the findings required by the Maryland statute, findings about hardship or best interest, really should understand the totality of the terms of the structured settlement. This should include all of the payments, not merely the slice of the payments, the subset that may be the subject of a pending transfer application, because if someone who is proposing to transfer payments fairly soon after entering the structured settlement and receive a big lump sum of cash as part of the settlement, is now proposing to cash out the settlement payments within a short period of time, this is information that is surely germane to an assessment of best interest. It seems that the Chair has already anticipated the appropriate resolution of that issue, which is to have a rule that recognizes that if documents are not available, this can be

addressed.

Mr. Ulman said that he had one caveat. This goes to the issue of sealing documents that are filed and are required exhibits. As was discussed at the Subcommittee meeting, often settlement agreements, apart from the fact that they may include information about medical conditions, also include confidentiality provisions. For example, medical malpractice settlements often have non-disclosure provisions, because the physicians do not want the information in the public record. The answer to that problem is to provide that the documents shall, not may, be filed under seal. The amendment would make this change. In addition to making that change, it might be a good idea to consider whether in the Access Rules in Title 16, it would be appropriate to put in a cross reference to the structured settlement Rules, or put in a cross reference to Title 16 in those Rules.

Mr. Vogel told the Committee that he was an attorney practicing in Maryland and Washington, D.C. He primarily practices business law, civil rights law, and commercial litigation. A very small part of his practice is structured settlements. He wanted to address several practical matters. He liked the idea of requiring the annuitant to attend the hearing. This is very important. When he had started doing the structured settlement practice several years ago, the settlements were done more en masse. People would present a petition. The attorneys would say that all of the statutory requirements had been

complied with. The judge would look it over, ask some questions, and usually grant the transfer. Although the annuitant is not required to attend the hearing under the statute, the overwhelming practice is for the judge to require it.

Mr. Vogel expressed the opinion that the judges are very good. The quality of judges currently is considerably better than the quality of judges when Mr. Vogel started practicing law in 1987. When Mr. Vogel goes to court now, the judges are prepared, they have read the petition, they are ready to ask questions, and they do so. The judges are not simply rubberstamping the petitions. Mr. Vogel said that he thought that the disclosure statements could be much better. In his experience, many petitions have disclosure statements from other jurisdictions. When he sees how much information other states require, it is obvious how little is in the Maryland disclosure statement. The annuitants see the statements from other states, also. Mr. Vogel expressed the view that the statement in Maryland could be much better. He would like to see more guidelines being given to the judges. The proposed changes are fairly extreme. He did not think that the added protections are necessary. For example, if the judges are asked the maturity of the annuitant, the education of the annuitant, and other factors this would be important.

Mr. Vogel commented that he always asks the independent professional advisor where the person got his or her attorney. The person replies either it is a family attorney, the attorney

was obtained by word-of-mouth, or the attorney was obtained from the Internet. No one has told Mr. Vogel that the annuity purchaser has given the annuitant the name of the advisor. A number of attorneys do this. One attorney informed Mr. Vogel that he advises every single annuity seller that it is a bad deal, and he or she should not do it. As competent adults, the annuitants make their own choice. People are free to ignore the advice from their doctor or attorney.

Mr. Vogel said that the debate among attorneys pertains to what is the appropriate rule of this independence. Some will work to re-negotiate the deal; some will shop the deal; some will just get advice on the deal. The reason they do this has to do with their own philosophy and how they perceive the ethics involved. One attorney with whom Mr. Vogel had spoke and, who is an independent professional advisor, always advises against transfers and always charges a flat rate. The annuitant is the one paying, not Mr. Vogel's client, the seller. Mr. Vogel and his clients do not advance any money, and they do not find the advisor. He believes that if he were to take an active role in renegotiating the deal or shopping the deal, this would be an ethical problem for him, particularly because he is not paid on a contingency. There is an analogy with an attorney who is in a real estate transaction who is paid a contingency. They lose their objectivity when they are contingent. This is another factor to put in the mix.

Mr. Vogel said that his last point was that when a petition

is put under seal, the petition is not available to another annuity purchaser. The Chair commented that the petition would not have to be under seal; it is the exhibits that might have to be. Mr. Vogel agreed. He added that most people who sell annuities sell small pieces at a time. They frequently do not keep the documents. If they wanted to sell another part to another purchaser later, it would be that much more difficult for the seller and the other purchaser to get copies. Mr. Vogel said he understood why it is important to keep certain information confidential, but this would force the annuity seller who would like to sell another piece of the annuity to go back to the original purchaser of a previous piece, because the original purchaser has the documents. If they wanted to competitively shop, the competitor may not be able to get those items. It locks the seller into a certain relationship that may or may not be in his or her best interest. Mr. Vogel noted that the agreements are completely non-binding on the seller up until the judge signs the order. The Chair pointed out that in some of the agreements, the buyer can back out any time before the judge approves it. Mr. Vogel responded that he had never seen a buyer back out. The Chair added that the buyers are allowed to do so.

Mr. Zarbin hypothesized that someone consults Mr. Vogel, who is an independent professional advisor, about selling his or her annuity to a company who is going to buy it. As the advisor, Mr. Vogel tells the person that it is a bad deal. The seller decides to go forward, anyway. Would Mr. Vogel go into court and tell

the judge that he had recommended against selling? Mr. Vogel answered negatively. Mr. Zarbin asked him why he would not do this. Mr. Vogel said that this would sabotage his client if the client wants to sell this part of his or her annuity. The client has a legal right to sell the annuity. If Mr. Vogel were to go to court and tell the judge that he did not approve of the transfer, this is a problem. Mr. Zarbin referred to Mr. Vogel using the word "sabotage." Mr. Zarbin said that it would be more a situation of protecting the client. Why not protect the client from his or her own bad ideas? This happens in the workers' compensation area. The client would like to settle, and the attorney thinks that it is a bad settlement. The client needs the money. The commissioner asks the attorney whether he or she approves of the settlement. This is what an attorney does to protect the client.

Mr. Vogel responded that he had not practiced in the workers' compensation area. In Mr. Vogel's role in representing businesses, and as a civil litigator, if his client wants to do something, he or she has the right to do it. Mr. Vogel said that he personally would have a problem in telling a judge to disregard the client's wishes, because he, the attorney, knows better. Mr. Zarbin inquired whether Mr. Vogel has to sign a document that states that the advisor gave this advice, and the client would like to go forward anyway. Mr. Vogel replied that the document that he has seen independent professional advisors sign states that the advisor has advised the person. The advisor

does not state what the advice is. This would be privileged under attorney-client privilege. Mr. Vogel does not know what the advisor would have in his or her files. Mr. Zarbin remarked that he was referring to what is in the files.

Delegate Vallario referred to the time when this gets to the point of dealing with insurance companies, who are willing to give 40 cents on the dollar. The company says that the deal is so bad that the insurance company will give the person the 40 cents, and no approval process will be necessary. The company will mark the papers "paid in full" and file a notice with the court, so that the settlement is satisfied. Mr. Vogel said that he had heard that there are cases in which some companies will step in and give the seller a better deal, and if the person accepts what he or she perceives to be a better deal, the person has a right to do this.

The Chair said that there had been testimony that some insurance companies, the annuity companies themselves, will make a deal to advance the payments for a cash payout. This is an option for some people. It is much cheaper to do this, because the person gets a better deal from the insurance company than from one of the purchasing companies. The question is whether the people are ever told that this is an option or may be an option. Does the independent professional advisor ever investigate as to whether the seller can make a deal with his or her own annuity company? Mr. Vogel answered that he did not know about this. He has a communication. He knows that some of the

companies will get the sellers a better deal. If the court does not approve the transaction, there is a 40% excise tax. The Chair said that he did not know whether someone who makes a deal with his or her own company is subject to that tax.

The Chair asked Mr. Ulman whether he knew about the tax. Mr. Ulman answered that if different insurance companies are asked, they would probably answer differently. The federal statute defines "structured settlement factoring transaction," so that it would not apply to a "commutation" where a payee arranges with the insurer of the annuity contract to get a lump sum payout instead of future payments. This does not usually happen for a variety of tax and other reasons. If it is a pure commutation, then it is not a transfer or factoring transaction within the meaning of the IRS code. The Chair asked if there would be an excise tax on that. Mr. Ulman replied that there would not be one. However, this type of transaction is fairly rare because of the tax implications.

The Chair told the Committee that since no one else had asked to speak on this issue, they would consider each Rule.

The Chair said that Rule 15-1301 is simply a statement of the applicability and where the definitions are. No one had a comment on this Rule.

The Chair noted that a revised version of Rule 15-1302 had been handed out at the meeting. The word "HANDOUT" is at the bottom of the revised Rule. The Chair commented that sections (a) and (b) had not been changed. A change in subsection (c)(4)

corrects a typographical error. The correct language is "interested parties" and not "interested persons." The term "interested parties" is a defined term. The Chair said that one possibility in light of the comments at the meeting is that in subsection (c)(1), the following language could be added before the word "include": "subject to section (d) of this Rule." In section (d), the word "may" would be changed to the word "shall." A new sentence would be added that would read: "If a document is unavailable, the petition shall state that fact and any effort made by the petitioner to locate the document."

Mr. Carbine commented that there is a potential problem. He referred to *Della Ratta v. Dyas*, 414 Md. 556 (2010), which held that in Maryland, anti-assignment clauses are enforceable. There are all kinds of litigation on this throughout the country with a majority and a minority rule as to whether the anti-assignment clauses in the structured settlements agreements can be enforced to prevent the assignments. One of the interested parties who gets notice is the structured settlement obligor. The life insurance company that is paying the annuity does not know about this. However, if the structured settlement agreement is not required to be produced, it will never be known whether it contains an anti-assignment clause, and although the payee may be willing to waive the anti-assignment clause, the structured settlement obligor may object. The Chair pointed out that this had been discussed in the Subcommittee. The impact of an anti-assignment clause either in a structured settlement agreement or

in the annuity itself had been discussed. There are cases around the country as to whether a statute that permits assignments if they are approved by the court somehow supersedes the anti-assignment clause. Mr. Ulman had made the point that they do not supersede the clauses, but that since the annuitant is an interested party and gets notice of this, if the person does not object, the settlement can be assigned. The Chair said that the anti-assignment clauses are enforceable, but if no one objects to the assignment, and it is under the statute, there is a waiver.

Mr. Carbine said that he was concerned that this would lead to a "Catch 22." The settlement agreement is no longer available. All that is left is the profile in the computer of how many years payments have to be made, etc. This is a very pertinent provision in writing the Rule on structured settlements. The Chair noted that this was the reason that the Subcommittee wanted the structured settlement agreement and the annuity to be before the judge.

Mr. Carbine expressed his concern about the ability of a payee to get a lump sum payment to prevent something like a foreclosure. Can a rule provide that the filing of a petition stays legal proceedings against a payee, or should there be a rule that provides this? Mr. Frederick referred to voluntary bankruptcy proceedings under 11 U.S.C. §362, an automatic stay provision, which someone could cite to hold off proceedings against him or her. Mr. Carbine commented that the person could ask for a temporary restraining order. The Chair remarked that a

rule may not be able to automatically stay a proceeding.

The Chair pointed out that in subsection (g)(1) of Rule 15-1302, language has been added that reads: "subject to subsection (g)(2) of this Rule." Subsection (g)(2) provides that a document that is going to be attached to the petition under seal would not get served on the interested parties. Mr. Weaver pointed out that in section (f), the second sentence provides that the clerk shall send to the petitioner a written notice. In most circuit courts, the assignment function is in the domain of the judge and not the clerk. He asked whether the word "clerk" should be the word "court," which would encompass the clerk if that is who sends the notice. Mr. Weaver noted that the same change would need to be made in subsection (g)(1)(B). By consensus, the Committee agreed to make that change.

Mr. Ulman referred to the language in subsection (g)(1) that reads: "The petitioner shall serve on each interested party: ... a copy of the petition and the transfer agreement." An earlier statement indicated that the transfer agreement is part of the petition. The Chair agreed, but he explained that the intent was to make sure that the transfer agreement did get served. Mr. Ulman said that the negative implication is that the agreement is not part of the petition. He expressed the concern that if the transfer agreement is listed, other documents should be listed also, most particularly the disclosure statement. The Chair asked if Mr. Ulman would drop the words "and the transfer agreement." Mr. Ulman answered affirmatively, noting that it is

included as part of the petition by definition and would have to be served in any event unless it was expressly excluded. By consensus, the Committee agreed with Mr. Ulman's suggestion to delete the words "and the transfer agreement" from subsection (g)(1)(A) of Rule 15-1302.

Senator Norman referred to section (b), Venue. He inquired whether any consideration had been given to a scenario, such as a plane crash that took place in Carroll County, which was where the lawsuit was filed, and where the structured settlement was. The payees took the money and bought a house in Worcester County. Should the venue not be where the case was, where the court file might be, where the attorneys might be located? There might be a benefit to the venue being where the court file might be. The Chair replied that this issue had been discussed. It could be done either way. One of the problems that was exposed in the articles is the fact that these cases were being filed in places where the payee did not live, and the payees have had some difficulty getting to the hearings. The Subcommittee's view was that if the payee is living in Maryland, the case should be filed where he or she lives, because this is the most convenient place for the payee. Under Rule 2-327, Transfer of Action, the venue could be changed. Mr. Zarbin remarked that once the Maryland Electronic Courts ("MDEC") project is in full effect, the documents will be available anywhere.

Delegate Vallario inquired why the petitions are not filed in the case itself, in the event that the judge is still around

and expresses interest in getting involved. Delegate Vallario expressed the opinion that the right place for venue is where the suit was filed. The Chair responded that the Subcommittee had considered this, but they noted that the settlement may not have come from the lawsuit. The matter could have been settled without a lawsuit. Secondly, the judge in the case where the underlying claim was may not have any concern or care about whether the matter is going to be assigned or not. That judge would have tried the case and entered a judgment for the plaintiff but may have had nothing to do with the structured settlement agreement. Some of these agreements are approved by the court. However, the judge may not be interested in the assignment. The decision was to make the venue where the payee lives.

Judge Adams said that she had a concern after listening to the discussion today. She referred to the 40-day requirement for setting up a hearing that appears in section (f) of Rule 15-1302. She noted that it had been added because of the 20-day service provision in Code, Courts Article, §5-1103 and so the court could be assured that all parties had been notified of the hearing. There may be a scenario where all the paperwork is in place when the case is filed, and there truly is an emergency. Should the court be allowed to set the case earlier than the 40 days for good cause if the court deems it appropriate? The Committee agreed that the court should be allowed to do this. The Chair suggested that a period could be added after the words "hearing

date." Then the next sentence would be "Unless otherwise ordered by the court, the hearing date shall be no earlier than 40 days after the date of filing." By consensus, the Committee agreed to this change.

Senator Norman referred to subsection (c)(8) of Rule 15-1302. He noted that earlier there had been discussion about attorney-client privilege, but nothing was said about this part of the privilege, the dates and nature of the communications. He guessed that almost every one of these advisors is going to be an attorney. The attorney would probably not reveal anything between the attorney and the client. The Chair pointed out that this is attorney-client privilege. What is in subsection (c)(8) is not between the attorney and the payee. This is between the attorney and the petitioner who is seeking to buy. What was intended was that this is part of the independence of that professional advisor. If there has been any contact between the company who wants to buy the settlement and the professional advisor who is supposed to be advising the payee, the judge might want to know this.

Senator Norman pointed out that the advisor is an attorney. The Chair clarified that the advisor may be an attorney. Senator Norman remarked that if there is an accident case, and the client takes $20,000 instead of the $30,000 the attorney feels that he or she can get for the client, the attorney has to support the client. He or she has to represent the client zealously. If the attorney tells the client not to take the

$20,000, and hold out for the $30,000, as an analogy, why would the attorney have to tell the judge, whose sole purpose is to determine whether the payee is being taken advantage of, that the attorney feels that the client is being taken advantage of. It is up to the judge. The Chair responded that what he was suggesting was that this is not what subsection (c)(8) provides. This is for the petitioner to state any contact, not between the client and the professional advisor, but between the person or entity trying to buy the settlement and the advisor. There is no attorney-client privilege. Senator Norman expressed the view that this is not entirely clear. He suggested that the words "unless privileged" be added after the words "transfer and." He said that the Chair's argument is that this is not privileged communication, but Senator Norman's view was that it could be privileged under certain circumstances.

Mr. Zarbin remarked that the information will have to be divulged before it is determined to be privileged. The Reporter commented that if the attorney is talking to the structured settlement buyer, the privilege is already out there. Mr. Frederick observed that it is the same issue as if an attorney is defending someone in a case, and the attorney talks to the attorney for the other side. This does not fall under the attorney-client privilege. It seemed to Mr. Frederick that the communication between the advisor and the petitioner might be helpful to the trial court. He could not see how this could be privileged communication. The Chair said that the Subcommittee

had been told that for a variety of reasons, it is not uncommon for the professional advisor to talk to the company that wants to buy these settlements. The concern is to make sure that the contacts are legitimate and not compromising the independence of the professional advisor.

Judge Nazarian commented that he agreed with the language referred to earlier recognizing the possibility that documents in the list of exhibits in subsections (c)(1)(A), (B), and (C) of Rule 15-1302 might not be available. This is likely. He expressed the concern that if the petition provides that none of the documents listed in subsections (c)(1)(A), (B), or (C) is available, the petition will say nothing about what the structured settlement was before the transfer. The stream of payments, the length of time, etc. will not be known, because the documents will not be available. The way that this is captured in the petition as the Rule was originally drafted was by requiring those documents.

Judge Nazarian added that he did not have language to solve this problem. How would a trial judge make a best-interest determination if the petition states that none of these documents is available? Ms. Vassallo replied that with every one of these cases that she and her colleagues file, they always have an annuity stream included. The judge will know what the entire situation is. They may not have the annuity contract to disseminate. Judge Nazarian noted that the mechanical language of Rule 15-1302 (c)(1) is the problem. If the contract is not

available, unless the Rule asks for some alternative for information that captures the annuity stream described by Ms. Vassallo as he read it, the Rule would not require that information. Ms. Vassallo reiterated that it would be an annuity schedule. Ms. LaBorde added that it could be an income verification statement. Judge Nazarian guessed that the attorneys could talk to all of their companies, and for each company, the document would have a different title. Ms. LaBorde agreed that each insurance company titles their documents differently. What is required could be stated as the document from the insurance company indicating the payment stream.

The Chair asked whether it would a document from the annuity issuer. Ms. LaBorde said that it could also be from the annuity obligor. Judge Nazarian explained that what he was trying to capture was other information if the documents listed in subsections (c)(1)(A), (B), and (C) are not available. Ms. LaBorde reiterated that the language to be added could be "a copy of a document from the annuity issuer or obligor evidencing the payments payable under the annuity policy." The Reporter commented that this could be added as a separate exhibit. The Chair said that Ms. LaBorde's language could be added as subsection (c)(1)(D) of Rule 15-1302. By consensus, the Committee agreed with this suggestion.

Judge Adams told the Committee that since she had to leave, she wanted to make a comment about Rule 15-1303 pertaining to the discussion today about the privacy of the payee and his or her e-

mail address and telephone numbers. She had thought about shielding information in domestic violence cases. She suggested that language could be put into Rule 15-1303 that allowed the e-mail and telephone numbers to be shielded from Case Search. It would still be available in the file if necessary. The Chair responded that this could be done. Language can be added to the form in Rule 15-1303 requiring the shielding of identifying information. Judge Adams said that she was referring to e-mail addresses and telephone numbers of the payee. The Chair asked about shielding the address. Judge Adams replied that all of it should be shielded. It will be available in the court file, but it will not be out on the Internet. The Reporter inquired whether Case Search only has the names available. Mr. Zarbin answered that Case Search does not have all of the information that Judge Adams was concerned about. He expressed the concern that someone who is abusive and would like to get to the files can go to the courthouse and pull the file.

The Chair noted that section (d) of Rule 15-1302 has language providing that sensitive information shall be under seal, and the language suggested by Judge Adams could be included there. Rule 15-1303 is a consent form that is also asking about other information. The form could ask about the payee's educational background if the Committee wants to include that. Judge Adams was not certain that her problems would be solved by sealing of the cases. The point of getting this information into the court record is because the judge will need to notify the

person. Sealing from the judges' perspective is not a problem, but sealing a file creates a difficult issue for the clerks. Judge Adams was not sure that the affidavit information needs to be sealed. The Chair pointed out that Rule 15-1303 has a consent form, not an affidavit. The shielding of the information could be added either to the Structured Settlement Rules or to the Access Rules, one of which (Rule 16-1006, Required Denial of Inspection – Certain Categories of Case Records) has a list of documents that are shielded. The Chair said that Judge Adams is asking that the information not be available. Judge Adams agreed, and she added that she would approve of however the shielding concept is added to the Rules.

The Chair asked for other comments on Rule 15-1303. Ms. LaBorde said that she had a comment on Rule 15-1302. Subsection (c)(4) asks for any allegations of medical issues related to the petition. The Chair noted that instead of what is in subsection (c)(4), one approach for this provision is to provide: "state whether the petitioner has any reason to believe that there is or may be a mental or cognitive impairment on the part of the payee, or that the structured settlement arose from a claim of lead poisoning." Ms. LaBorde commented that this is medical information. The Chair clarified that the petitioner is not stating what the medical information is, just whether he or she has any reason to believe that there is or may be a mental or cognitive impairment on the part of the payee, or that the structured settlement arose from a claim of lead poisoning. Ms.

LaBorde remarked that they have customers who are FBI agents and may be getting a background check, and there is a petition that provides that when the payee was three years old an allegation had been made of a mental impairment. This is serious information. The Chair said that what is being requested is not about the person when he or she was three years old, but what he or she is like now.

Ms. McBride remarked that she was not sure that this solves the problem. In the version of Rule 15-1302 in the meeting materials, subsection (c)(4) reads: " state whether, to the best of the petitioner's knowledge, information, and belief, the structured settlement arose from ... any other claim in which an allegation was made in a court record of a mental or cognitive impairment on the part of the payee." This could refer to a situation in the past. She presumed that the court record would also be a public record that would be available to the investigative authority. The Chair noted that it would be public unless it was shielded in that case. Ms. McBride was not sure that the revised language solves the problem. She preferred that subsection (c)(4) not be changed. By consensus, the Committee agreed to retain the language of subsection (c)(4) in the version of Rule 15-1302 that was in the meeting materials.

The Chair asked if anyone had a comment on Rule 15-1303. He reiterated that language referring to shielding would be added to the Rule. No other comment was forthcoming. He asked if anyone had a comment about Rule 15-1304, which is the affidavit of the

independent professional advisor. The Chair asked Delegate Vallario whether he was aware of any proposed legislation that would do away with the independent professional advisor. Delegate Vallario answered negatively. Senator Norman commented that there might be some legislation on this. The Chair remarked that if that happens, the Structured Settlement Rules would need to be changed.

The Chair asked if anyone had a comment on Rule 15-1305. Ms. McBride said that she had a question on subsection (b)(4) of Rule 15-1305. When she first read it, it had occurred to her that it is possible that the petitioner could argue that the attorney who is appearing before the court is the "duly authorized officer or employee." She did not think that this was the intent of subsection (b)(4). She thought that the intent was that the duly authorized officer or employee be a person separate from the attorney. She did not want there to be any confusion that the attorney who is representing the purchaser or petitioner is claiming to be the duly authorized person. Rule 15-1305 suggests that the authorized person is someone separate. The Chair responded that the thought was that the duly authorized person not be the attorney. The petitioners could be anyone, and they have to be at the hearing. The Reporter suggested that subsection (b)(4) of Rule 15-1304 could read: "the petitioner or a duly authorized officer or employee of the petitioner, other than counsel for the petitioner."

Ms. McBride remarked that she understood the provision, but

she did not want a judge to be in a position where he or she is not clear as to whether the attorney is a duly authorized officer or employee of the petitioner. The Chair observed that the attorney could be. Judge Nazarian added that it could be an in-house attorney who has entered an appearance on behalf of the company.

Ms. McBride inquired whether the petitioner's attorney should be allowed to be the authorized officer providing testimony in a case. The Chair noted that this would create an attorney-client privilege problem. Ms. Strickland expressed the view that this is an important point. She wanted to inform the Committee that most of her clients are not in Maryland, so if a representative from a company has to attend every hearing, it would be costly and virtually impossible. The Chair pointed out that the company is the petitioner. Ms. Strickland acknowledged this, but she asked what would happen if every State had the requirement that the petitioner had to show up at every hearing. Thousands of people would have to fly all over the country. The Chair responded that if those people are the petitioners, they have the burden of proving that the court should approve the transfer. Ms. Strickland explained that there is a significant cost. If a company wants to do business in Maryland, and they have to show up in court, the effect of this will cost a great amount of money in this transaction.

The Chair asked Ms. Strickland what the airfare is from Texas to Maryland. Mr. Zarbin noted that it is about $200. Ms.

Strickland responded that it is more than $200, and the person would probably have to stay overnight. If the hearing is in Baltimore City, it would begin early in the morning, and an employee from the petitioner company would have to go there. The companies do thousands of transactions. Many of the companies are based in Florida, and they would have representatives going all over the place every single day. Judge Nazarian inquired what happens if in a structured settlement transaction now, before the Rules go into effect, the court asks factual questions about the transaction. First the court has to make a best-interest finding, and the only person at the hearing representing the petitioner is the petitioner's outside counsel. What happens if the trial judge asks factual questions? Ms. Strickland answered that in practice, when the judge wants an answer to a question from her client, the judge asks her the question, and she replies that she will get the judge the answer. The Chair remarked that there is no cross-examination. Ms. LaBorde commented that this is not accurate. She routinely picks up her telephone during the day answering a judge. She tells the judge who she is, and she is sworn in over the telephone. She gives the testimony. If the judge feels it is necessary, they are available. The added benefit of personally flying to Seattle, Washington versus being available on the telephone is not that significant.

Mr. Marcus noted that if this is what happens, Ms. LaBorde is not the attorney for the petitioner, she is an employee of the

company, which is what Rule 15-1305 contemplates. The problem he sees is what Judge Nazarian had pointed out, and that is how can the attorney represent facts and be cross-examined on those facts without not implicating some privileged material. The only way the attorney could have gotten the information was as counsel to the company. Ms. LaBorde said that if she is called by a court, nine times out of ten, she is asked what she can do or what other things had she considered. Mr. Marcus observed that what the confusion is not how the information comes to the court, because he appreciates the fact that there may be some other methods that the courts can use in gaining information without the need for someone to travel. Other accommodations can be made. But substantively as to how the facts and how the evidence is developed is not the same issue as how to logistically address the time, distance, and convenience. There are two different concepts. Under the appropriate circumstances, as Ms. Strickland had said, the court can address problems of time and distance. One might not be able to assess the credibility of a witness, who is not present before the judge, but if the judge says that he or she needs someone in court, the witness has to be there. Ms. LaBorde reiterated that this would increase the cost.

Judge Mosley expressed the view that it is important to keep the testimony in. As trial judges, they are building a record. If someone is not there, how does the appellate court look at the record? The Chair commented that if the Committee would like any change at all, in Rule 15-1305 (b)(1) with respect to the payee

being at the hearing unless the court excuses him or her, the following language could be added to the beginning of section (b): "[u]nless the court orders otherwise." If the court does not order otherwise, all of the people listed in section (b) have to be at the hearing. Rule 2-513, Testimony Taken by Telephone, permits telephone testimony. Any change that would be made would be to add that the court could excuse a personal appearance for anyone. Ms. McBride asked whether the Rule should clarify that subsection (b)(4) does not refer to the attorney appearing for the company. The Chair replied that it should.

Judge Bryant read from Rule 2-513 (f): "If a party objects, a court shall now allow the testimony of a witness to be taken by telephone unless the court finds that the witness is not a party and will not be testifying as an expert." This is a limitation on telephone testimony. Mr. Frederick commented that the other issue is whether the attorney, as the company's designee, is going to cross the line according to Maryland Rule of Professional Conduct, 3.7, Lawyer as Witness. Judge Nazarian said that this is where he was headed when he raised this issue. If the court has factual questions, attorneys can make representations, but to the extent that an attorney cannot be sworn in, or this runs into Rule 3.7, there are logistical issues, and Judge Nazarian had no idea whether telephone testimony is feasible in all circuit courts. Judge Bryant remarked that it would make it difficult for her as a trial judge to present a document to a witness and ask questions about it if

that witness is not in court.

The Reporter asked whether Rule 2-513 applies only when someone objects to the testimony. Judge Bryant replied that the first part of the Rule applies when a party objects, but starting from section (f), the second part pertains to when telephone testimony is prohibited. The Reporter pointed out that section (f) only applies if someone objects. If no one objects, a person in Virginia can testify by telephone even if the person is a party. Judge Bryant noted that the problem for the trial judges is that they cannot present a document to the person who is not in court. Credibility is, in fact, an issue when people testify over the telephone. It is a different dynamic when the witness is on the telephone.

Judge Nazarian said that he appreciated the cost concerns that had been expressed at the meeting. However, he suspected that if the Rule is revised as has been suggested, there will never be a live body representing the petitioner in court, unless there is some reason why that would not get litigated ahead of time. This is an issue that the Committee will have to get comfortable with if the change is to be made, and Judge Nazarian said that he was struggling with this. Even if it were proper to have the personal attendance of a payee optional, the independent professional advisor has to be present. This goes against changing Rule 15-1305 (b). Otherwise, Judge Nazarian said he did not know how a trial judge can make a best-interest finding if neither the payee nor the independent professional advisor is at

the hearing.

The Chair referred to Ms. McBride's point that subsection (b)(4) of Rule 15-1305 is not clear as to whether the attorney for the petitioner can be a duly authorized officer or employee. The Chair suggested that a Committee note could be added after subsection (b)(4) or language added to subsection (b)(4) indicating that this does not include an attorney for the petitioner bound by the attorney-client privilege. It explains what the meaning is of an employee or officer. By consensus, the Committee approved this change.

Mr. Marcus remarked that he appreciated the comments of Ms. McBride and Judge Nazarian. Hearkening back to the process of how the judge does this, there is a burden on the petitioner to make the case. The fallback position is that if the trial judge is not satisfied with the presentation made by the petitioner, because either the documents are not there, and the judge did not have a full and ample opportunity to examine them, or the judge is not satisfied that the transaction is in the best interest of the payee, the petition will be denied. Mr. Marcus was not sure how to communicate in the Rules that this transfer procedure is not an automatic process. It may be that a note could be added that would state that nothing in the Rules should be construed as either undermining or negating the obligation of the petitioner to prove the case. If the proof is not there, and there is not substantiation for the petition for whatever reason, the petition is denied.

Ms. Strickland agreed with Mr. Marcus. This is how it works in effect. In the hundreds of cases that Ms. Strickland has handled, she could not think of any time when a judge has asked that her client be at the hearing in person. That does not mean the judges do not have questions. If the judge has an issue with credibility or has questions that cannot be answered, the petition should be denied. Judge Nazarian said that he understood this, but the way that it will work in real life is that the petition will have documents attached to it. It will include the paper from the annuity provider. There is someone who really wants to get this lump sum of money. No one from the company nor the independent professional advisor is at the hearing. It is not meant to be a purely adversarial proceeding, but these will turn into rubber stamps. The trial judge would have to independently assess all of this, do some complicated math, know enough about the business to figure out whether the complicated math resulted in a positive outcome for the payee. It would be different if it were like foreclosure where the purpose is specifically streamlined by statute to accomplish a specific procedure. The trial judge has to make a best-interest decision. Judge Nazarian remarked that with a streamlined procedure for the structured settlements where everyone's attendance is optional, he was struggling to see how an analysis can be made. He added that if the trial judges view it differently, he would defer to their judgment.

Ms. Strickland agreed with Judge Nazarian. She expressed

the opinion that the payee has to be at the hearing. The person selling has to be there. The Chair pointed out that under Ms. Strickland's view, the petitioner, who has a burden of proof, does not have to be at the hearing. Ms. Strickland noted that the payee has to be at the hearing, because the judge has to question the payee for credibility and other purposes.

The Chair asked for comments on Rule 15-1306. No one commented. The Chair pointed out that Rule 15-1307 sets forth what the statute requires. Most of Rule 15-1307 was drafted by the Subcommittee, but there have been a number of changes since then.

The Chair asked for a motion to approve the Rules as amended. Ms. McBride moved to approve the Rules as amended, the motion was seconded, and it passed unanimously.

The Chair thanked the guests who came to help with this subject. The Rules will be amended as was discussed and sent promptly to the Court of Appeals. The report will be posted on the Judiciary website. At some point, the Court will hold an open hearing on the Rules. One of the reasons the speakers were asked to give their addresses was so that they can be notified as to when the hearing is. Anyone who wishes to can address the Court. To do so, the Clerk has to be notified at least two days before the hearing. There will be another opportunity to present to the Court itself.

Additional Agenda Item.

The Chair said that he had sent the Committee a memorandum

explaining the background of the proposed changes to the Professionalism Rules. (See Appendix 2). He and the Reporter knew that this issue was in the offing, but they did not get direction from the Court of Appeals until October 7, 2015. This is why the Rules were distributed later. They are facing a deadline, because under current Rule 11, Required Course on Professionalism, the course sunsets on January 1, 2016. Another Rule needs to take its place. This is why this matter is on a fast track.

The Chair presented Rule 13, Out-0f-State Attorneys, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

RULES GOVERNING ADMISSION TO THE BAR OF MARYLAND

AMEND Bar Admission Rule 13, as follows:

Rule 13. OUT-OF-STATE ATTORNEYS

. . .

(p) ~~Required Course on Professionalism~~ Required Orientation Program

A petitioner recommended for admission pursuant to section (n) of this Rule shall comply with Rule 11 (a).

. . .

The Chair commented that one additional Rule needs to be modified, which is Rule 13, Out-of-State Attorneys. Currently, if the proposed Rules are adopted, out-of-state attorneys who

would like to be admitted to practice in Maryland, will have to be in practice for five years in some other state and will have to take the Maryland attorneys' examination. They will also have to take the Multistate Professional Responsibility Examination ("MPRE") again. For most of them, even if they took it, it would have been a long time ago. The Chair had spoken with the Honorable Clayton Greene, Jr., Associate Judge of the Court of Appeals, and with Jeffrey Shipley, Esq., Secretary to the State Board of Law Examiners, and they had agreed if an attorney has been in practice for five years and is in good standing in another state, he or she should not have to take the MPRE. This is a decision for the Rules Committee to make. If the Committee is in agreement with Judge Greene and Mr. Shipley, a minor amendment to Rule 13 would be required to provide that out-of-state attorneys have to comply with Rule 11 (a) instead of Rule 11.

By consensus, the Committee agreed to make this change.

By consensus, the Committee approved Rule 13 as amended.

The Chair presented Rule 1, Definitions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

RULES GOVERNING ADMISSION TO THE BAR OF MARYLAND

AMEND Bar Admission Rule 1, as follows:

Rule 1. DEFINITIONS

In these Rules, the following definitions apply, except as expressly otherwise provided or as necessary implication requires:

(a) ADA

"ADA" means the Americans with Disabilities Act, 42 U.S.C. §12101, et seq.

(b) Board

"Board" means the Board of Law Examiners of the State of Maryland.

(c) Court

"Court" means the Court of Appeals of Maryland.

(d) Code, Reference to

Reference to an article and section of the Code means the article and section of the Annotated Code of Public General Laws of Maryland as from time to time amended.

(e) Filed

"Filed" means received in the office of the Secretary of the Board during normal business hours.

(f) MBE

"MBE" means the Multistate Bar Examination published by the National Conference of Bar Examiners.

(g) MPRE

"MPRE" means the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners.

~~(g)~~ (h) MPT

"MPT" means the Multistate Performance

Test published by the National Conference of Bar Examiners.

~~(h)~~ (i) Oath

"Oath" means a declaration or affirmation made under the penalties of perjury that a certain statement or fact is true.

~~(i)~~ (j) State

"State" means (1) a state, possession, territory, or commonwealth of the United States or (2) the District of Columbia.

Source: This Rule is derived from former Rule 1.

The Chair said that the only change to Rule 1 was to define the term "MPRE," so it would not be necessary to repeat the full name each time it comes up in the Rules. The full name is "Multistate Professional Responsibility Examination."

The Chair presented Rule 10, Report to Court - Order, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

RULES GOVERNING ADMISSION TO THE BAR OF MARYLAND

AMEND Bar Admission Rule 10, as follows:

Rule 10. REPORT TO COURT - ORDER

(a) Report and Recommendations as to Candidates

As soon as practicable after each examination, the Board shall file with the Court a report ~~of~~ containing (1) the names of the ~~successful~~ candidates who successfully

completed the bar examination and (2) the Board's recommendation for admission. ~~If proceedings as to the character of a candidate are pending, the~~ The Board's recommendation ~~of that~~ with respect to each candidate shall be conditioned on the outcome of ~~the~~ any character proceedings relating to that candidate and satisfaction of the requirements of Rule 11.

(b) Order of Ratification

On receipt of the Board's report, the Court shall enter an order fixing a date at least 30 days after the filing of the report for ratification of the Board's recommendations. The order shall include the names and addresses of all persons who are recommended for admission, including those who are conditionally recommended. The order shall state generally that all recommendations are conditioned on character approval and satisfaction of the requirements of Rule 11, but shall not identify those persons as to whom proceedings are still pending. The order shall be published in the Maryland Register at least once before ratification of the Board's recommendations.

(c) Exceptions

Before ratification of the Board's report, any person may file with the Court exceptions relating to any relevant matter. For good cause shown the Court may permit the filing of exceptions after ratification of the Board's report and before the candidate's admission to the Bar. The Court shall give notice of the filing of exceptions to the candidate, the Board, and the Character Committee that passed on the candidate's application. A hearing on the exceptions shall be held to allow the exceptant and candidate to present evidence in support of or in opposition to the exceptions and the Board and, if the exception involves an issue of character, the Character Committee to be heard. The Court may hold the hearing or may refer the exceptions to the Board, the Character Committee, or an examiner for hearing. The Board, Character Committee, or

examiner hearing the exceptions shall file with the Court, as soon as practicable after the hearing, a report of the proceedings. The Court may decide the exceptions without further hearing.

(d) Ratification of Board's Report

On expiration of the time fixed in the order entered pursuant to section (b) of this Rule, the Board's report and recommendations shall be ratified subject to the conditions stated in the recommendations and to any exceptions noted under section (c) of this Rule.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 11.

Section (b) is derived from former Rule 12 a.
Section (c) is derived from former Rule 12 b.
Section (d) is derived from former Rule 12 c.

The Chair explained that most of the changes to Rule 10 are conforming amendments to Rule 11.

The Chair presented Rule 11, Additional Requirements for Admission, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

RULES GOVERNING ADMISSION TO THE BAR OF MARYLAND

AMEND Bar Admission Rule 11, as follows:

Rule 11. ~~REQUIRED COURSE ON PROFESSIONALISM~~ ADDITIONAL REQUIREMENTS FOR ADMISSION

~~(a) Course on Legal Professionalism -~~

~~Development and Approval~~

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

~~(b) Course Presentation~~

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

~~(c) Duty to Complete Course~~

~~Before admission to the Bar, an individual recommended for admission pursuant to Rule 10 shall successfully complete a course on legal professionalism approved by the Court of Appeals. For good cause shown, the Court may admit an individual who has not completed the course, on condition that the individual complete the next regularly scheduled course. If the attorney does not successfully complete the next post-admission course, the Court shall enter a Decertification Order prohibiting the individual from practicing law in the State and shall mail, by first-class mail, a copy of the order to the individual. Mailing of the copy shall constitute service. The~~

~~decertification shall remain in effect until the Court, after having received satisfactory proof that the individual has successfully completed the course, enters a Recertification Order that restores the individual to good standing. The Clerk of the Court of Appeals shall send a copy of each Decertification Order and each Recertification Order to the Clerk of the Court of Special Appeals, the Clerk of each circuit court, the Chief Clerk of the District Court, and the Register of Wills of each county.~~

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

~~This Rule shall remain in effect until January 1, 2016. Prior to that date, the Court of Appeals shall evaluate the results of the course requirement to determine whether to extend this Rule. The Court of Appeals may appoint a committee consisting of one or more judges, lawyers, legal educators, bar association representatives, and other interested and knowledgeable individuals to assist the Court in the evaluation and make appropriate recommendations to the Court.~~

(a) Orientation Program

(1) The Court of Appeals shall appoint a work group of not more than seven individuals to develop and present to the Court for its approval an orientation program for effectively informing candidates of certain core requirements, established by Rules of the Court or other law, for engaging in the practice of law in Maryland.

(2) The program shall include information regarding (A) reporting requirements established by Rules of the Court, (B) Rules governing attorney trust accounts and the handling of client funds and papers, and (C) the Rules of Professional Conduct regarding competence, scope of representation, diligence, communications with clients, fees, confidentiality, conflicts of interest, declining representation, meritorious claims, candor toward tribunals, and law firms.

(3) The program shall be given at least twice a year, in May and in either November or December.

(4) The program shall not exceed three hours in duration. It may include the provision of written materials distributed in a manner determined by the Court but, to the extent practicable, it shall be given in electronic form, so that a candidate may participate from a remote location, subject to appropriate verification of the candidate's actual participation.

(5) Commencing June 1, 2016, a candidate may not be admitted to the Bar unless (A) prior to admission, the candidate has produced evidence satisfactory to the Board that the candidate satisfactorily participated in the program, or (B) the candidate has been excused from that requirement by Order of the Court of Appeals.

Committee note: The purpose of the Orientation Program is to assure that newly admitted attorneys are familiar with core requirements for practicing law in Maryland, the violation of which may result in their authority to practice law being suspended or revoked. The program is not intended to take the place of broader programs on professionalism offered by law schools, bar associations, and other entities, in which the Court of Appeals strongly encourages all attorneys to participate.

(b) MPRE

(1) Unless otherwise provided by Order of the Court of Appeals, commencing December 1, 2017, a candidate may not be admitted to the Bar unless the candidate has produced evidence satisfactory to the Board that the candidate has received a qualifying score on the MPRE taken not earlier than three years prior to the date of the first day of the Maryland bar examination on which the admission is based.

(2) Upon recommendation of the Board, the Court shall determine the minimum

Maryland qualifying score for the MPRE.

(3) A candidate may take the MPRE whenever and as many times as permitted by the National Conference of Bar Examiners, but a qualifying score will be counted only with respect to an MPRE taken within the time set forth in subsection (b)(1) of this Rule.

(4) If a candidate has not provided satisfactory evidence of a qualifying score prior to the time the Board makes its report to the Court pursuant to Rule 10, the Board shall not recommend admission. If the candidate provides such evidence after the filing of the Report but prior to the scheduled admission, the Board shall amend its report to recommend admission, unless there is another ground to do otherwise.

Source: This Rule is new.

The Chair told the Committee that the heart of the rule changes in this agenda item is the complete rewriting of Rule 11. He asked Mr. Shipley if he would like to speak about this. Mr. Shipley responded that the Chair had covered most of the issues in the memorandum he had sent out.

The Chair said that Donald B. Tobin, Dean of the University of Maryland Francis King Carey School of Law, was present. The Chair welcomed the Dean. Dean Tobin told the Committee that he was a Maryland attorney, so he had never taken the MPRE. He had waived into the bar of Ohio, which did not require taking the that exam. Dean Tobin said that he was there on behalf of himself and Ronald Weich, Dean of the University of Baltimore School of Law, who could not attend the meeting. As representatives of the law schools, they are both on the

Professionalism Center Committee and on the working group chaired by Judge Greene. Dean Tobin noted that he had some comments on the Rules and one or two technical suggestions.

Dean Tobin remarked that his main purpose was to address the MPRE requirement. Initially, an issue that arose was how to handle the expiration of Rule 11. One idea was to substitute taking the MPRE for the Professionalism Course. Dean Tobin expressed the view that this is a bad way to move forward. The Court of Appeals can address its concerns regarding the Professionalism Center without adopting the requirement to take the MPRE. From an educational perspective, adopting the MPRE is a movement in the wrong direction. Pedagogically, the trend is to move away from multiple choice tests. They are an attempt to make people memorize rote rules to try to regurgitate them back in a multiple choice context.

Dean Tobin expressed the opinion that the educational philosophy of including ways to discuss and consider professionalism would be a much better way of moving forward. Since the trend is to move away from the professionalism course, there seemed to be some concern about the burden on the people who had to take the course. Many of the attorneys present at the meeting today had to take the course, as did Dean Tobin. He had thought that the course was a good method of teaching professionalism. The course had been modified, so that it could be taken through some types of electronic format, but adding the test requirement is a huge burden. The attorneys would have to

prepare for the MPRE. They would have to study and take a day off to take the test.

Dean Tobin said that the response that he and his colleagues had gotten was that nearly 2/3 of the students already take the exam. Dean Tobin had been an appellate attorney before he became a professor. Many attorneys, who have gone to schools all over the country and who would like to practice in the District of Columbia, take the Maryland bar exam, so that they can be barred in two jurisdictions. This is understandable. Dean Tobin had never waived into D.C., because the Department of Justice, where he had been previously employed, would not pay for it. The law schools cannot get good data on how many of their students take the MPRE. It seems to be around 50% of the students.

Dean Tobin asked whether there has been any evidence that there is any benefit to taking the exam. The only benefit that anyone has put forward in all of the discussion is that 48 states require it. Dean Tobin expressed the opinion that the fact that 48 states require the exam is not a sufficient reason to require it. The benefit needs to be demonstrated.

Dean Tobin noted that currently, Maryland does test ethics on the Maryland bar exam. The students are studying for this as part of their goal to take and pass the bar examination. The idea that the MPRE has to be required just because 48 other states also require it was not convincing to Dean Tobin that it is necessary. One way of addressing this issue is to add more subjects to the bar exam.

Dean Tobin commented that he had spoken with people who are concerned about student debt and about what is happening to the next generation of attorneys. Attorneys need to be able to practice law and get jobs. The number one issue of concern to students is passage of the bar. By requiring the MPRE, the students are being put through another hurdle. Dean Tobin did not think that this was particularly helpful.

Dean Tobin told the Committee that one of the reasons he had attended the meeting was not only to express his strong feelings about the MPRE but also to express his strong feelings about what is being created by the test, which is more requirements for law students. There is no evidence that this is making the practice of law any better for attorneys. He asked the Committee to consider the ramifications of the test requirement.

Dean Tobin remarked that the other issue he had was what is required as the passing score on the MPRE. He said that he obviously preferred the lowest score possible, because he was not in favor of the test in the first place. He referred to the scores in Pennsylvania and D.C. If the view is that the test is not an added burden, then what should be considered is a score that is similar to that of those two jurisdictions, instead of using a score that is higher. When he had read Rule 11, it was not clear to him that someone could take the MPRE after bar passage. He was not sure what happens to a student who is taking the MPRE and fails, then the student takes the bar exam and passes, then takes the MPRE and passes. He thought that what was

intended was that this scenario was proper.

Mr. Shipley said that this was the object of all of his prior discussions with the Chair and with Judge Greene. The student would have to achieve a passing score before admission to the bar, not before the bar exam. Dean Tobin reiterated that this was not clear from his reading of the Rule. The Chair commented that this was the intent of the Rule. In Rule 11, if the person has not gotten a qualifying score by the time the Board of Law Examiners files its report to the Court, but then the person gets a qualifying score, the report shall be amended to recommend admission.

Dean Tobin read from subsection (b)(4) of Rule 11: "If a candidate has not provided satisfactory evidence of a qualifying score prior to the time the Board makes its report to the Court pursuant to Rule 10, the Board shall not recommend admission. If the candidate provides such evidence after the filing of the Report but prior to the scheduled admission, the Board shall amend its report to recommend admission, unless there is another ground to do otherwise." Dean Tobin expressed his concern about the candidate filing such evidence after the filing of the report but prior to the scheduled admission. Does this cover filing such evidence two years later? He thought that it was a cycle. Someone took the exam, and then he or she would get sworn in. If the person took the MPRE in between the exam and being sworn in, it would be appropriate, because there is a new cycle of the exam and the swearing-in.

The Chair presented Rule 16-407, Maryland Professionalism Center, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 400 - ATTORNEYS, OFFICERS OF COURT AND OTHER PERSONS

AMEND Rule 16-407, as follows:

Rule 16-407. MARYLAND PROFESSIONALISM CENTER

(a) Existence

There is a Maryland Professionalism Center, which exists as a unit of the Maryland Judiciary.

(b) General Purposes and Mission

The general purposes and mission of the Maryland Professionalism Center are:

(1) to implement the professionalism policies adopted by the Court of Appeals;

(2) to examine ways of promoting professionalism among Maryland judges, judicial appointees and personnel, and attorneys and to encourage them to exercise the highest level of professional integrity in their relationship with each other, the courts, and the public and fulfill their obligations to improve the law and the legal system; and

(3) to help ensure that the practice of law remains a high calling focused on serving clients, promoting the proper administration of justice, and furthering the public good.

(c) Duties

To carry out its purposes, the Maryland Professionalism Center shall:

(1) develop and refine mechanisms to advance professionalism as an important core value of the legal profession and the legal process;

(2) design a professionalism website and gather and maintain on it information that will serve as a resource on professionalism for judges, judicial appointees and personnel, attorneys, and the public;

(3) monitor professionalism efforts and developments in other States;

(4) monitor and attempt to coordinate professionalism efforts by the various segments of the Maryland legal and judicial community - the Bar, the courts, the law schools, and attorneys and law firms - with particular emphasis on professionalism training in the law schools;

(5) monitor the efforts of the Maryland State Bar Association and other bar associations in the State in carrying out the mandate of the Court of Appeals with respect to the advancement of professionalism; and

(6) publicly acknowledge judges, judicial appointees and personnel, and attorneys for particularly commendable acts of professionalism~~;~~.

~~(7) administer the New Bar Admittees' Professionalism Course and mentoring program; and~~

~~(8) recognize the efforts of attorneys engaged in the Professionalism Course and Mentoring Program.~~

(d) Board of Directors

(1) Membership

The Maryland Professionalism Center shall be governed by a Board of Directors, to consist of (A) a judge of the Court of Appeals, who shall serve as Chair; (B) a judge of the Court of Special Appeals; (C) a judge of a circuit court; (D) a judge of the

District Court; (E) the Dean of the University of Maryland School of Law, or the Dean's designee; (F) the Dean of the University of Baltimore School of Law, or the Dean's designee; and (G) seven practicing members of the Maryland Bar, one from each judicial circuit, giving due regard to ethnic, gender, and experiential diversity.

(2) Appointment

The members of the Board shall be appointed by the Chief Judge of the Court of Appeals.

(3) Terms

(A) The judge of the Court of Appeals serves at the pleasure of the Chief Judge;

(B) The term of the other judges shall be three years or during the incumbency of the individual as a judge of the court upon which the individual was serving at the time of appointment, whichever is shorter.

(C) The term of the Deans' designees shall be three years or during the incumbency of the individual in the capacity in which the individual serves at the law school, whichever is shorter.

(D) The term of the other members shall be three years.

(E) Of the initial appointees, four shall be appointed for an initial term of three years, four shall be appointed for an initial term of two years, and four shall be appointed for an initial term of one year, in order that the terms shall remain staggered. At the end of a term, a member may continue to serve until a successor is appointed.

(F) With the approval of the Chief Judge, the Chair may remove a member prior to the expiration of the member's term and appoint from the same category of membership a successor for the remainder of the unexpired term.

(G) (i) Subject to subsection (d)(3)(G)(ii) of this Rule, a member may be reappointed.

(ii) The period of consecutive service by a member other than the Chair shall be not more than two consecutive terms, except that if the member was appointed to fill the unexpired term of a former member, the period of consecutive service also may include the remainder of the term of the former member.

(4) Secretary

The Chair shall appoint one of the members of the Board to serve as Secretary, at the pleasure of the Chair. The Secretary shall take minutes of the meetings of the Board and perform other duties related to the work of the Board as may be directed by the Chair.

(5) Compensation

The members of the Board shall serve without compensation but shall be reimbursed for expenses in connection with travel related to the work of the Center in accordance with the approved budget of the Center.

(6) Vice Chair; Committees

The Chair may appoint a Vice Chair and committees of the Board.

(7) Meetings

The Board shall meet at least twice each year, at the call of the Chair.

(8) Quorum

Seven members of the Board shall constitute a quorum for the transaction of business.

(9) Duties

The Chair in collaboration with the

Board shall ~~(A)~~ provide managerial oversight of the policies, programs, operations, and personnel of the Maryland Professionalism Center and~~, (B)~~ prepare and transmit to the State Court Administrator and the Chief Judge of the Court of Appeals a proposed annual budget for the ~~Professionalism~~ Center ~~and transmit the proposed budget to the Chief Judge of the Court of Appeals, (C) establish clear standards for the procurement of goods and services needed by the Center and the establishment and maintenance of a bank account for the Center, and (D) retain a certified public accountant to perform an annual audit of the books and records of the Center~~. Preparation of the budget and all procurement and personnel decisions shall be in conformance with standards and guidelines promulgated by the State Court Administrator.

Cross reference: See Rule 16-101 e.

(e) Personnel

(1) Appointment

The Chair of the Board of Directors may ~~shall~~ appoint ~~an Executive Director, a bookkeeper, and such other~~ personnel for the Center as ~~are~~ authorized ~~by~~ in the approved budget of the Center. ~~The Executive Director and the other personnel serve at the pleasure of the Chair.~~

~~(2) Executive Director~~

~~Subject to oversight by the Chair and the Board, the Executive Director is responsible for the day-to-day administration of the Center, implementation of the Board's policies and directions, and performance of the other duties specified in this Rule.~~

~~(3)~~ (2) Advisors

The Chair may invite ~~other~~ persons to provide advice to and participate in the work of the Center. Unless funds are available in the approved budget of the Center for that purpose, service by those persons shall be without compensation.

(f) Funding

~~The Court of Appeals shall provide funding for the Center:~~

~~(1) from the fees paid by new Bar Admittees for the required Professionalism Course;~~

~~(2) commencing July 1, 2013, from the assessment collected from each attorney by the Client Protection Fund on behalf of the Disciplinary Fund, an annual amount from the Disciplinary Fund maintained pursuant to Rule 16-714, not to exceed five dollars; and~~

~~(3) from such other sources as may be provided for in the judicial budget.~~
Funding for the Center shall be solely as provided in the annual judicial budget.

Source: This Rule is new.

Dean Tobin said that he had a comment about the Professionalism Center, which is currently organized as a 501 (c)(3) non-profit organization. It is a separate organization with a separate budget. Section (f) of Rule 16-407 reads: "Funding for the Center shall be solely as provided in the annual judicial budget." This relates to the concern of the Committee and of the work group that people should not raise funds for the Center. It has about $250,000 in the bank. Some language should be added to the Rule that provides that except for funds already in existence, the Center should be allowed to spend its money. The money was raised through the $5.00 fee that has been assessed on all attorneys. Part of the view of the Center is that as they try to figure out how they are going to change into something else, they will have some funds to start. The Chair added that

this had been the intent.

Dean Tobin told the Committee that he appreciated the opportunity to express his views. The Chair commented that the only problem with respect to the MPRE is that it was a recommendation of the work group. The Court had taken up this recommendation. The message given to the Chair from Judge Greene was that this is what the Court wants. Dean Tobin noted that two work groups had looked at this, and there had been significant disagreement about it. The Chair said that there had been a divided vote in the Work Group. Dean Tobin remarked that no vote on the issue of retaining the MPRE had been taken. However, there was an agreement to send to the Court the memorandum from Dean Weich and Dean Tobin that laid out their objections to the MPRE. Clearly, their views had been expressed to the Court. All of the evidence that had been before the Committee was simply that 48 states have the MPRE. No one has articulated any reason to use the MPRE. Dean Tobin felt that it was important for the Rules Committee to express his concerns about the adoption of the MPRE to the Court. He also would testify before the Court that it is not a real benefit to the bar and to the future of the practice of law.

Judge Ellinghaus-Jones inquired whether the work group actually saw any MPRE exams and questions on the exams. Mr. Shipley responded that he had offered Judge Greene the opportunity to have this material distributed. Judge Greene had not been not very interested in the work groups' looking at the

MPRE questions. There were only about 15 questions available to the public. Judge Ellinghaus-Jones remarked that her son had recently taken the MPRE in Illinois. He had read her several of the questions, and they were very confusing and very vague. Her son is very ethical, and he was not able to get all of the correct answers. He did pass the MPRE, and he passed the bar exam, also. Some of the questions on the MPRE are worded so that it is difficult to pick the correct one. Judge Ellinghaus-Jones had picked some incorrect answers even though she has been a judge for some time. She said that she shared Dean Tobin's concern about the MPRE. Some of the correct answers had not made sense to her.

Judge Ellinghaus-Jones remarked that she thought that the passing grade for the MPRE is fairly low. Mr. Shipley noted that the highest cut score that is used by some jurisdictions but does not really mean anything is 85, which is approximately 62% correct on the exam, and about 70% of those taking it achieve that score on the MPRE. The cut scores go down to 75, which means getting about 55% correct on the exam. About 85% of people pass it at that cut score. Judge Ellinghaus-Jones told the Committee that she had spoken about this issue with the Honorable John P. Morrissey, Chief Judge of the District Court, and he was in favor of having the MPRE.

The Chair noted that the work group had a fair discussion about the MPRE, and there was a division among the members on whether to have this exam. The two deans were not alone in their

opposition to it. For whatever reason, the majority had recommended it. The problem is that the Court of Appeals has approved that. Dean Tobin remarked that the Court had adopted the report. He and Dean Weich had been told that they would have two options to present their views, one in front of the Rules Committee and one in front of the Court. The Chair agreed.

Dean Tobin said that he did not know whether the Court was concerned about removing the Professionalism Course, and they wanted to replace something with it, whether for some reason, the Court felt that Maryland should have the MPRE to produce ethical attorneys in Maryland, or whether there was another reason that the MPRE was needed. Dean Tobin added that he had been supportive of doing something else besides the course. He was there to represent the concerns of Dean Weich and himself. He also thought that it was important that the legal community recognize the burden that the MPRE is placing on the students. Is the extra burden really worth the benefit?

The Chair told the Committee that they should vote on this issue as they chose. He thought that it would be appropriate to send up Rule 11 to the Court as it appears in the version before the Committee today, so that if the Court of Appeals would like for the MPRE to be required in Maryland, they would see a Rule that provides for it. If the Committee's view was that it should not be required, this can be communicated to the Court, which will then make its own decision. Mr. Carbine commented that he had a compromise suggestion. The Court of Appeals should not

think that the Committee was opposed to requiring the exam. He viewed this as similar to what the Committee is asked to do when the legislature passes a statute that locks in how the Rules need to be changed. The Report to the Court could provide that the Committee had not studied the wisdom of requiring the MPRE.

The Reporter asked Dean Tobin whether the delayed effective date would allow the students to take the MPRE while they are in law school right after they have taken the Professional Responsibility course. Dean Tobin answered that this had not been the original idea, and a significant transition rule would be necessary. The date that is picked would make the test requirement apply to first-year students, not second or third-year students. The original idea was that the third-year students could take the exam, and Dean Tobin was not in favor of it. The students do normally take the exam close in time to their Professional Responsibility course. If the first-year students were to take it, they would know to think about it the next year when they take the Professional Responsibility course. This is very important. The Chair said that the test requirement would begin as of December, 2017.

Dean Tobin remarked that he had read the date "2017" in subsection (b)(1) of proposed Rule 11 to mean that the people who had taken the bar exam in July, 2016 would not be required to have taken the MPRE. Mr. Shipley added that the people who take the July, 2017 bar exam would need to get a successful score on the MPRE by the time they are admitted in December, 2017. Dean

Tobin asked whether the current second-year law students would be required by proposed Rule 11 to take the MPRE. Mr. Shipley answered negatively.

The Chair told the Committee that another issue had been discussed. He referred to subsection (b)(2) of proposed Rule 11 which read: "Upon recommendation of the Board, the Court shall determine the minimum Maryland qualifying score for the MPRE." Mr. Shipley had suggested that this should be determined by the Board of Law Examiners subject to approval by the Court. Mr. Shipley noted that if it is necessary, it is considerably easier to change the score if the Rule is a Board Rule rather than a Court Rule. By consensus, the Committee agreed to make this change.

The Chair asked the Committee what their opinion was on requiring the MPRE. He did not think that there was a dispute about anything else in the proposed Rules. Judge Nazarian said that he agreed with Mr. Carbine that this is analogous to the situation where a Rule has to conform to legislation. He moved that Rule 11 be forwarded as amended to the Court, but the view of the Rules Committee that the MPRE should not be required should also be expressed to the court. The other Rules would be sent as presented. Mr. Carbine asked whether the motion should be that the Committee had not considered the MPRE yet. There was no response. Judge Nazarian's motion was seconded. The Chair said that the motion was to send the Rules as they were amended today, but with the statement that the Committee does not

recommend that the MPRE be required. The motion passed with a majority in favor.

Agenda Item 2. Consideration of a proposed amendment to Rule 4-342 (Sentencing - Procedure in Non-Capital Cases)

Mr. Marcus presented Rule 4-342, Sentencing - Procedure in Non-capital Cases, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-342 by adding to the cross reference after section (g), as follows:

Rule 4-342. SENTENCING - PROCEDURE IN NON-CAPITAL CASES

. . .

(g) Reasons

The court ordinarily shall state on the record its reasons for the sentence imposed.

Cross reference: For factors related to drug and alcohol abuse treatment to be considered by the court in determining an appropriate sentence, see Code, Criminal Procedure Article, §6-231. For procedures to commit a defendant who has a drug or alcohol dependency to a treatment program in the Department of Health and Mental Hygiene as a condition of release after conviction, see Code, Health General Article, §8-507. <u>For procedures to be followed by the court to depart from a mandatory minimum sentence for certain drug-related offenses, see Code, Criminal Law Article, §5-609.1.</u>

. . .

Rule 4-342 was accompanied by the following Reporter's note.

> Chapter 490, Laws of 2015 (HB 121) added a new Section 5-609.1 to the Criminal Law Article, which allows a court to depart from a mandatory minimum sentence for certain drug-related offenses if the court states on the record that giving due regard to the nature of the crime, the history and character of the defendant, and the defendant's chances of successful rehabilitation, imposition of the mandatory minimum sentence would result in substantial injustice to the defendant, and the mandatory minimum sentence is not necessary for protection of the public. The Criminal Subcommittee recommends drawing attention to the new provision to give judges guidance by adding a cross reference to it in the already-existing cross reference after section (g) of Rule 4-342.

Mr. Marcus explained that the General Assembly had passed a statute, Code, Criminal Law Article, §5-609.1, which was in Chapter 490, Laws of 2015 (HB 121). This keeps with the national trend to focus corrections on alcoholic and drug counseling as opposed to the imposition of mandatory minimum sentences that are non-paroleable. Effective October 1, 2015, the General Assembly enacted an exception to mandatory minimum sentences for non-violent drug offenses. The law provides that the court is permitted to depart from a mandatory minimum sentence for a defendant with several prior convictions where the court makes a finding on the record that, given the defendant's peculiar circumstances, the nature of the crime, the history and character of the defendant, and the defendant's chances of successful

rehabilitation that there can be a modification of the sentence. The suggestion was that because this new statute is in effect, it may be wise to have a cross reference in Rule 4-342 that specifically cites this exception to the mandatory minimum sentence.

Mr. Marcus noted that the proposed Rule change is a "housekeeping" matter that adds language to the cross reference after section (g) of the Rule, reminding counsel and the court that not only is there an exception to the mandatory minimum sentence, but that there is a statute pertaining to it. The statute provides that the trial judge, in making the determination to not apply the mandatory minimum, clearly must set forth the applicable reasons for departing from a mandatory minimum sentence, incorporating the particular elements and findings that the court is to make. It is a situation where the Rule is incorporated into the statute, because the elements that the court must find could have been in both the Rule and the statute. The cross reference seemed to Mr. Marcus to be relatively innocuous and helpful in the long run to draw attention to the exception.

The Chair commented that the Judicial Institute had sent out a communication calling attention to this to all judges, but this is a good addition to Rule 4-342.

By consensus, the Committee agreed to the addition of the cross reference.

Agenda Item 3. Consideration of proposed amendments to Rules 2-131 (Appearance) and 3-131 (Appearance)

Mr. Frederick presented Rules 2-131, Appearance, and 3-131, Appearance, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 100 - COMMENCEMENT OF ACTION AND PROCESS

AMEND Rule 2-131 by replacing the word "representation" with the word "appearance" in subsection (b)(1); by specifying that, except as otherwise ordered by the court, the scope of a limited appearance includes any procedural task required by law to achieve the objective of the appearance; and by adding a Committee note following subsection (b)(1); as follows:

Rule 2-131. APPEARANCE

. . .

(b) Limited Appearance

(1) Notice of Appearance

An attorney, acting pursuant to an agreement with a client for limited representation that complies with Rule 1.2 (c) of the Maryland Lawyers' Rules of Professional Conduct, may enter an appearance limited to participation in a discrete matter or judicial proceeding. The notice of appearance (A) shall be accompanied by an Acknowledgment of Scope of Limited Representation substantially in the form specified in subsection (b)(2) of this Rule and signed by the client, and (B) shall specify the scope of the limited ~~representation~~ appearance, which (i) shall

not exceed the scope set forth in the Acknowledgment but (ii) unless otherwise ordered by the court, shall include the performance of any procedural task required by law to achieve the objective of the appearance.

Committee note: Although the scope of a limited representation is largely a matter of contract between the attorney and the client, if there are procedural requirements necessary to the achievement of the objective agreed upon, a limited appearance, unless otherwise ordered by the court for good cause, must include satisfaction of those requirements, and the Acknowledgment must include that commitment. As examples, (1) if the appearance is limited to filing and pursuing a motion for summary judgment and achievement of that objective requires the filing of affidavits, the attorney is responsible for assuring that the affidavits are prepared, that they are in proper form, and that they are properly filed; (2) if the appearance is limited to obtaining child support for the client, the attorney is responsible for assuring that any financial statements, child support guideline worksheets, and other documents necessary to obtaining the requested order are prepared, are in proper form, and are properly filed.

. . .

Rule 2-131 was accompanied by the following Reporter's note.

Provisions permitting an attorney to enter a limited appearance were added to Rules 2-131 and 3-131, effective July 1, 2015. Interpretation and implementation of the new provisions have varied from county to county, especially in the circuit courts.

The Attorneys and Judges Subcommittee recommends amendments to clarify the two Rules and strike a balance between (1) the principle that the scope of representation is a matter of contract between attorney and client and (2) the authority of the Court of Appeals to regulate the practice of law. The Conference of Circuit Judges has reviewed and

approved the proposed amendments to Rule 2-131.

In subsection (b)(1), the change in terminology from "limited representation" to "limited appearance" clarifies that the Rule pertains to the in-court purpose[s] for which the attorney has been retained, rather than any out-of-court purposes for which the attorney may have been retained.

New subsection (b)(1)(B)(ii) regulates duties of the attorney related to the attorney's in-court appearance by requiring that, unless otherwise ordered by the court, all procedural tasks required by law to achieve the objective of the appearance must be performed by the attorney as part of the limited appearance. Examples of such tasks are included in a Committee note following Rule 2-131 (b)(1)(B)(ii). Because the examples are geared toward circuit court practice, the Committee note is omitted from the proposed amendments to Rule 3-131.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 100 - COMMENCEMENT OF ACTION AND PROCESS

AMEND Rule 3-131 by replacing the word "representation" with the word "appearance" in subsection (b)(1) and by specifying that, except as otherwise ordered by the court, the scope of a limited appearance includes any procedural task required by law to achieve the objective of the appearance, as follows:

Rule 3-131. APPEARANCE

. . .

(b) Limited Appearance

(1) Notice of Appearance

An attorney, acting pursuant to an agreement with a client for limited representation that complies with Rule 1.2 (c) of the Maryland Lawyers' Rules of Professional Conduct, may enter an appearance limited to participation in a discrete matter or judicial proceeding. The notice of appearance (A) shall be accompanied by an Acknowledgment of Scope of Limited Representation substantially in the form specified in subsection (b)(2) of this Rule and signed by the client, and (B) shall specify the scope of the limited ~~representation~~ appearance, which (i) shall not exceed the scope set forth in the Acknowledgment but (ii) unless otherwise ordered by the court, shall include the performance of any procedural task required by law to achieve the objective of the appearance.

. . .

Rule 3-131 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 2-131.

Mr. Frederick said that the proposed changes to Rules 2-131 and 3-131 pertain to the issue of unbundled legal services. He views the proposed amendments as a "save the attorney from himself or herself" amendment. The Committee note added to Rule 2-131 provides that a circuit court judge can tell an attorney that he or she is trying to unbundle too many services, and if the attorney unbundles, certain requirements still have to be satisfied. The example in the Committee note is that if an attorney is hired only to do a summary judgment motion, the

affidavits have to be prepared in accordance with the Rule. Other examples are laid out in a protocol issued by Montgomery County, which all of the administrative judges with whom Mr. Frederick had spoken had liked.

Mr. Frederick commented that Lydia Lawless, Esq., a very competent Assistant Bar Counsel, and Mr. Frederick had been invited to do a presentation in Montgomery County on the unbundled legal services Rules. The presentation had been very well attended. Mr. Frederick remarked that he did not think that attorneys appreciate that in an unbundled legal services representation, there has to be a written retainer agreement in every single instance. This is not required currently. It is only necessary in a contingent fee case. It is probably a good idea for an attorney who is unbundling legal services to have two written fee agreements, because one will have to be filed with the court to prove to the court that the attorney is there for a limited representation. The "bare bones" fee agreement that is referred to in Rule 2-131 is not going to protect the attorney. Should a Committee note be added to modify this at some later time?

Mr. Frederick urged the adoption of the amendments to Rules 2-131 and 3-131, because it helps attorneys, and it helps judges. The Reporter pointed out that a Committee note had not been added to Rule 3-131, the comparable District Court Rule, because most of the examples are circuit court examples, but the text of the Title 3 Rule is exactly the same as Rule 2-131.

By consensus, the Committee approved the amendments to Rules 2-131 and 3-131 as presented.

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