COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in the Rules Committee's Conference Room, Room 1.514, People's Resource Center, 100 Community Place, Crownsville, Maryland on June 20, 1997.

Members present:

Hon. Joseph F. Murphy, Jr., Chairperson
Linda M. Schuett, Esq., Vice Chairperson

Robert L. Dean, Esq.
Bayard Z. Hochberg, Esq.
H. Thomas Howell, Esq.
Hon. G. R. Hovey Johnson
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Joyce H. Knox, Esq.
James J. Lombardi, Esq.
Hon. Mary Ellen T. Rinehardt
Larry W. Shipley, Clerk
Melvin J. Sykes, Esq.
Roger W. Titus, Esq.
Hon. James N. Vaughan
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Richard Herrmann, Esq.
Melvin Hirshman, Esq., Bar Counsel
Patricia T. Adams, Esq.

The Chair convened the meeting. He announced that there is a tentative date for the 50th anniversary celebration of the Rules Committee. Chief Judge Robert Bell of the Court of Appeals had said that the Administrative Office of the Courts could help pay for the dinner which is to be held at the Governor's House. The tentative date is September 2, 1997, but the Chair told the Committee that he has asked for a few other possible dates from mid-September through

mid-October, since September 2nd is the day after Labor Day and may not be convenient for everyone.

Agenda Item 3. Consideration of proposed new Products Liability Form Interrogatories and amendments to certain existing form Interrogatories.

---

The Chair said that the first item for consideration is Agenda Item 3, because Mr. Titus has to leave the meeting early. Mr. Titus explained that the Form Interrogatories were developed as a means of limiting the number of interrogatories in a given case and of standardizing the interrogatories. Another purpose is to promote the reduction of discovery disputes and increase uniformity of interrogatories throughout the State. There are currently interrogatories for motor vehicle cases and for domestic cases. Products liability interrogatories are now being proposed. They were drafted almost exclusively by Mr. Klein, who had asked various bar associations for suggestions. The Baltimore City Bar Association had responded. The interrogatories will be discussed later on in the meeting. At that time, Mr. Klein will present them.

Agenda Item 1. Reconsideration of proposed new Rule 2-504.3 (Computer-Generated Evidence)

---

The Vice Chair presented Rule 2-504.3 for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 500 - TRIAL

ADD new Rule 2-504.3, as follows:

Rule 2-504.3. COMPUTER-GENERATED EVIDENCE

(a) Definitions

(1) Computer-Generated Evidence

"Computer-generated evidence" means a computer-generated illustration and a computer simulation as those terms are defined in this section. The term does not encompass (A) documents merely because they were generated on a word or text processor; (B) business, personal, or other records or documents admissible under Rule 5-803 (b) merely because they were generated by computer; or (C) summary evidence admissible under Rule 5-1006, spread sheets, or other documents merely presenting or graphically depicting data taken directly from business, public, or other records admissible under Rules 5-802.1 through 5-804.

(2) Computer-Generated Illustration

"Computer-generated illustration" means a computer-generated aural, visual, or other sensory aid, including a computer-generated depiction or animation of an event or thing, that is used to assist a witness by illustrating the witness's testimony and is not offered as substantive evidence.

(3) Computer Simulation

"Computer simulation" means a mathematical program or model that, when

provided with a set of assumptions and parameters, will formulate a conclusion in numeric, graphic, or some other form and that is intended to be used as substantive evidence or as a basis for expert opinion testimony in accordance with Rule 5-703.

(b) Notice

(1) Subject to subsection (b)(2) of this Rule, any party who intends to use computer-generated evidence at trial for any purpose other than as a statement by a party-opponent admissible under Rule 5-803 (a) shall file a written notice that:

(A) contains a descriptive summary of the computer-generated evidence the party intends to use, including (i) a statement as to whether the computer-generated evidence intended to be used is a computer-generated illustration or a computer simulation, (ii) a description of the subject matter of the computer-generated evidence, and (iii) a statement of what the computer-generated evidence purports to prove or illustrate;

(B) is accompanied by a written undertaking that the party will take all steps necessary to (i) assure the availability of any equipment or other facility need to present the evidence in court, (ii) preserve the computer-generated evidence and furnish it to the clerk in a manner suitable for transmittal as a part of the record on appeal, and (iii) comply with any request by an appellate court for presentation of the computer-generated evidence to that court; and

(C) is filed within the time provided in the scheduling order or no later than 90 days before trial if there is no scheduling order.

(2) Any party who intends to use computer-generated evidence at trial for purposes of impeachment or rebuttal shall file, whenever practicable, the notice required by subsection (b)(1) of this Rule, except that notice is not

required if computer-generated evidence prepared by or on behalf of a party-opponent will be used only for impeachment of that party-opponent.

(c) Required Disclosure; Additional Discovery

Within five days after service of the notice required by section (b) of this Rule, the proponent shall make the computer-generated evidence available to any party. Notwithstanding any provision of the scheduling order to the contrary, the filing of a notice of intention to use computer-generated evidence entitles any other party to a reasonable period of time to discover any relevant information needed to oppose the use of the computer-generated evidence before the court holds the hearing provided for in section (e) of this Rule.

(d) Objection

Not later than 60 days after service of the notice required by section (b) of this Rule, a party may file any then-available objection that the party has to the use at trial of the computer-generated evidence and shall file any objection that is based upon an assertion that the computer-generated evidence does not meet the requirements of Rule 5-901 (b)(9). The mandatory objection based on the alleged failure to meet the requirements of Rule 5-901 (b)(9) is waived if not so filed, unless the court for good cause orders otherwise.

(e) Hearing and Order

If an objection is filed in accordance with section (d) of this Rule, the court shall hold a pretrial hearing to rule on the objection. If the hearing is an evidentiary hearing, the court may appoint an expert that the court deems necessary to enable it to rule on the objection, and the court may assess against one or more parties the reasonable fees and expenses of the person appointed. In ruling on the objection, the court may require modification of the computer-generated evidence and may impose conditions relating to its use at trial. The court's ruling on the objection shall control the subsequent course of the action. If the court rules that the computer-generated evidence may be used at trial, when

it is used, (1) the proponent may, but need not, present any evidence that was presented at the hearing on the objection, and (2) the party objecting to the evidence is not required to re-state an objection made in writing or at the hearing in order to preserve that objection for appeal. If the court excludes or restricts the use of computer-generated evidence, the proponent need not make a subsequent offer of proof in order to preserve that ruling for appeal.

(f) Preservation of Computer-Generated Evidence

The party offering computer-generated evidence at any proceeding shall (1) preserve the computer-generated evidence and furnish it to the clerk in a manner suitable for transmittal as a part of the record on appeal and (2) present the computer-generated evidence to an appellate court upon request.

Committee note: This section requires the proponent of computer-generated evidence to reduce the computer-generated evidence to a medium that allows review on appeal. The medium used will depend upon the nature of the computer-generated evidence and the technology available for preservation of that computer-generated evidence. No special arrangements are needed for preservation of computer-generated evidence that is presented on paper or through spoken words. Ordinarily, the use of standard VHS videotape or equivalent technology that is in common use by the general public at the time of the hearing or trial will suffice for preservation of other computer-generated evidence. However, when the computer-generated evidence involves the creation of a three-dimensional image or is perceived through a sense other than sight or hearing, the proponent of the computer-generated evidence must make other arrangements for preservation of the computer-generated evidence and any subsequent presentation of it that may be required by an appellate court.

Cross reference: For the shortening or extension of time periods set forth in this Rule, see Rule 1-204.

Source: This Rule is new.

Rule 2-504.3 was accompanied by the following Reporter's Note.

By Rules Order dated June 10, 1997, the Court of Appeals recommitted proposed new Rule 2-504.3 to the Rules Committee for further study and republication. The Court's concerns include overbreadth of the definitions, the Rule's treatment of admissions and summary evidence, and assurance of the availability of necessary equipment and facilities.

In this redraft, the Rule has been narrowed by the elimination of "computer-generated data," "electronically-imaged documentary evidence," and "computer-generated material." The term "computer-generated evidence" has been redefined to more clearly specify what it is not. The basic procedural structure of the Rule (pretrial notice, disclosure, additional discovery, objection, hearing, and ruling) and the requirement of preservation of computer-generated evidence for appellate review has been retained. Additions to section (b) exempt from the notice requirements of the Rule statements by party-opponents that are admissible under Rule 5-803 (a) and computer-generated evidence prepared by or on behalf of a party-opponent that will be used solely for impeachment purposes. Another addition to section (b) adds to the written undertaking a provision that the party who intends to use computer-generated evidence will assure the availability of any equipment or other facility need to present the evidence in court.

The Vice Chair told the Committee that the Honorable Alan M.

Wilner, who was the previous Chair of the Rules Committee and now a Court of Appeals judge, had been concerned about the breadth of the proposed Computer-Generated Evidence Rule. The Honorable Dennis M. Sweeney, of the Circuit Court of Howard County, had written a letter, which is in the meeting materials for today's meeting, in which he also expressed his concern that the Rule is overbroad. Judge Wilner had indicated that at least one more judge on the Court of Appeals agrees that the proposed Rule is overbroad. Judge Wilner had drafted an amendment to narrow the Rule. Through a conference call, the Subcommittee considered the amended version of the Rule. The draft of the Rule was not considered by the full Rules Committee, but it was submitted to the Court of Appeals. The Court was concerned that there may be computer-generated evidence which is produced at trial, but the proponent decides not to use it. Then the adverse party wants to use the evidence, and the question is if this is an admission. Other concerns of the Court were how to handle summaries, and if it is clear that the proponent is responsible for providing the equipment in court to show the computer-generated evidence.

The Vice Chair noted that the version of the Rule before the Committee today is different from the version adopted by the full Committee previously. In subsection (a)(1), the definitions of "computer-generated data" and "electronically-imaged documentary evidence" were deleted because they were overbroad. The only terms retained were "computer-generated illustration" and "computer

simulation." Subsection (a)(1)(B) contains language suggested by Judge Wilner which lists some of the computer-related items which are not covered under this definition. Subsection (a)(1)(C) refers to summary evidence and was added in response to the question by the Court of Appeals as to how to treat summary evidence. The Subcommittee decided to exclude this type of evidence from the definition so there is no need to give notice to use it or to provide for objections or a hearing. The term "computer-generated material" had been part of the Rule and was used to indicate what can be used in the closing argument without the requisite notice. However, the Subcommittee believes that the Rule is so limited that no one should be able to use a computer simulation or illustration in a closing argument without giving the required notice, so the term "computer-generated material" was dropped.

The Vice Chair pointed out that the language in subsection (b)(1) which reads "other than as a statement by a party-opponent admissible under Rule 5-803 (a)" has been added to indicate that computer-generated evidence which is to be used as an admission exempt from the Rule. Subsection (b)(1)(B) addresses the concern of the Court of Appeals that equipment be provided by the proponent of the computer-generated evidence to present the evidence in court. The word "need" in subsection (i) should be changed to the word "needed", since it is a typographical error. The Committee agreed that this change should be made. The Vice Chair noted that in

subsection (b)(2), the language which reads "except that notice is not required if computer-generated evidence prepared by or on behalf of a party-opponent will be used only for impeachment of that party-opponent" has been added to address the exemption of admissions. In section (e) the phrase in the second sentence which had read "an expert or other person" has been modified to remove the language "or other person" because of a comment from Judge Sweeney that it is not clear who the "other person" would be. The end of section (e) has been rewritten by the Style Subcommittee to more clearly reflect the intent of the Rule as adopted by the Rules Committee.

Mr. Titus referred to subsection (a)(2). He asked how this provision would govern computer-generated evidence used solely for argument, but which is not used to assist a witness by illustrating the witness's testimony and is not used as substantive evidence. The Vice Chair responded that if a computer simulation or illustration is used in closing argument only, it is not covered by this Rule; it would be subject to the general rules, and its admissibility is up to the discretion of the trial judge, especially if the simulation is evidence.

Mr. Sykes noted that there is an inconsistency between subsections (b)(1) and (b)(2). In subsection (b)(1), notice is required if the computer-generated evidence is used for a purpose other than as a statement by a party-opponent admissible under Rule 5-803. In subsection (b)(2), notice is not required if the computer-

generated evidence will be used only for impeachment purposes. The Chair commented that the last clause in subsection (b)(2) which begins "except that..." is not necessary. The Vice Chair responded that that clause had been added by Professor Lynn McLain, who is a consultant to the Subcommittee, but could not attend today's meeting. The Chair said that the impeachment should not be limited to impeachment of the party-opponent, and he suggested that the language at the end of subsection (b)(2) which reads "of that party-opponent" should be taken out. The Vice Chair expressed the view that if that language were deleted, it would be at odds with the beginning of the sentence.

Mr. Herrmann remarked that in a multi-party case, the evidence could be used to impeach another party. Mr. Sykes observed that the sentence as it is written is not clear. In subsection (b)(1), notice is not necessary if the evidence is an admission. In subsection (2), notice does not have to be given in rebuttal if the computer-generated evidence is prepared and used only for impeachment. The Vice Chair commented that under section (b)(1), computer-generated evidence offered as an admission requires no notice, nor does the same kind of evidence if it is used to impeach. In any other way, notice must be given.

Mr. Titus reiterated that according to the definition of "computer-generated evidence", if someone does not offer something as substantive evidence, it does not fall within the definition. Mr.

Herrmann explained that a simulation is different from an animation. An animation is demonstrative and traditionally not admitted into evidence. A simulation is usually admitted as substantive evidence. The Chair said that in Maryland, demonstrative evidence is admitted into evidence, such as a diagram being allowed in the jury room. Mr. Titus asked why the phrase "and is not offered as substantive evidence" is needed in subsection (a)(2). He suggested that it be deleted. The Vice Chair commented that the Style Subcommittee had discussed deleting the references in the Rule to "substantive evidence."

The Chair suggested that the last two lines of subsection (a)(2) could be deleted, so that the last word of the sentence would be "thing." Mr. Titus expressed the view that the language about illustrating the witness's testimony is useful. The Chair observed that in a domestic relations case, if an economist states that the data was analyzed in a computer to project earnings, it is difficult to argue this. Mr. Herrmann remarked that there is an exception for spread sheets. The Chair explained that he was not referring to a spread sheet, but the projections of an expert done in the computer. Mr. Howell said that he was troubled about removing so much from the Rule. The definition of "computer-generated data" has been removed. Its definition had been limited to data prepared in anticipation of trial or litigation. Data are often based on masses of material which come in because they are done routinely. How does the

adversary get the chance to inquire as to the underlying data, since some data are inadmissible? The Chair responded that his sense of this is that the Rule is trying to avoid trial by ambush. If the evidence is simply business records, there is no need to go through all the hoops. Mr. Howell noted that the former draft of the Rule provided an opportunity to object to summary presentations. Summaries can be misleading. The Chair said that in Maryland, misleading summaries would not be admitted under Rule 5-1006, Summaries.

Mr. Klein pointed out that the version of the Rule being considered today is a creation of the Subcommittee. Many terms of jargon are being used. The difference between "simulation" and "illustration" is at the heart of the misunderstanding. If the condition of not being offered as substantive evidence is eliminated, the distinction will be blurred further. The Chair said that if the language "not offered as substantive evidence" is used, then the argument can be made that the evidence is being offered only for impeachment and not for substantive evidence, avoiding the need to give notice. Mr. Titus suggested that if the language "illustrating the witness's testimony" is removed, at trial there would be no use of this evidence. However, a power point could be used in closing argument, and this can be a powerful tool. The Rule is not intended to cover the power point. The Chair observed that Mr. Titus' concern is that the computer-generated evidence comes in without discovery as

substantive evidence. The Chair commented that the Subcommittee felt that the distinction between an illustration and substantive evidence was necessary. Mr. Klein remarked that there may have been a distinction from computer-generated data. He said that he would like to consult Prof. McLain about this.

The Vice Chair observed that the language "and is not offered as substantive evidence" could come out of subsection (a)(2). The Chair cautioned about the risk of the judge fencing with counsel on the issue of substantive vs. illustrative evidence. Mr. Klein noted that by jumping through the appropriate hoops, a demonstrative aid could be admitted, unless it is used to illustrate a witness's testimony. The Chair pointed out that the witness may be required to authenticate, although he said that he was not sure if the authentication foundation is necessary if it illustrates a witness's testimony. The Vice Chair questioned as to why that situation would be covered, since authentication is not the same as illustrating testimony. The Chair commented that courts have made rulings on the admissibility of computer-generated evidence. A California case allowed a computer simulation to reconstruct a murder. He asked if that would fall under this Rule, since it is not an illustration. The Vice Chair remarked that a model of how a crime occurred could result from a computer fed with facts which were testified to or admitted into evidence. Judge Vaughan noted that proposed Rule 2-504.3 would not apply in a criminal case.

The Chair pointed out that a model of a plane crash would be a simulation and not an illustration. He inquired if the definition of the term "computer-generated illustration" is needed in the Rule. Mr. Klein added that another issue to consider is preservation for appeal. The Vice Chair remarked that an illustration is not necessarily easily preserved for appeal. She expressed the view that oral, visual, or other sensory aids are different from written exhibits. She noted that Judge Rodowsky had said that the term "simulation" is too broad. It includes demonstrative evidence coming in which should not be subject to notice and hearings. The Chair said that in medical malpractice cases, the physicians use illustrations to give examples. The Rule could provide in subsection (a)(2) after the word "including" the following language: "computer-generated depiction or illustration of an event or thing."

Mr. Lombardi commented that he is concerned about using the word "depiction." An example could be a graph of ten months' treatment by a physician. This could be excluded under subsections (a)(1) and (a)(2). The Vice Chair pointed out that this is not an example of an oral, visual, or other sensory aid. Mr. Lombardi inquired if it would be included under subsection (a)(2). Mr. Herrmann replied that some of the things included in subsection (a)(1) are not included in subsection (a)(2). Mr. Lombardi asked if the attorney should try to introduce the graph. The Vice Chair commented that this may be a drafting problem. Subsection (a)(2)

does not provide that it is subject to the provisions of subsection (a)(1). Mr. Titus noted that subsections (a)(2) and (a)(3) are within the definition of subsection (a)(1).

Mr. Lombardi said that when an earlier draft of Rule 2-504.3 was discussed, a power point presentation was admissible without the necessity of notice and a hearing. He questioned whether the current draft of the Rule is clear that this is the case. Mr. Titus stated that the minutes should clarify that a typical power point presentation is not intended to fall under Rule 2-504.3. The Vice Chair agreed that the Subcommittee's intent was that a power point is not covered by the Rule. Mr. Klein noted that generally, computer-generated evidence is not subject to notice. The Vice Chair added that this is true unless the evidence is classified as a simulation or illustration.

The Chair asked about a scientific calculation or conclusion which is presented at closing argument and which summarizes the testimony of 60 witnesses. Mr. Hochberg commented that if the plaintiff prepared the calculation, it falls within the ambit of the Rule. He asked whether he would have had to give the other side notice, if he had used the calculation in his case-in-chief as substantive evidence. The Vice Chair said that this is like the defense taking over the plaintiff's expert report, which is fairly rare. The defense might have to give notice. If the plaintiff gives notice about computer-generated evidence, and then decides not to use

it, and the defendant then wants to use it, the defendant has to give notice.

The Chair hypothesized a case where the issue is how the plane crashed. The plaintiff discloses in interrogatories a scientist as a witness, who then changes his or her testimony, and the defendant wants to use the scientist as an expert witness. The question is whether the witness originally retained by the plaintiff is an agent of the plaintiff. The Chair said that he did not think that that was the case. He noted that Judge Wilner wanted to make sure that the other side could use the information generated by the party-opponent without the necessity of giving notice. The Chair expressed the opinion that the statement by the expert retained by plaintiff's counsel is admissible as a statement of a party-opponent. There is no agency relationship.

Mr. Hochberg inquired if a mandatory hearing 30 days before trial is practical. The Vice Chair responded that some hearings on objections may occur on the day of the trial. The Chair commented that all of the cases on this issue never pertained to problems with disclosure -- the problems were with admissibility. The Vice Chair stated that one of the concerns with the Rule is that a computer simulation can include routine evidence. The issue is if the Rule can be narrowed, so that it only covers very technical evidence. The Chair remarked that some of the cases on this issue may contain definitions, and it might be useful to use some of the

narrow definitions. Mr. Herrmann noted that one of the problems is that the judiciary and the attorneys are confusing the definitions of the terms "simulation" and "illustration." Judge Vaughan observed that no other jurisdiction has a rule on computer-generated evidence. He suggested that the Rule be put into practice to see if there are any problems with it. The Chair expressed his agreement with Judge Vaughan, pointing out that if the Rule is too broad, the Court of Appeals will not approve it. Mr. Klein added that an example of the Rule being too broad is if it excluded a spread sheet on future earnings. Mr. Herrmann commented that a computer program which runs mathematics problems should not be covered, but if a unique program is developed by an economist, this should be covered by the Rule.

The Vice Chair commented that a spread sheet or its functional equivalent could be excluded under subsection (a)(1) even though subsection (a)(3) seems to include it. The Chair noted that if one uses a computer calculation to come up with a figure for lost wages, then it is a computer simulation. Mr. Lombardi commented that cost-of-living information is admissible without an expert. He asked why this is not included in the definition. An economist may use a chart to provide the information. The Chair said that at the deposition of the economist, he or she may be asked to explain the figures calculated. At the trial, there may be no disclosure of the computer-simulated evidence. The Vice Chair noted that the

economist's testimony may not be a computer simulation. Common sense will need to be used to see if a calculation is equivalent to a computer simulation.

The Chair questioned as to how the definition of "computer simulation" should be changed. The Vice Chair suggested that the language at the end of subsection (a)(3) could end at the word "form." Mr. Sykes pointed out that to be fair, some simulations require notice, even if the simulation is only a computer spread sheet. The question is what is unfair. The Vice Chair commented that the Subcommittee worked very hard on the definitions and attempted to make them inclusive, but not under-inclusive.

The Chair commented that the plaintiff's expert is not the plaintiff's agent. He referred to admissibility under Rule 5-803. The Vice Chair questioned as to why this is a problem. The Chair said that this involves notice and hearing. The defendant may be using the computer-generated evidence discovered by the plaintiff. The Vice Chair asked for an example. The Chair responded that the plaintiff's expert may have a computer-generated model of how a fire started. If the defendant wishes to use the expert, he or she must give notice. Court of Appeals Judges Alan Wilner and Howard Chasanow are against the idea of the defendant giving notice if the plaintiff started the process. The Vice Chair expressed the opinion that notice should be required, although she remarked that it is rare for the defendant to steal the other side's expert. Mr. Hochberg argued

that it is not rare for that to happen.

Mr. Lombardi noted that the Federal Rules Advisory Committee has addressed this issue. There was a Second Circuit case in which the judge admitted the computer-generated evidence. Mr. Lombardi inquired if the Subcommittee had looked into this. The Vice Chair answered that they had considered this. Mr. Lombardi said that if the situation is rare, it is not necessary to change the notice provisions.

The Chair commented that there had been a suggestion to change subsection (a)(2) by deleting the language at the end which reads, "and is not offered as substantive evidence." Mr. Hochberg expressed the view that this should be deleted. The Reporter added that this would be subject to the provisions of subsection (a)(1). The Committee agreed by consensus to delete the language at the end of subsection (a)(2).

The Reporter drew the Committee's attention to subsection (a)(3). She suggested that there be a period placed after the word "form", and that the remainder of the sentence which reads, "and that is intended to be used as substantive evidence or as a basis for expert opinion testimony in accordance with Rule 5-703" be deleted. The Chair said that there had been a presentation at the Maryland Judicial Conference this past April where the judges had been shown a picture of what a witness looked like after an accident. Judge Sweeney asked why something like this has to be disclosed. The

answer is that this is a simulation of an injury, not photograph of the actual injury, and persons are entitled to know this. The Chair said that a picture is classicly used as a visual aid. Mr. Lombardi observed that this picture is computer-generated, as opposed to a photograph. The Vice Chair noted that Judge Sweeney's point is that if a photo is not computer-generated, it is taken by a camera and treated differently. Mr. Lombardi pointed out that something videotaped by a computer is not covered by the Rule.

The Chair commented that describing something as reduced to graphic form is too limited. He agreed with Judge Wilner that a rule which is too narrow may not encompass cases which cause trouble, but if the rule is too broad, it creates the potential for abuse by "scorched earth" litigators. Mr. Sykes noted that the term "graphic" means written. He questioned whether the words "pictorial" or "cinematic" would be better. Mr. Klein pointed out that subsection (a)(2) uses the terms "aural" and "visual." Mr. Sykes remarked that writing is visual, as are numbers.

The Chair said that this Rule concerns a simulated occurrence at issue in trial. Mr. Hochberg suggested that subsection (a)(3) end with the word "conclusion," but the Vice Chair expressed the view that this would be too broad. Mr. Klein suggested that the language could be "a conclusion in aural or pictorial form." Mr. Lombardi questioned whether the language should be parallel to the language in subsection (a)(2). Mr. Howell observed that that subsection uses the

term "visual," and not "pictorial." Mr. Klein expressed the view that the term "visual" would be too broad. Mr. Howell commented that in both subsections (a)(2) and (a)(3), the term could be "pictorial." The Vice Chair remarked that other senses, such as smell, may be involved. The Chair suggested that the language in subsection (a)(3) be changed to read "... will formulate a conclusion in aural, pictorial, or other sensory form." Mr. Sykes referred to the definitions of "computer-generated illustration" and "computer-generated simulation," noting that the language "aural, visual, or other sensory aid" is appropriate for the illustrations, but the language "pictorial or cinematic" is only appropriate for simulations.

Mr. Herrmann pointed out that a simulation presented in cinematic form is also an animation, but this is not true the other way around. A simulation draws its own conclusion upon which men and women rely, but an animation does not draw a conclusion. The Chair asked for an example of an animation. Mr. Herrmann replied that in reconstructing an auto accident at an intersection using a visual moving format, the jury sees the various views and angles. The Chair commented that there has to be a reasonable degree of probability that the expert who does this has created a fair and accurate depiction. Mr. Herrmann noted that the expert's opinion comes in, but whether an animation comes in is up to the court. A simulation is an opinion reached by computer, using information such as the

blueprints of a plane, a geodetic survey, or the data from an airplane's black box. The Chair observed that an expert has to identify the basis of his or her conclusion--whether the presentation involves a simulation or an animation. If each of these is defined, and discovery is required, is it necessary to go beyond this in the Rule?

Mr. Klein pointed out that still pictures such as corkboard drawings in still form may be offered into evidence. Mr. Herrmann responded that there can be a still picture from an animation or a simulation. The Chair said that the Rule could refer to the evidence derived from the computer-generated evidence. Mr. Herrmann commented that to anticipate future developments, the Rule could include the audio type, because of the sound from the screen, which is as persuasive as other types of evidence. The computer simulation can even generate smells. The Vice Chair inquired how this would differ from the definitions in the Rule. The Reporter noted that an earlier draft had covered this. The Chair suggested that some of the earlier drafts be reviewed.

The Vice Chair remarked that an illustration includes an animation, and this is not simply a cartoon. Mr. Lombardi observed that in discussing a simulation of a car crash, Mr. Herrmann has said that the result is often something mathenatical, and it has nothing to do with an animation. The term "computer-generated illustration" seems to cover everything that the Rule is attempting

to address. The Vice Chair countered that this is not necessarily so. A simulation tells the trier of fact how something occurs. Mr. Lombardi noted that for an illustration to be admitted into evidence, it has to pass the test in Rule 5-703. Mr. Herrmann said that that depends on whether the illustration was created after the expert reached an opinion. The Chair stated that a good definition prevents trial by ambush with respect to discovery material.

The Chair said that a photograph should not be excluded under Rule 2-504.3, but it appears to be excluded if it were computer-generated. The Vice Chair commented that if the photograph were generated by a computer, it should be subject to the Rule. The Chair hypothesized a situation where a brain surgeon comes into court with a series of computer-generated illustrations which the surgeon intends to use to show the body area on which the surgery was performed. The Chair asked if the illustrations would be subject to this Rule if no conclusion were presented. The Vice Chair replied that if the illustrations are computer-generated, they would be subject to the Rule. The Chair then inquired if the fact that an expert cannot use computer-generated evidence can be disclosed. The Vice Chair answered that currently, the fact cannot be disclosed, but in ten years, if this kind of evidence becomes routine, it may be able to be disclosed.

Mr. Lombardi questioned as to why a physician is not able to show three-dimensional pictures of anatomy to a jury without

notifying the other side. Rule 2-504.3 seems to require notice, and Mr. Lombardi said that he was sympathetic to the idea of not requiring notice. The Chair commented that a computer animation must be disclosed. The Vice Chair expressed the opinion that it should be disclosed. If it is not disclosed, there is no sanction in the Rule, and the sanctions in Rule 2-433 would have to be used.

Mr. Sykes commented that there is no need to distinguish a simulation from an illustration, since the notice requirement covers both. The types of computer-generated evidence requiring notice should be defined. Computer-generated evidence includes aural, visual, or other sensory depictions. A simulation is a program or model which will formulate a conclusion and is intended to be used at trial. The Vice Chair suggested that the words in the definitions which the practitioners will not know how to use should be taken out.

Mr. Howell questioned as to why a special rule for computer-generated evidence is needed. A definition can be added to the discovery rules. Other issues are dealt with pretrial, and if the parties are not going to use interrogatories, they deserve the problems that arise. The Vice Chair commented that this Rule is not so narrow as to be meaningless. It covers relatively high-technology evidence. Mr. Howell said that as the bar becomes more sophisticated, the parties will work out the problems with computer evidence. Mr. Howell remarked that he would like to see discovery

utilized, and he felt that computer simulations should be disclosed.

The Chair reiterated that trial by ambush is very dangerous, and a clear definition of computer-generated evidence is important. Mr. Sykes suggested the following definition: "computer-generated evidence means a computer-generated aural, visual, or other sensory depiction or animation of an event or thing and a computer program or model that will formulate a conclusion in aural, pictorial, or other sensory form that is intended to be used at trial." The Chair said that Mr. Sykes' definition will work. The second sentence of subsection (a)(1) would stay in, and subsections (a)(2) and (a)(3) would not be necessary. These changes can be typed and distributed to the Rules Committee for comments which can be made to the Reporter, the Chair, or the Vice Chair. The Vice Chair noted that numerical evidence would be excluded.

Mr. Sykes inquired whether the language in the proposed definition which is "a computer program or model that will formulate a conclusion" would cover computer spread sheets. He noted that a computer simulation of a kind that requires notice can be presented on a spread sheet. Mr. Herrmann explained that the purpose of the Rule is not to deal with than kind of problem, since the discovery rules cover that. The Subcommittee was concerned with the kind of evidence that has an unfair impact on a jury. The Chair asked if the definition of "computer-generated illustration" is being redefined.

Mr. Sykes replied that it was not. He said that the computer does not do any more than to depict in still or in moving form testimony already given. The Chair said that that would be limited to aural or pictorial form. Mr. Sykes added that other sensory forms are included. The Chair noted that an expert who testifies and the basis of his or her conclusion is the computer program the expert had run, does not get treated under this Rule. It is only where the jury is presented with something.

Judge Kaplan moved to accept Rule 2-504.3 with the amendments made today. The motion was seconded, and passed with one opposed. The Chair stated that the Subcommittee had done an excellent job preparing Rule 2-504.3.

Agenda Item 2. Reconsideration of proposed amendments to Rules 2-510 and 3-510 (Subpoenas)

---

The Vice Chair presented Rules 2-510 (Subpoenas) and 3-510 (Subpoenas) for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-510 to clarify how a subpoena may be used, to require sanctions if a subpoena is used improperly, to require the issuance of a blank subpoena under certain circumstances, to require a certain good faith effort concerning the time of service of a subpoena,

to allow a court to modify a subpoena under certain circumstances, to make a certain stylistic change, to add certain provisions concerning the protection of persons subject to subpoena, and to add a certain cross reference, as follows:

Rule 2-510. SUBPOENAS

(a) Use

A subpoena is required to compel the person to whom it is directed to attend, give testimony, and produce designated documents or other tangible things at a court proceeding, including proceedings before a master, auditor, or examiner. A subpoena is also required to compel a nonparty and may be used to compel a party over whom the court has acquired jurisdiction to attend, give testimony, and produce and permit inspection and copying of designated documents or other tangible things at a deposition. A subpoena shall not be used for any other purpose. If the court, on motion of a party alleging a violation of this section or on its own initiative, after affording the alleged violator a hearing, finds that a party or attorney used or attempted to use a subpoena for a purpose other than a purpose allowed under this section, the court shall impose an appropriate sanction upon the party or attorney, which may include, but is not limited to, a fine, an award of a reasonable attorney's fee and costs, and the exclusion of evidence obtained by the subpoena.

Committee note: It is improper to use a trial or hearing subpoena to circumvent discovery procedures. See Rule 3.4 (c) of the Maryland Lawyers' Rules of Professional Conduct.

(b) Issuance

On the request of a person entitled to the issuance of a subpoena, the clerk shall

issue a completed subpoena, or provide a blank form of subpoena which shall be filled in and returned to the clerk to be signed and sealed before service. On the request of an attorney or other officer of the court entitled to the issuance of a subpoena, the clerk **[**may**]** shall issue a subpoena signed and sealed but otherwise in blank, which shall be filled in before service.

(c) Form

. . .

(d) Service

A subpoena shall be served by delivering a copy either to the person named or to an agent authorized by appointment or by law to receive service for the person named. A subpoena may be served by a sheriff of any county or by any person who is not a party and who is not less than 18 years of age. Unless impracticable, a party shall make a good faith effort to serve a trial or hearing subpoena at least five days before the trial or hearing.

(e) Objection to Subpoena for Court Proceedings

On motion of a person served with a subpoena to attend a court proceeding (including a proceeding before a master, auditor, or examiner) filed promptly and, whenever practicable, at or before the time specified in the subpoena for compliance, the court may enter an order that justice requires to protect the person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more the following:

(1) that the subpoena be quashed or modified;

(2) that the subpoena be complied with only at some designated time or place other than that stated in the subpoena;

(3) that documents or other tangible things designated in the subpoena be produced only upon the advancement by the party serving the subpoena of the reasonable costs of producing them; or

(4) that documents or other tangible things designated in the subpoena be delivered to the court at or before the proceeding or before the time when they are to be offered in evidence, subject to further order of court to permit inspection of them.

(f) Objection to Subpoena for Deposition

A person served with a subpoena to attend a deposition may seek a protective order pursuant to Rule 2-403. If the subpoena also commands the production of documents or other tangible things at the deposition, the person served may seek a protective order pursuant to Rule 2-403 or may file, within ten days after service of the subpoena, an objection to production of any or all of the designated materials. The objection shall be in writing and shall state the reasons for the objection. If an objection is filed, the party serving the subpoena is not entitled to production of the materials except pursuant to an order of the court from which the subpoena was issued. At any time before or within 15 days after completion of the deposition and upon notice to the deponent, the party serving the subpoena may move for **[**such**]** an order to compel the production.

(g) Protection of Persons Subject to Subpoenas

A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.

Cross references: See Rule 1-201 (a) concerning sanctions for violations of this section. See Rule 1-341 concerning conduct in

bad faith or without substantial justification that harms an adverse party.

**[**(g)**]** (h) Hospital Records

A hospital served with a subpoena to produce at trial records, including x-ray films, relating to the condition or treatment of a patient may comply by delivering the records to the clerk of the court that issued the subpoena at or before the time specified for production. The hospital may produce exact copies of the records designated unless the subpoena specifies that the original records be produced. The records shall be delivered in a sealed envelope labeled with the caption of the action, the date specified for production, and the name and address of the person at whose request the subpoena was issued. The records shall be accompanied by a certificate of the custodian that they are the complete records for the patient for the period designated in the subpoena and that the records are maintained in the regular course of business of the hospital. The certificate shall be prima facie evidence of the authenticity of the records.

Upon commencement of the trial, the clerk shall release the records only to the courtroom clerk assigned to the trial. The courtroom clerk shall return the records to the clerk promptly upon completion of trial or at an earlier time if there is no longer a need for them. Upon final disposition of the action the clerk shall return the original records to the hospital but need not return copies.

When the actual presence of the custodian of medical record is required, the subpoena shall so state.

Cross reference: Code, Courts Article, §10-104.

**[**(h)**]** (i) Attachment

. . .

Source: This Rule is derived as follows:
Section (a) is new but the second sentence is **[**consistent with**]** derived in part from former Rule 407 a.
Section (b) is new.
Section (c) is derived from former Rules 114 a and b, 115 a and 405 a 2 (b).
Section (d) is derived from former Rules 104 a and b and 116 b.
Section (e) is derived from former Rule 115 b.
Section (f) is derived from FRCP 45 (d)(1).
Section (g) is derived from FRCP 45 (c)(1).
Section **[**(g)**]** (h) is new.
Section **[**(h)**]** (i) is derived from former Rules 114 d and 742 e.

Rule 2-510 was accompanied by the following Reporter's Note.

The Rules Committee recommends a number of changes to Rule 2-510.

In section (a), the words "and permit inspection and copying of" have been added, making clear in the subpoena that a deponent is required to allow inspection and copying in accordance with Rule 2-415 (c).

The amendments to section (a) also address misuse of subpoenas. If section (a) is violated, the amendment requires the court to impose a sanction, which may include a fine, attorney's fees and costs, and exclusion of the evidence obtained. A Committee note is added to make clear that the practice of issuing a trial subpoena for discovery purposes (in order to circumvent the notice require of Rule 2-412 (c)) is impermissible. The Trial Subcommittee discussed adding a provision similar to the last sentence of FRCP 45 (b)(1), which reads as follows:

> Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5 (b).

The Subcommittee concluded that such a broad approach was not necessary to combat a narrow problem.

An amendment to section (b) requires the clerk, upon request, provide a blank subpoena to an attorney or other officer of the court entitled to issuance of a subpoena.

A sentence is added to section (d) to require a party to make a good faith effort to serve a trial or hearing subpoena at least five days before the court date, unless it is impracticable to do so. Last-minute service of subpoenas on nonparties can be very disruptive to the plans of business persons and others, and affords the subpoenaed person who may have a valid objection to the subpoena no realistic opportunity to formulate and assert that objection.

An amendment to section (e) makes clear that the court has the power to modify a subpoena, on motion of a person served with a subpoena to attend a court proceeding.

An amendment to section (f) is stylistic, only.

New section (g) is taken verbatim from the first sentence of FRCP 45 (c)(1). It imposes a duty upon parties and attorneys to avoid imposing undue burden or expense on a person subject to a subpoena.

Following new section (g) are cross references to Rule 1-201 (a) concerning sanctions, generally, and to Rule 1-341, regarding harm to an adverse party that occurs because of conduct in bad faith or without substantial justification.

In light of the addition of new section (g), existing sections (g) and (h) are relettered as sections (h) and (i), respectively.

A cross reference to new Code, Courts Article, §10-104 (concerning the admissibility of certain medical, dental, and hospital records and writings) is added following section (h) of the Rule. New Code, Courts Article, §10-104 was added by Chapter 554, Laws of 1996, and was repealed and reenacted, with amendments, by Chapter 443, Laws of 1997.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 500 - TRIAL

AMEND Rule 3-510 to clarify how a subpoena may be used, to require sanctions if a subpoena is used improperly, to require the issuance of a blank subpoena under certain circumstances, to require a certain good faith effort concerning the time of service of a subpoena, to allow a court to modify a subpoena under certain circumstances, to make a certain stylistic change, to add certain provisions concerning the protection of persons subject to subpoena, and to add a certain cross reference, as follows:

Rule 3-510. SUBPOENAS

(a) Use

A subpoena is required to compel the person to whom it is directed to attend, give testimony, and produce designated documents or other tangible things at a court proceeding, including proceedings before a master, auditor, or examiner. A subpoena is also required to compel a nonparty and may be used to compel a

party over whom the court has acquired jurisdiction to attend, give testimony, and produce and permit inspection and copying of designated documents or other tangible things at a deposition taken pursuant to Rule 3-401 or 3-431. A subpoena shall not be used for any other purpose. If the court, on motion of a party alleging a violation of this section or on its own initiative, after affording the alleged violator a hearing, finds that a party or attorney used or attempted to use a subpoena for a purpose other than a purpose allowed under this section, the court shall impose an appropriate sanction upon the party or attorney, which may include, but is not limited to, a fine, an award of a reasonable attorney's fee and costs, and the exclusion of evidence obtained by the subpoena.

Committee note: It is improper to use a trial or hearing subpoena to circumvent discovery procedures. See Rule 3.4 (c) of the Maryland Lawyers' Rules of Professional Conduct.

(b) Issuance

On the request of a person entitled to the issuance of a subpoena, the clerk shall issue a completed subpoena, or provide a blank form of subpoena which shall be filled in and returned to the clerk to be signed and sealed before service. On the request of an attorney or other officer of the court entitled to the issuance of a subpoena, the clerk **[**may**]** shall issue a subpoena signed and sealed but otherwise in blank, which shall be filled in before service.

(c) Form

. . .

(d) Service

A subpoena shall be served by delivering a copy either to the person named or to an agent authorized by appointment or by law to receive service for the person named. A subpoena may be served by a sheriff of any

county or by any person who is not a party and who is not less than 18 years of age. Unless impracticable, a party shall make a good faith effort to serve a trial or hearing subpoena at least five days before the trial or hearing.

(e) Objection to Subpoena for Court Proceedings

On motion of a person served with a subpoena to attend a court proceeding (including a proceeding before a master, auditor, or examiner) filed promptly and, whenever practicable, at or before the time specified in the subpoena for compliance, the court may enter an order that justice requires to protect the person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more the following:

(1) that the subpoena be quashed or modified;

(2) that the subpoena be complied with only at some designated time or place other than that stated in the subpoena;

(3) that documents or other tangible things designated in the subpoena be produced only upon the advancement by the party serving the subpoena of the reasonable costs of producing them; or

(4) that documents or other tangible things designated in the subpoena be delivered to the court at or before the proceeding or before the time when they are to be offered in evidence, subject to further order of court to permit inspection of them.

(f) Objection to Subpoena for Deposition

A person served with a subpoena to attend a deposition may seek a protective order pursuant to Rule 2-403. If the subpoena also commands the production of documents or other tangible things at the deposition, the person served may seek a protective order pursuant to

Rule 2-403 or may file, within ten days after service of the subpoena, an objection to production of any or all of the designated materials. The objection shall be in writing and shall state the reasons for the objection. If an objection is filed, the party serving the subpoena is not entitled to production of the materials except pursuant to an order of the court from which the subpoena was issued. At any time before or within 15 days after completion of the deposition and upon notice to the deponent, the party serving the subpoena may move for [such] an order to compel the production.

(g) Protection of Persons Subject to Subpoenas

A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.

Cross references: See Rule 1-201 (a) concerning sanctions for violations of this section. See Rule 1-341 concerning conduct in bad faith or without substantial justification that harms an adverse party.

[(g)] (h) Hospital Records

A hospital served with a subpoena to produce at trial records, including x-ray films, relating to the condition or treatment of a patient may comply by delivering the records to the clerk of the court that issued the subpoena at or before the time specified for production. The hospital may produce exact copies of the records designated unless the subpoena specifies that the original records be produced. The records shall be delivered in a sealed envelope labeled with the caption of the action, the date specified for production, and the name and address of the person at whose request the subpoena was issued. The records shall be accompanied by a certificate of the custodian that they are the complete records

for the patient for the period designated in the subpoena and that the records are maintained in the regular course of business of the hospital. The certificate shall be prima facie evidence of the authenticity of the records.

Upon commencement of the trial, the clerk shall release the records only to the courtroom clerk assigned to the trial. The courtroom clerk shall return the records to the clerk promptly upon completion of trial or at an earlier time if there is no longer a need for them. Upon final disposition of the action the clerk shall return the original records to the hospital but need not return copies.

When the actual presence of the custodian of medical record is required, the subpoena shall so state.

Cross reference: Code, Courts Article, §10-104.

**[**(h)**]** (i) Attachment

. . .

Source: This Rule is derived as follows:
Section (a) is new but the second sentence is **[**consistent with**]** derived in part from former Rule 407 a.
Section (b) is new.
Section (c) is derived from former M.D.R. 114 a and b, 115 a.
Section (d) is derived from former M.D.R. 104 a and b and 116 b.
Section (e) is derived from former M.D.R. 115 b.
Section (f) is derived from FRCP 45 (d)(1).
Section (g) is derived from FRCP 45 (c)(1).
Section **[**(g)**]** (h) is new.
Section **[**(h)**]** (i) is derived from former M.D.R. 114 d and 742 e.

Rule 3-510 was accompanied by the following Reporter's Note.

The proposed amendments to Rule 3-510 track the proposed amendments to Rule 2-510.

The Vice Chair explained that the Style Subcommittee had considered Rules 2-510 and 3-510. At the February, 1997 meeting, the Committee approved a recommendation of the Trial Subcommittee, adding the underlined language which is after the sentence, "A subpoena shall not be used for any other purpose." The added language provides for a sanction for improper use of a subpoena. The

Committee also approved adding the Committee note at the end of section (a). The Vice Chair questioned the meaning of the Committee note. Mr. Howell commented that sometimes an attorney will issue a subpoena for discovery purposes with no notice to the other side. Mr. Hochberg pointed out that the situation may be worse than that. An attorney can issue what appears to be a trial subpoena accompanied by a letter which asks the recipient to bring the subpoena to the attorney's office. Once the recipient does, he will be asked questions about the case. The Vice Chair questioned whether the Committee note means more than that. Mr. Hochberg's example may not violate the Rule. Mr. Hochberg said that a trial may be postponed, but a person who had received a subpoena may not have known it, and turns over the documents, anyway. This may be producing the documents for an improper purpose.

The Vice Chair remarked that she did not like the Committee note. Mr. Sykes noted that if someone is subpoenaed to trial, but the other side tells him or her that it is not necessary to go to the trial, that would be circumventing discovery. Mr. Hirshman commented that no attorney has the authority to tell a witness to disregard a subpoena. The Vice Chair expressed the opinion that the first sentence of the note is too broad and ambiguous to mean anything. Mr. Howell observed that it seems to indicate that the only purpose of the rule is to avoid circumventing discovery procedures. However, there are other abuses, and the note should be eliminated. The

Committee agreed to the deletion of the Committee note by consensus. Mr. Howell stated that it will also be taken out of Rule 3-510.

Turning to section (b), the Vice Chair pointed out that in the second sentence, the word "may" has been changed to the word "shall" which will make it mandatory that the clerk issue a subpoena when the clerk is requested to do so. Mr. Shipley expressed the concern that there may be many blank subpoenas floating around. Judge Rinehardt observed that there are many blank subpoenas floating around Baltimore City. Mr. Shipley suggested that it might be helpful to limit the amount of blank subpoenas given out at one time. Judge Johnson inquired why there are blank subpoenas. The Vice Chair replied that blank subpoenas save an attorney time. They also save the Clerk's office time. Most subpoenas are used appropriately 99% of the time. Mr. Shipley commented that the addition of sanctions to the Rule will help avoid violations.

Mr. Howell observed that the federal rule authorizes an attorney, not the clerk, to issue a subpoena. The Vice Chair asked the Committee if it wanted to go back to the word "may" in the second sentence of section (b), and the Committee indicated that it did not. Mr. Hochberg inquired to whom the term "person" refers in the first sentence of section (b). Does this mean a litigant or an attorney? The Vice Chair answered that this includes anyone who can get a subpoena.

Mr. Shipley questioned whether there is a conflict between the

second and third sentences of section (d). The second sentence provides that a subpoena may be served by a sheriff or anyone not a party who is over 18 years of age, and the third sentence provides that a party shall serve a subpoena. The Reporter suggested that the third sentence provide that a party shall cause service to be made. Mr. Sykes suggested that the third sentence read as follows: "Unless impracticable, a party shall make a good faith effort to cause a trial or hearing subpoena to be served at least five days before the trial or hearing." The Committee agreed to this change by consensus.

Mr. Hochberg pointed out that section (f) provides that if a witness does not appear with the documents which have been subpoenaed, there is no contempt power available. The Vice Chair said that contempt is available as long as the non-party did not file the objection. The burden is on the party to get the order compelling production. The objection procedure is not used very often. Mr. Hochberg suggested that the Rule provide that service of a subpoena on an attorney is the equivalent of service on a party. The Chair pointed out that to get a body attachment on a party who does not comply, that party, and not his or her attorney, would have to be served. Mr. Howell commented that this is an issue for the Subcommittee to discuss. The Chair said that the issue would be submitted to the Subcommittee.

Agenda Item 3. Consideration of proposed new Products Liability Form Interrogatories and amendments to certain existing Form Interrogatories.

---

Mr. Klein presented the Product Liability Form Inter-rogatories for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX: FORMS

FORM INTERROGATORIES

ADD new Form No. 9 - Product Liability Definitions, to the Appendix of Forms, Form Interrogatories, as follows:

**Form No. 9 - PRODUCT LIABILITY DEFINITIONS**

**Definitions**

(a) **Component(s) at issue** means the **product** component(s) alleged to be defective in this action. (Standard Product Liability Definition (a).)

(b) **Occurrence,** unless otherwise indicated, means the accident or other event complained of in the pleadings. (Standard Product Liability Definition (b).)

(c) **Product** means the particular [insert description of product] alleged in the pleadings to have been involved in the **occurrence.** (Standard Product Liability Definition (c).)

**Committee note:** These definitions, in addition to the General Definitions, are designed to be used in product liability cases.

MARYLAND RULES OF PROCEDURE

APPENDIX: FORMS

FORM INTERROGATORIES

ADD new Form No. 10 - Product Liability Interrogatories, to the Appendix of Forms, Form Interrogatories, as follows:

**Form No. 10 - PRODUCT LIABILITY INTERROGATORIES**

**Interrogatories For Use by Either Party**

1. **Identify** the specific provision(s) of each governmental or industry regulation, standard, guideline, recommendation, accepted practice, or custom, that you contend was applicable to the design, manufacture, performance, testing, certification, or safety of the **component(s) at issue** at the time the **product** left the manufacturer's control. (Standard Product Liability Interrogatory No. 1.)

2. State whether the **product** underwent any substantial change in its condition between the time it left its manufacturer's control and the time of the **occurrence** and, if so, describe each substantial change in condition. (Standard Product Liability Interrogatory No. 2.)

3. State whether the **product** underwent any substantial change in its condition between the time of the **occurrence** and the present and, if so, describe each substantial change in condition. (Standard Product Liability Interrogatory No. 3.)

4. State whether at any time after the **occurrence**, you or any **person** on your behalf examined the **product** or any of its parts and, if so, describe the nature and results of each examination, **identify** the person who performed it, and **identify** each **document** that refers to it. (Standard Product Liability Interrogatory No. 4.)

5. State whether, at any time, you or any **person** on your behalf conducted any test, study, or other analysis concerning possible safety or health hazards of the **product** or of any substantially similar product and, if so, describe the nature and results of each test, study, or analysis, state when it was performed, **identify** each **person** who performed it, and **identify** each **document** referring to it. (Standard Product Liability Interrogatory No. 5.)

6. State whether you or any **person** acting on your behalf performed a simulation (computer or actual) of the **occurrence** or of any of the events immediately before or immediately after the **occurrence**, and, if so, describe the simulation, **identify** the person who performed it, and **identify** each **document** that refers to the simulation. (Standard Product Liability Interrogatory No. 6.)

7. State whether you or any **person** acting on your behalf performed or intends to perform at trial any experiment, test, or analysis illustrating a scientific principle in support of any claim or defense that you have or will assert in this action, and, if so, describe each experiment, test, or analysis, **identify** the **person** who performed or intends to perform it, and **identify** each **document** that refers to the experiment, test, or analysis. (Standard Product Liability Interrogatory No. 7.)

8. **Identify** each **document** that depicts or purports to depict the **occurrence**, scene of the **occurrence**, or the **product**. (Standard Product Liability Interrogatory No. 8.)

9. State the date, place, and circumstances under which you first became aware that exposure to, or use of, the **product** or any other substantially similar product may be harmful to human health, **identify** each source of information leading to your awareness, and identify the harm or hazards of which you became aware. (Standard Product Liability Interrogatory No. 9.)

10. **Identify** each **person** other than your attorney who has made any written or oral report, memorandum, or statement to you or anyone acting on your behalf regarding the cause of the **occurrence**, and **identify** all **documents** constituting or concerning each such report, memorandum, or statement. (Standard Product Liability Interrogatory No. 10.)

**Interrogatories To Defendant From Plaintiff**

31. State whether you contend that any instruction, warning, or other cautionary advice should have been provided with the **product** at the time of its sale or distribution to the end user, and if so:

(a) state the subject matter of the instruction, warning, or other cautionary advice;

(b) **identify** the **person** responsible for providing the instruction, warning, or cautionary advice; and

(c) **identify** each **document** constituting or referring to the instruction, warning, or other cautionary advice. (Standard Product Liability Interrogatory No. 31.)

32. **Identify** and describe each study performed by you or on your behalf that evaluated, in whole or in part, any adverse effects of the use of the **product** or any substantially similar product. (Standard Product Liability Interrogatory No. 32.)

33. State whether any label of or warning concerning the **product** or any substantially similar product was changed in any way concerning product safety or hazards for the period [date] through [date]. (Standard Product Liability Interrogatory No. 33.)

34. **Identify** each safety-related warning, instruction, sign, display, or other **document** furnished by you to sellers for display in their sales facilities from [date] through [date] and concerning the **product** or any substantially similar product. (Standard Product Liability Interrogatory No. 34.)

35. Describe each change, if any, that was made to each item identified in your answer to the preceding Interrogatory, state whether the change was furnished by you to sellers of the **product** or their customers, and state the date the change was furnished to the sellers or their customers. (Standard Product Liability Interrogatory No. 35.)

36. State whether at any time before the **occurrence** you or anyone on your behalf made any written or oral statement regarding the safety of the **product**, and if so:

(a) state the date and substance of each statement and whether it was written or oral;

(b) **identify** the **person** making the statement;

(c) **identify** the **person** to whom the statement was made; and,

(d) **identify** each **document** constituting or referring to the statement. (Standard Product Liability Interrogatory No. 36.)

37. State whether you contend that the plaintiff was given any written or oral warning, caution, instruction, or recommendation as to uses or limitations of the **product** at any time before the **occurrence**, and if so:

(a) state the substance of each warning, caution, instruction, or recommendation;

(b) state the date on which the plaintiff was given the warning, caution, instruction, or recommendation;

(c) **identify** the **person** who gave the plaintiff the warning, caution, instruction, or recommendation;

(d) describe the manner in which the warning, caution, instruction, or recommendation was given to the plaintiff; and

(e) **identify** each **document** constituting or referring to the warning, caution, instruction, or recommendation. (Standard Product Liability Interrogatory No. 37.)

38. If you or anyone on your behalf provided to the plaintiff any technical literature, product brochure, or promotional literature concerning the **product** at any time

before the **occurrence**:

(a) **identify** the literature or brochure;

(b) **identify** the **person** who provided the literature or brochure to the plaintiff; and

(c) state the date the literature or brochure was given to the plaintiff. (Standard Product Liability Interrogatory No. 38.)

39. State whether at any time you became aware of any lawsuit or other claim that was based upon an allegation that a defect in a product component substantially similar to the **component(s) at issue** was a cause of any personal injury, death, or property damage, and if so, as to each lawsuit or other claim:

(a) state the date you became aware of the lawsuit or claim;

(b) state the date and location of the incident involved in the lawsuit or claim, and describe the product(s) and component(s) involved and the nature of the defect alleged;

(c) **identify** the **person** bringing the lawsuit or claim; and

(d) if a lawsuit, **identify** the court, case caption, and docket number. (Standard Product Liability Interrogatory No. 39.)

40. State whether there has been any federal or state governmental or industry investigation of the safety of the **product** or of any substantially similar product and if so:

(a) state the date of the investigation;

(b) **identify** the governmental or industry entity that conducted the investigation;

(c) **describe** the nature and subject matter of the investigation;

(d) **identify** each **person** who responded on your behalf to the investigation; and,

(e) **identify** each **document** that refers to the investigation. (Standard Product Liability Interrogatory No. 40.)

41. Did you, or any agent or employee of yours, warrant or guarantee the **product**? If so, state the exact words of each warranty or guarantee, how the warranty or guarantee was given, and the date the warranty or guarantee was given. (Standard Product Liability Interrogatory No. 41.)

42. If you contend that you, or any agent or employee of yours, disclaimed any warranty or guarantee of the **product**, state the exact words of each disclaimer, how the disclaimer was made, and how the Plaintiff was made aware of the disclaimer. (Standard Product Liability Interrogatory No. 42.)

43. Explain the meaning of each code word, code number, or other symbol appearing on the **product**, including any that identifies the place of manufacture, the date of manufacture, the lot or batch of which the **product** was a part, or any test or examination of the **product**. (Standard Product Liability Interrogatory No. 43.)

44. State whether, after the date of manufacture of the **product**, you changed the design of the **component(s) at issue** in any otherwise substantially similar product. If so:

(a) state the nature of the change;

(b) state the reason for the change;

(c) state the date of the change;

(d) **identify** each **person** who directed the change; and

(e) **identify** each plan that refers to the change or alteration. (Standard Product Liability Interrogatory No. 44.)

45. **Identify** all **persons** who were or are directly responsible for or most knowledgeable about the design, testing, certification, or

safety of the **component(s) at issue**; as to each **person**, state the area of that **person's** responsibility or knowledge (e.g., design, testing, certification, or safety). (Standard product Liability Interrogatory No. 45.)

46. **Identify** the **person** who manufactured the **component at issue** and the **person** who assembled the **component at issue** into the **product**. (Standard Product Liability Interrogatory No. 46.)

**Interrogatories to Plaintiff from Defendant**

61. Name each **component at issue**, state whether you contend that the alleged defect in the **component at issue** is one of design, manufacture, or a failure to warn, and **identify** each **person** and **document** having or containing information that supports your contention that the component was defective or unreasonably dangerous and caused your injuries or damages. (Standard Product Liability Interrogatory No. 61.)

62. With respect to each **component at issue**, describe the specific nature of each alleged design, manufacturing, or warnings defect. (Standard Product Liability Interrogatory No. 62.)

63. With respect to each **component at issue** for which you contend there was a defect in design, state the particulars of each alternative design that you contend could and should have been employed. (Standard Product Liability Interrogatory No. 63.)

64. With respect to each **component at issue** for which you contend there was a defect in manufacture, **identify** the applicable manufacturing specifications for the **component at issue** and state how you contend it failed to meet the prescribed manufacturing

specifications. (Standard Product Liability Interrogatory No. 64.)

65. If you contend that this defendant failed to provide adequate warnings or instructions regarding the **product**, state how you contend the warnings or instructions were inadequate and how you contend the defendant could and should have made them adequate. (Standard Product Liability Interrogatory No. 65.)

66. State the facts that support your contention that the **product** was defective and unreasonably dangerous, and **identify** each **person** and **document** having or containing information that supports your contention. (Standard Product Liability Interrogatory No. 66.)

67. **Identify** each **person** whom you contend is responsible for causing the alleged defective or unreasonably dangerous condition of the **product**, state for how long the alleged defective or unreasonably dangerous condition existed before the **occurrence**, and **identify** each **person** and **document** having or containing information that supports your contention. (Standard Product Liability Interrogatory No. 67.)

68. State the facts that support your contention that the **product** reached you without substantial change in the condition in which it was manufactured, and **identify** each **person** and **document** having or containing information that supports your contention. (Standard Product Liability Interrogatory No. 68.)

69. State the facts that support your contention that the alleged defect in the **product** was a proximate cause of the injuries, damages, or losses you claim in this action. (Standard Product Liability Interrogatory No. 69.)

70. If you contend that the **product** was not properly installed before the **occurrence**,

state the facts that support your contention, and **identify** each **person** and **document** having or containing information that supports your contention. (Standard Product Liability Interrogatory No. 70.)

71. If you contend that, before the **occurrence**, this defendant had notice of any defect or unreasonably dangerous condition of the **product**, state the facts that support your contention, and **identify** each **person** and **document** having or containing information that supports your contention. (Standard Product Liability Interrogatory No. 71.)

72. Describe each complaint about the **product**, if any, made at any time by you or any other **person** to defendant, and **identify** each **person** and **document** having or containing information about the complaint. (Standard Product Liability Interrogatory No. 72.)

73. Describe the negligent acts or omissions for which you contend that this defendant is responsible with respect to the **product**, state the facts that support your contention, state how each negligent act or omission could and should have been avoided, and **identify** each **person** and **document** having or containing information that supports your contention. (Standard Product Liability Interrogatory No. 73.)

74. If you contend that this defendant violated any statute, regulation, ordinance, standard, or guideline with respect to the manufacture, design, or labeling of the **product**, or with respect to instructions or warnings about the **product**, then for each such statute, regulation, ordinance, standard, or guideline provide the following information:

(a) the name of the publication in which it appears;

(b) the page number of the publication in which it appears;

(c) the specific provision that you contend was violated; and

(d) its promulgation date and effective date. (Standard Product Liability Interrogatory No. 74.)

75. If you contend that the violation of any statute, regulation, ordinance, standard, or guideline set forth in your answer to the preceding Interrogatory proximately caused any injury, damage, or loss for which claim is made in this action, state the facts that support your contention. (Standard Product Liability Interrogatory No. 75.)

76. If you contend that this defendant had a duty to test but failed to test the **product**, state the facts that support your contention, and **identify** each **person** and **document** having or containing information that supports your contention. (Standard Product Liability Interrogatory No. 76.)

77. **Identify** the **person** who sold the **product** to the owner of the **product** at the time of the **occurrence**, and state the sales price, the date of sale, and whether the **product** was sold in a "new" or "used" condition. If the **product** was sold in a "used" condition, then **identify** each **person** who owned the **product** at any time from the date of its manufacture to the present, and state when they owned it. (Standard Product Liability Interrogatory No. 77.)

78. **Identify** each **person** who has had custody of the **product** or any **component at issue** from the date of the **occurrence** to the present, and for each **person** state the time during which that **person** had custody and the street address, city, and state at which the **product** or **component at issue** was kept. (Standard Product Liability Interrogatory No. 78.)

79. If you are aware of any maintenance or repair that was contemplated, conducted, or

should have been conducted on the **product** before the **occurrence**, describe the basis of your awareness, state any recommendations made by any **person** regarding the maintenance or repair, and **identify** each **person** and **document** having or containing any information concerning the maintenance or repair. (Standard Product Liability Interrogatory No. 79.)

80. Describe the condition of the **product** both before and after the **occurrence**, and **identify** each **person** and **document** having or containing information about the condition. (Standard Product Liability Interrogatory No. 80.)

81. State whether you have knowledge of any photograph, videotape, motion picture, drawing, model, or other image made of the **product** or any **component at issue** at any time. If your answer is affirmative, describe the medium on which the image is recorded, **identify** each **person** who made it, state the date when it was made, and **identify** the **person** who has present custody of it. (Standard Product Liability Interrogatory No. 81.)

MARYLAND RULES OF PROCEDURE

APPENDIX: FORMS

FORM INTERROGATORIES

AMEND Form No. 2 - General Definitions, to include in Standard General Definition (b) a requirement that the present custodian of a document be identified, as follows:

**Form No. 2 - GENERAL DEFINITIONS**

**Definitions**

In these interrogatories, the following definitions apply:

. . .

(b) **Identify**, **identity**, or **identification**, (1) when used in reference to a natural **person**, means that **person*s** full name, last known address, home and business telephone numbers, and present occupation or business affiliation; (2) when used in reference to a **person** other than a natural **person**, means that **person's** full name, a description of the nature of the **person** (that is, whether it is a corporation, partnership, etc. under the definition of **person** below), and the **person*s** last known address, telephone number, and principal place of business; (3) when used in reference to any **person** after the **person** has been properly **identified** previously means the **person's** name; and (4) when used in reference to a **document**, requires you to state the date, the author (or, if different, the signer or signers), the addressee, the **identity** of the present custodian of the **document**, and the type of **document** (e.g. letter, memorandum, telegram, chart, etc.) or to attach an accurate copy of the **document** to your answer, appropriately labeled to correspond to the interrogatory. (Standard General Definition (b).)

. . .

FORM INTERROGATORIES

AMEND Form No. 3 - General Interrogatories, to include a certain new Standard General Interrogatory No. 6, as follows:

**Form No. 3 - GENERAL INTERROGATORIES**

**Interrogatories**

. . .

6. If you contend that this party (or anyone acting on this party's behalf) made any admission or declaration against interest that pertains to the matters alleged in the complaint, state the particulars of each admission or declaration against interest, **identify** the **person** making the admission or declaration, and **identify** each **document** that refers to it. (Standard General Interrogatory No. 6.)

. . .

MARYLAND RULES OF PROCEDURE

APPENDIX: FORMS

FORM INTERROGATORIES

AMEND Form No. 5 - Domestic Relations Interrogatories, to correct a certain internal reference in Standard Domestic Relations Interrogatory No. 12, as follows:

**Form No. 5 - Domestic Relations Interrogatories**

**Interrogatories**

. . .

12. If the information contained on your financial statement submitted pursuant to Rule **[**S72**]** 9-203 f. has changed, describe each change. (Standard Domestic Relations Interrogatory No. 12.)

. . .

MARYLAND RULES OF PROCEDURE

APPENDIX: FORMS

FORM INTERROGATORIES

AMEND Form No. 7 - Motor Vehicle Tort Interrogatories, to clarify Standard Motor Vehicle Tort Interrogatory No. 10, as follows:

**Form No. 7 - Motor Vehicle Tort Interrogatories**

**Interrogatories**

. . .

10. If a written or oral report with respect to the **occurrence** was made in the ordinary course of business, state the date of the report and **identify** the **person** who made the report and, if written, the custodian. (Standard Motor Vehicle Tort Interrogatory No. 10.)

. . .

Mr. Klein told the Rules Committee that the Federal Rules Advisory Committee on the Civil Rules has a special subcommittee which is going to take a look at the status of the discovery rules at a symposium in Boston on September 4 and September 5. He explained that the Product Liability Form Interrogatories originated as a result of a canvassing of the product liability sections of the Maryland State Bar Association and the Baltimore City Bar Association. Although the State Bar did not respond, the Baltimore City Bar did from both the plaintiff's and the defendant's viewpoints. The City Bar Association did a comprehensive set of interrogatories. The Subcommittee went over them to eliminate any overlap or redundancy with the Form Interrogatories which have already been approved. The Subcommittee also eliminated proposed interrogatories that were too subject-matter specific for certain types of products and interrogatories which were objectionable or too broad. Sixteen of the interrogatories can be used for the

plaintiff to question the defendant, 21 for the defendant to question the plaintiff, and 10 can be used in either direction.

Mr. Klein said that Form No. 9 contains three definitions. The Chair noted that major litigation can arise from what is included in a definition and what is not. Mr. Klein explained that an example of a "component" is the steering system of an automobile. The issue is not the design of the auto, but the design of the steering system. Mr. Howell pointed out that section (c) contains a bracket which reads "insert description of product", and he inquired if a similar bracket would be useful in section (a). Mr. Sykes expressed the view that it would be a good idea to illustrate this in both sections. Judge Rinehardt added that it should be clear to the reader that the product is the entire entity, such as the car.

The Chair asked if the "product" should be defined first, followed by the definition of "component." Mr. Klein responded that the definitions were alphabetical. Mr. Sykes suggested that the definitions could be integrated with the general definitions. Mr. Karceski pointed out that the product is not always the sum of its components, such as a marble. Mr. Klein said that it is only in the unusual case that these definitions cannot be used. He noted that a definition of the term "occurrence" is also in the Motor Tort Form Interrogatories, and the slight variation between the two definitions is intended. The Subcommittee could not find a generic definition to fit both.

Mr. Klein drew the Committee's attention to Form No. 10. Mr. Sykes commented that some products have only one component, and the first interrogatory does not cover this. The Reporter suggested that the definition of the term "component at issue" could be changed by adding in language referring to the situation where there is only one component, the product itself. The Committee agreed to this suggestion by consensus.

In Interrogatory 2 in Form No. 10, Mr. Hochberg suggested that the word "substantial" be deleted. This could be the issue in the case, and could lead to the necessity of a discovery decision. Mr. Klein added that the same change could be made in Interrogatory 3 as well. The Committee agreed to these changes by consensus. Mr. Sykes questioned whether the information about describing the change in condition in the second and third interrogatories is necessary, since the question as to whether the product had undergone change has already been asked. The Chair commented that asking about any change is too broad a question. Mr. Sykes noted that some change may be inherent in the product, and the product's condition may be internal or external. The Chair said that what is being considered is the issue of whether the product that caused the accident has changed. Mr. Klein pointed out that Rule 2-402 (a) provides that condition is one of the items that is discoverable.

The Chair drew the Committee's attention to Interrogatory 4. Mr. Sykes asked about the word "parts". The Chair responded that

this would be any of the components. Mr. Klein added that it is not necessarily the component at issue. Mr. Karceski remarked that if a product has many components, the examination may have been on the entire product, such as a car, and not the part that was defective. Mr. Klein said that this is not intended to be limited to any component. Mr. Sykes noted that Interrogatory 1 uses the defined term "component at issue," but there is no definition of the term "components." There should be consistency with Interrogatory 1. Mr. Klein reiterated that it is not necessary to specify the component at issue. Mr. Sykes noted that one may not know what is at issue until discovery is finished.

The Chair drew the Committee's attention to Interrogatory 5. He asked about the language "substantially similar product". Mr. Sykes expressed the view that that language is necessary. Mr. Klein added that if the word "substantially" were not included, the question would be objectionable.

The Chair drew the Committee's attention to Interrogatory 6. Mr. Klein pointed out that this was drafted before the computer-generated evidence rules. Mr. Sykes expressed the opinion that the meaning of the interrogatory is clear.

The Chair drew the Committee's attention to Interrogatory 7. He questioned whether this includes a simulation. Mr. Sykes responded that it does. Mr. Klein suggested that the term "simulation" could be added to the interrogatory. Mr. Sykes inquired

if Interrogatories 6 and 7 could be combined to cover both past and future experimentation. The Chair pointed out that in Interrogatory 6, something had been done which may never show up at trial. Mr. Sykes said that one interrogatory could ask for any simulation which has been performed, and any experiment which will be performed. Mr. Klein commented that the past simulation question is too broad as it may get into work product. Mr. Sykes suggested that the language "to be used at trial" should be added into Interrogatory 6. The Chair stated that Interrogatories 6 and 7 will be combined, with clarification that the question as to whatever was done or is to be done refers only to what will be used at trial. The Committee agreed by consensus to this.

The Chair drew the Committee's attention to Interrogatory 8. Mr. Sykes inquired if this includes a commonplace advertising brochure. Mr. Klein replied that this refers to a document describing this particular product, with its specific serial number. Mr. Sykes remarked that there are many types of brochures pertaining to a specific model of the Taurus automobile. The Chair said that this is intended to identify documents intended for use at trial or intended for discovery. Mr. Klein explained that one example of what Interrogatory 8 is looking for would be photographs of the condition of a product after an accident. Judge Rinehardt expressed the concern that the reader of the interrogatory may read it as Mr. Sykes read it. Mr. Klein suggested that the word "product" could be

removed, since there are so many brochures pertaining to products.

The Chair questioned whether this interrogatory covers a police report of an accident. Does the report depict the accident? Mr. Sykes responded that a police report usually has a drawing on it. Mr. Howell noted that the term "occurrence" usually is related to an accident, while product cases are often associated with latent diseases. Mr. Klein said that the form interrogatories cannot be tailored to fit every situation, and the latent disease aspect is hard to handle.

The Chair asked if the language "or the product" should be deleted. Mr. Klein said that he would draft something less broad. Mr. Sykes suggested that the language be deleted until the Rule is revised, and the Committee was in agreement.

The Chair drew the Committee's attention to Interrogatory 9. He pointed out that the language "harmful to human health" may be too narrow, since there could be something which is harmful to livestock or to other kinds of property. The Committee agreed by consensus to remove the language "to human health." The Chair suggested that the words "or hazardous" could be added after the word "harmful". Mr. Klein remarked that the terms "harmful" or "hazardous" may be redundant. Mr. Howell commented that the term "hazardous" connotes risk. The Committee agreed to add in the language suggested by the Chair. Mr. Sykes observed that Mr. Howell's problem with the latent disease could be solved if the definition of the word "occurrence"

was changed to "... the accident, event, or other phenomenon...". The Chair said that the language in Interrogatory 9 which reads, "harmful or hazardous" is the best approach to asbestos litigation.

The Chair drew the Committee's attention to Interrogatory 10. Mr. Howell inquired as to why this is not in the general set of interrogatories, since it would apply to any litigation. The Reporter asked if it would apply to domestic litigation. The Chair commented that experts are often advised not to put their conclusions in writing. This could lead to a work product argument. Mr. Hochberg commented that this interrogatory simply identifies the person who made the report, and it does not mean the report can be obtained. Mr. Sykes referred to the expert who has not been designated for trial. Mr. Hochberg responded that that expert is protected from disclosing. Mr. Sykes suggested that the interrogatory could exclude the person's attorney or an expert consultant. Mr. Howell suggested that the language could be "other than your attorney and an expert retained in anticipation of litigation."

The Chair asked what is being looked for in the interrogatory. Arguably, it is a statement made by an expert to an attorney acting on the client's behalf that there is not a good case. Mr. Howell remarked that the plaintiff may be trying to get experts from within a company. Mr. Sykes suggested that the interrogatory should ask for reports other than those from one's attorney and experts. Mr. Klein

said that there is already an interrogatory to that effect. Mr. Sykes said that reports in the usual course of business may take care of the company's experts.

The Chair suggested that the wording of Interrogatory 10 could be: "Identify each person other than your attorney or any expert consulted by your attorney who has made ...". Mr. Sykes cautioned that the interrogatory should cover an expert from a company. Such an expert, who has prepared something, should not be immunized from reporting otherwise admissible or discoverable material which has been submitted to an attorney. Mr. Klein suggested that a question concerning reports made in the ordinary course of business could be added in here. Mr. Howell commented that Interrogatory 10 could have subparts so that it could be broader. The persons could be identified by categories, such as a company expert, or an expert called at trial. Mr. Klein noted that there is already a general question covering that.

Mr. Klein drew the Committee's attention to Interrogatory 31, which is one of the Interrogatories to Defendant from Plaintiff. Mr. Howell suggested that the language "was or" should be added in after the word "advice" and before the word "should," so that the first part of the interrogatory reads as follows: "State whether you contend that any instruction, warning, or other cautionary advice was or should have been provided...". The Committee agreed by consensus to this modification.

Mr. Klein drew the Committee's attention to Interrogatory 32. The Chair asked if this refers to post-manufacturing/pre-accident studies or post-accident studies. Mr. Klein replied that this could be pre-accident. Mr. Sykes inquired if evaluation is necessary or simply a reference to adverse effects. The Reporter suggested that the word "mentioned" could be used instead of "evaluated," so that the interrogatory would read: "Identify and describe each study performed by you or on your behalf that mentioned, in whole or in part, any adverse effects of the use of the product or any substantially similar product." The Committee agreed by consensus to this change.

Mr. Klein drew the Committee's attention to Interrogatory 33. Mr. Howell pointed out that this interrogatory is interchangeable with Interrogatory 31, and Interrogatory 37 also refers to a warning. He asked whether there is a generic term to cover these interrogatories. Mr. Klein answered that there is no generic term, but that parallelism may be good. Mr. Sykes remarked that the nature of the warning does not make any difference, such as whether it is a warning, instruction, or cautionary advice concerning the product. Mr. Howell suggested that the term "warning" could be defined to include all the various terminology. The Chair questioned what would be included if something were not a warning or instruction. Mr. Klein observed that an instruction is not a warning. He suggested including all the terms unless the interrogatory would not apply to

that type of thing.

Mr. Klein drew the Committee's attention to Interrogatory 34. He said that this was covered by the discussion of Interrogatory 33.

Mr. Klein drew the Committee's attention to Interrogatory 35. Mr. Sykes pointed out that there may be more than one date involved. Mr. Howell suggested that instead of the language "whether the change was furnished by you to sellers", the language should be "whether the change was furnished to sellers." Mr. Sykes suggested that in place of the language requesting the date to be stated, the following language should be substituted: "state when the change was furnished...". The Committee agreed by consensus to both of these changes.

Mr. Klein drew the Committee's attention to Interrogatory 36. The Chair suggested that the word "person" should be pluralized. Mr. Klein suggested that sections (b) and (c) should say: "identify each person", and the Committee agreed by consensus to this change. The Chair pointed out that the person making the statement may not necessarily be the person who is being addressed. He suggested that there be a sentence which states "identify the circumstances under which the statement was made." Mr. Klein suggested that the new language be: "identify the circumstances or occasion under which the statement was made." The Committee agreed to the latter change.

Mr. Klein drew the Committee's attention to Interrogatory 37. Mr. Sykes suggested that this interrogatory be made consistent with

the general warning language which was previously decided upon. He noted that this interrogatory uses the term "limitations," and he suggested that this could be added into the general warning formula. The Committee agreed to add in the term "limitations" to all of the interrogatories involving warnings. The Committee was also in agreement to conform this interrogatory to all of the other interrogatories involving warnings. Mr. Sykes suggested that the interrogatory could be redesigned so that it reads as follows "If you contend that..... the occurrence, (a) state the substance ...". The Committee agreed by consensus to this change.

Mr. Howell commented that in Interrogatories 36, 37, and 38, it would be better to add in the concept of any substantially similar product. Interrogatory 37 could also refer to a warning about the product, such as the Ford Taurus, in general, and not be limited to the particular product the person actually bought. The Chair questioned what the term "substantially similar product" means. Mr. Howell responded that that is a difficult question to answer. The Chair cautioned that a line would have to be drawn on the term "substantially similar." There could be a Committee note or the body of the rule could contain illustrations. Mr. Howell suggested that there be a definition, but the Chair expressed the view that a definition would be difficult. Mr. Klein said that the year of the product should be restricted to avoid unfair comparisons among older and newer items. Mr. Sykes remarked that this would also include

products and components, since substantially similar components run through product lines.

Mr. Howell commented that these are difficult questions of substantive law. The term "substantially similar" should be limited to a certain brand. There may be similar processes among manufacturers. The Chair cautioned about the problem of "trial by ambush." Someone who is defending a case on behalf of a manufacturer may not be able to discover that the plaintiff had received warnings as to other automobiles. In a case of seatbelt failure, it could include a warning about a seatbelt of any automobile. The plaintiff is seeking to know if the defendant is going to throw this knowledge in the plaintiff's face.

Mr. Klein explained that his state of mind in drafting the interrogatory was battling harassing, broad discovery. Asking about similar products is a burden on the defendant who may be harassed with paper demands. Mr. Howell commented that this is a problem of interpretation -- the judge may agree that answering about any automobile is adequate. Mr. Sykes remarked that this interrogatory cannot be improved. The Chair said that the term "substantially similar" could be included, and examples could be provided. An attorney who wants to surprise the other side runs the risk of the judge saying that the other side should have been informed about it. A substantially similar product should be identified by the person propounding the interrogatories. Mr. Klein suggested that a blank

for substantially similar products could be added into Interrogatories 36, 37, and 38 coupled with a footnote with a definition that is not too broad. The Committee agreed by consensus with Mr. Klein's suggestion.

Mr. Klein drew the Committee's attention to Interrogatory 39. Mr. Howell asked if this question was based on Maryland law. Judge Rinehardt commented that a case which was settled may have a sealed court file. Mr. Klein responded that this is disclosing the fact of the settlement, and not the contents of the file. It is a notice question. Mr. Sykes remarked that usually this type of question is asked more specifically. It is better to name the product component to which one is referring. An example would be a certain type of seatbelt. Mr. Klein explained that this question is getting at the problem of the particular lawsuit. If the plaintiff is claiming the steering mechanism failed, there should not be questions about seatbelts or transmissions.

The Chair said that it is subject to interpretation as to whether the defendant has to disclose an awareness of a specific product defect. Mr. Klein observed that overbroad questions should be avoided. The Chair commented that the question should be about a defect in the component at issue or in a substantially similar product component. Mr. Klein expressed the concern that calling something a form interrogatory would mean that there cannot be an objection to it, even if the question is unfair. The Chair stated

that the Rule should be tailored to allow for objections if the interrogatory seeks more information than the person is obligated to answer. Mr. Sykes remarked that he hoped that this would not discourage pinpointed questions. The Chair commented that interrogatories need to be narrowly tailored, so one is not looking for a needle in a haystack.

Mr. Howell asked why the product as well as the component part has to be identified. The Chair suggested that the question could be couched in the alternative -- either identify the product or the component part. Mr. Sykes observed that the best solution is to call for suits alleging a defect in the product or in the component at issue, or in a substantially similar product or component. Mr. Howell suggested that the interrogatory have a choice in brackets of either (1) the product or a substantially similar product or (2) the product component or a substantially similar component. Mr. Klein suggested that a Committee note explaining this be added. The Committee agreed by consensus with these suggestions.

Mr. Klein drew the Committee's attention to Interrogatory 40. The Chair expressed the view that asking for investigations of the product is too broad, if it is the component at issue. Mr. Karceski remarked that there may not be an investigation of a component, but Mr. Howell noted that the Food and Drug Administration does investigate components. The Chair noted that the court in the case of Ellsworth v. Sherne Lingerie, Inc., 303 Md. 581 (1985) allowed

into evidence results of investigations of the cloth used to make a ladies' nightgown when the issue in the case was whether the nightgown was defectively designed. Mr. Klein suggested that the language "or component" be added into the first part of Interrogatory 40, so that the interrogatory reads as follows: "State whether there has been any federal or state governmental or industry investigation of the safety of the product, or component, or of any substantially similar product or component ...". The Committee agreed by consensus with this change.

Mr. Klein drew the Committee's attention to Interrogatory 41. Mr. Sykes inquired if this refers to an express warranty. Mr. Klein replied that it does. However, Interrogatory 42 is not referring to an express warranty. The Chair said that the warranty referred to in Interrogatory 41 is either express or implied. Mr. Sykes pointed out that in Interrogatories 41 and 42, instead of asking for an answer as to how the warranty or disclaimer was given, it would be better to ask when, where, and by what means the warranty or disclaimer was given. The question of when it was given should replace the question about the date. The question of where and by what means should replace the question about how it was given. The language of Interrogatory 41 should be as follows: "...state the exact words of each warranty or guarantee and when, where, and by what means the warranty was given." The Committee agreed by consensus to this change.

Mr. Sykes suggested that the same change should be made to Interrogatory 42. The Reporter noted that this interrogatory is somewhat different. Mr. Sykes said that a warranty is given expressly -- it does not matter if the plaintiff saw it as far as discovery goes. However, a disclaimer does not necessarily get to the plaintiff. The Chair suggested that the wording of the interrogatory could be: "If you contend that the plaintiff was made aware of a disclaimer, state when, where, and by what means the disclaimer was made." Mr. Sykes pointed out that if the disclaimer is on a package and the plaintiff did not read it, the plaintiff cannot escape the disclaimer. He suggested that the language should be "If you contend that the plaintiff was or should have been aware ...". The Committee was in agreement with these two suggestions.

Mr. Klein drew the Committee's attention to Interrogatory 43. No changes were suggested, so it was approved as presented.

Mr. Klein drew the Committee's attention to Interrogatory 44. Mr. Howell said that he thought it is a problem if the plaintiff is asking about any redesigning of a product. A parallel interrogatory is available which asks for any substantial change in the manufacturing process. Mr. Klein explained that he was concerned about overbroad, harassing questions. A question about a change in the manufacturing process is acceptable. Mr. Sykes suggested that in place of the language, "state whether ... you changed the design," the following language should be substituted: "state whether ...

there was a change," and the Committee agreed with this change by consensus. The Chair pointed out that the word "or" should be inserted before the word "in", so that the phrase reads "or in any substantially similar product."

Turning to the next two interrogatories, Mr. Hochberg suggested that Interrogatories 45 and 46 could be combined as follows: "Identify all persons who: (a) were or are directly responsible for or most knowledgeable about the design, testing, certification, or safety of the component (s) at issue ... (b) manufactured the component at issue, and (c) assembled the component at issue into the product." The Committee agreed by consensus to this suggestion.

The Reporter asked if there were any additions or corrections to the May minutes. There being none, the minutes were approved as read. Mr. Howell moved to adjourn the meeting, the motion was seconded, and it carried unanimously. The meeting was adjourned.